

Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction

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I. INTRODUCTION	41
II. THE EVOLUTION OF NATIONALITY-BASED CRIMINAL JURISDICTION IN U.S. LAW	44
A. <i>Early U.S. Practice</i>	44
B. <i>Nineteenth-Century Practice: The Rise of Consular Jurisdiction</i>	49
C. <i>Twentieth-Century Practice</i>	52
D. <i>Summary</i>	54
III. CLOSING THE JURISDICTIONAL GAP: THE INADEQUATE ALTERNATIVES TO NATIONALITY-BASED CRIMINAL JURISDICTION	54
A. <i>Foreign Prosecution</i>	54
B. <i>Alternative Bases for U.S. Jurisdiction</i>	60
IV. LEGAL AUTHORITY FOR NATIONALITY-BASED CRIMINAL JURISDICTION	63
A. <i>Constitutional Law</i>	63
B. <i>International Law and Practice</i>	67
V. FASHIONING NATIONALITY-BASED CRIMINAL JURISDICTION	70
A. <i>Evidentiary and Confrontation Considerations</i>	70
B. <i>Dual Criminality</i>	77
C. <i>Deference to Foreign Prosecution</i>	81
D. <i>Other Considerations</i>	82
VI. CONCLUSION	83

I. INTRODUCTION

The United States is not usually regarded as a timid prosecutor.¹ Indeed,

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1. See, e.g., Warren Richey, *Noriega's Ouster Carries Hefty Price Tag*, CHI. TRIB., Sept. 8, 1991, at C27 (quoting Professor Fletcher Baldwin's view that prosecution of General Manuel Noriega is "reprehensible overkill" involving "the most expensive execution of a search warrant ever"); Ruth Marcus, *Marcos Case Illustrates Longer Reach of U.S. Law: National Boundaries Less of an Obstacle*, WASH. POST, Oct. 26, 1988, at A4 (reporting experts' view that prosecution of former President Ferdinand Marcos "reflects the increasingly international reach of U.S. criminal law"). But see Anthony Chase, *Aspects of Extraterritorial Criminal Jurisdiction in Anglo-American Practice*, 11 INT'L LAW. 555 (1977) (discussing

U.S. enthusiasm for extraterritorial criminal jurisdiction has prompted criticism that "a proselytizing spirit" and a "sense of imperial mission" motivate U.S. practice.² Nevertheless, the United States is one of the least aggressive proponents of one of the most widely accepted forms of extraterritorial jurisdiction: nationality-based criminal jurisdiction, or criminal jurisdiction based on the nationality of the offender.³ Consequently, when a U.S. national⁴ commits a violent crime in a state that subsequently does not prosecute, the U.S. offender avoids prosecution altogether because the United States lacks jurisdiction. This jurisdictional gap is not hypothetical; it prevents prosecution of a number of serious cases every year.⁵

Several factors may prevent the host state, the state in which the U.S. national commits a serious crime, from prosecuting. First, extradition back to the host state may be impossible if the U.S. offender flees home, since U.S. law forbids extradition in the absence of an extradition treaty.⁶ The United States has no effective extradition treaty with dozens of countries.⁷ In a recent example, Korea requested the extradition from the United States of a U.S. national suspected of murder in Korea. The United States refused to extradite

"Case of the Curiously Reluctant Prosecutor").

2. A.D. NEALE & M.L. STEPHENS, *INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION* 208 (1988).

3. See, e.g., *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 402(2) & reporters' note 1 (1987) [hereinafter *RESTATEMENT*] (noting wide acceptance of nationality jurisdiction and "sparing" application of principle in U.S. law).

4. The term "U.S. national" refers to U.S. citizens and noncitizens who owe allegiance to the United States. Although often used interchangeably, "citizenship" is exclusively a concept of national law, while "nationality" is a concept of both international and national law. See *Immigration and Nationality Act*, 8 U.S.C. § 1101(a)(22) (1988); *RESTATEMENT, supra* note 3, §§ 211-213. For materials on the exercise of jurisdiction over legal persons such as corporations, see generally *RESTATEMENT, supra* note 3, § 414; A.V. LOWE, *EXTRATERRITORIAL JURISDICTION* (1983); Kenneth W. Damm, *Extraterritoriality and Conflicts of Jurisdiction*, 1983 AM. SOC'Y INT'L L. PROC. 370.

5. See, e.g., 137 CONG. REC. S4750 (daily ed. Apr. 18, 1991) (statement of Sen. Hollings); *Military Cooperation with Civilian Law Enforcement: Hearing Before the Subcomm. on Crime of the House Judiciary Comm.*, 99th Cong., 1st Sess. 9 (1985) [hereinafter *Hearing on Law Enforcement*] (statement of Rep. Rangel) (reporting that 422 "major offenses" were committed by civilian employees and dependents of military personnel in 1977, and host state declined to prosecute in 136 of those cases); *Operation of Article VII of the NATO Status of Forces Treaty: Hearing Before the Subcomm. on NATO Status of Forces of the Senate Armed Services Comm.*, 91st Cong., 2d Sess. 28 (1970) [hereinafter *1970 SOFA Hearing*]; U.S. GAO, *Report to the Congress of the United States: Some Criminal Offenses Committed Overseas by DOD Civilians Are Not Being Prosecuted: Legislation Is Needed* 12 (Sept. 11, 1979) [hereinafter *GAO Report*] (noting most military police, lawyers, and commanders believe many crimes are committed by civilian employees and dependents "with the full knowledge that there is no U.S. criminal jurisdiction," and that this is a matter of "serious concern"); G.I.A.D. DRAPER, *CIVILIANS AND THE NATO STATUS OF FORCES AGREEMENT* 115, 140-41 (1966); Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas—Still with Us*, 117 MIL. L. REV. 167, 180 (1987) (noting that 53 of 415 serious civilian cases not prosecuted by host state).

6. See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936) (U.S. Constitution forbids extradition in absence of treaty or statute). Proposals to abolish the treaty requirement are discussed below. See *infra* text accompanying note 119.

7. See, e.g., U.S. DEP'T OF STATE, *TREATIES IN FORCE* 138, 193, 206 (Jan. 1, 1989) (Korea, the Philippines, Saudi Arabia).

the accused for lack of an extradition treaty, and did not prosecute for lack of jurisdiction.⁸

Second, even if the host state can obtain custody of the suspect, it may be unable or unwilling to prosecute. The host state may be unable to prosecute because the offender has diplomatic immunity. Or the host state may simply be unwilling to prosecute because it expects the United States to take jurisdiction. This often occurs when a civilian dependent of a U.S. soldier stationed overseas commits a crime against a U.S. or other foreign national, since status of armed forces agreements often place primary responsibility for prosecution on the United States in such circumstances.⁹ However, constitutional protections prevent the United States from trying civilian dependents in U.S. courts-martial as currently configured. Although host states do prosecute most crimes committed by U.S. civilian dependents abroad, a significant number of serious crimes go unprosecuted every year.¹⁰

International law recognizes five bases for extraterritorial criminal jurisdiction: the nationality principle, the territorial effects principle, the protective principle, the universal principle, and the passive personality principle. Of these, only the nationality principle—which the United States generally rejects—would allow the United States to prosecute one of its nationals for a violent crime committed abroad. While the territorial effects (or "objective territorial") principle allows a state to regulate activity abroad if it affects that state's territory, this principle ordinarily does not justify prosecution of violent crimes committed abroad.¹¹ The protective principle applies to treason, espionage and other crimes directly affecting the state's security, but not to ordinary crimes, such as murder and assault, which do not directly threaten the home state's security.¹² The universal principle permits a state to prosecute crimes against humanity regardless of where they are committed, but not common

8. See 137 CONG. REC. 4752 (1991) (statement of Sen. Hollings) (reprinting letter of Assistant Secretary Janet G. Mullins, U.S. Department of State, requesting extradition); *Oregonian Returns Home After Five Months in Korean Prison*, UPI, Jan. 1, 1990, available in LEXIS, Nexis library, Wires file [hereinafter *Oregonian Returns Home*]. The author had some responsibility for this case while working at the State Department.

9. See *Operation of Article VII, NATO Status of Forces Treaty: Hearing Before a Subcomm. of the Senate Armed Services Comm.*, 89th Cong., 1st Sess. 14-15 (1965) [hereinafter *1965 SOFA Hearing*] (reporting that in one six-month period, foreign states prosecuted civilian dependents in only 222 of 1,178 possible cases); see also discussion *infra* note 72 and accompanying text.

10. See *supra* note 5.

11. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 300-02 (3d ed. 1979); cf. DIETER LANGE & GARY BORN, *THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS* 36-37 (1987) (criticizing U.S. application of "territorial effects" principle).

Moreover, the territorial effects principle is not normally considered to apply to acts merely because they may affect the foreign relations of the home state. Instead, such acts are prosecutable under the nationality principle.

12. See generally Monika B. Krizek, Note, *The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice*, 6 B.U. INT'L L.J. 337 (1988).

crimes.¹³ The final and most controversial basis of jurisdiction, the passive personality principle, permits a state to exercise jurisdiction because the victim was a national of that state. This basis would not cover the murder of a foreigner by a U.S. national. Until recently, the United States, like most states, expressed reluctance to base jurisdiction on this principle.¹⁴

Thus, when a host state does not prosecute a U.S. national who commits a violent crime abroad, the United States does not exercise jurisdiction. Should the United States eschew nationality jurisdiction, when it may provide the only basis for prosecution? Part II of this article traces the evolution of nationality-based criminal jurisdiction in U.S. law and asserts that the United States has in fact embraced such jurisdiction in the past, usually to ensure that U.S. offenders abroad were tried by U.S. courts rather than foreign tribunals. Part III examines the current U.S. jurisdictional scheme, which relies on foreign states to prosecute U.S. offenders abroad, and concludes that the scheme is inadequate because foreign states often cannot or will not prosecute. Part III further argues that only nationality-based jurisdiction could extend to all crimes committed by U.S. nationals abroad. Part IV asserts that the establishment of nationality-based criminal jurisdiction would be consistent with the U.S. Constitution and with international law. Finally, Part V sets forth practical considerations that should inform the establishment and exercise of nationality-based criminal jurisdiction.

II. THE EVOLUTION OF NATIONALITY-BASED CRIMINAL JURISDICTION IN U.S. LAW

A. *Early U.S. Practice*

Early U.S. criminal jurisdiction relied very little on nationality jurisdiction, or on any form of extraterritorial jurisdiction. Instead, early U.S. criminal jurisdiction was primarily territorial. The Founders expected the United States

13. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 839 (1988) (noting universal jurisdiction extends only to "piracy, slave trading, war crimes, hijacking and sabotage of aircraft, hostage-taking, crimes against internationally protected persons, apartheid, torture, and genocide").

14. See generally RESTATEMENT, *supra* note 3, § 402 cmt. g (passive personality principle has not been widely accepted with respect to ordinary crimes). Part III below discusses a recent congressional proposal to exercise passive personality jurisdiction over murder of U.S. nationals abroad.

For more on these five principles of extraterritorial jurisdiction, see LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 820-59 (2d ed. 1987); HARVARD RESEARCH IN INTERNATIONAL LAW, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 439, 480-508 (Supp. 1935) [hereinafter Harvard Research]; B.J. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 613-15 (1966).

Offenders Abroad

to exercise criminal jurisdiction over crimes committed in U.S. territory,¹⁵ or on U.S. flag vessels on the high seas.¹⁶ Since the United States adhered to the territorial principle, the U.S. government naturally chose not to prosecute U.S. nationals for crimes they committed abroad.¹⁷

The United States inherited its devotion to territorial criminal jurisdiction from England,¹⁸ and this devotion reflected the conviction that the exercise of extraterritorial jurisdiction would intrude on the sovereignty of a state in which an offense occurred.¹⁹ Reflecting this view, the Declaration of Independence criticized George III for "[t]ransporting us beyond Seas to be tried for pretended Offenses."²⁰ Territoriality promoted the common law ideal of confrontation in criminal cases by ensuring that suspects would face trial near the scene of the crime, where witnesses and evidence were more readily available. According to this ideal, a prosecution far from the scene of the crime not only inconvenienced witnesses²¹ but was also unfair to defendants.²² Moreover, it seemed unfair to require nationals to answer to two sovereigns while abroad (i.e., the laws of both the United States and the host

15. See Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 883 (1989) (discussing history); Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273, 1276 (1990) (same).

16. Although flag state jurisdiction can be understood as a species of nationality jurisdiction, the U.S. Supreme Court has long maintained the "mischievous fiction" that a ship is a "floating part of the flag-state." *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953) (footnote omitted); see also *United States v. Flores*, 289 U.S. 137, 155-59 (1933); *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A.) No. 10 (Sept. 7, 1928).

17. See Lowenfeld, *supra* note 15, at 883 (noting early Congresses rarely established nationality-based jurisdiction, and executive and judiciary rarely enforced it); accord Note, *supra* note 15, at 1276.

18. See generally JOHN WESTLAKE, *INTERNATIONAL LAW: PART I—PEACE* 252-53 (1910) (English common law fully and exclusively adopted the territoriality principle).

19. "A government would feel, with respect to offenses committed abroad in a civilized country, that it was, at the best, undertaking a work of supererogation; perhaps that it was interfering in a matter which, as the law of the place provided for it, would most properly be left alone." JOHN BASSETT MOORE, *U.S. DEP'T OF STATE, REPORT ON EXTRATERRITORIAL CRIME AND THE CUTTING CASE* 101 (1887).

20. THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776). Before independence, the American colonies repeatedly called on Parliament to repeal the act of Parliament permitting courts in England to try anyone who committed a crime in America. See, e.g., Resolution of Oct. 14, 1774, in 1 JOURNALS OF THE CONTINENTAL CONGRESS 62, 65 (1774) (resolving that colonies are entitled to common law of England and "more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law"); Petition of Congress to the King's Most Excellent Majesty (Nov. 18, 1774), reprinted in *id.* at 115, 117.

21. "[W]ho does his majesty think can be prevailed on to cross the Atlantick for the sole purpose of bearing evidence to a fact?" Thomas Jefferson, *Draft of Instructions to the Virginia Delegates in the Continental Congress* (1774), in 1 THE PAPERS OF THOMAS JEFFERSON 128 (Julian P. Boyd ed., 1950) [hereinafter JEFFERSON].

22. "And the wretched criminal . . . stripped of his privilege of trial by peers, of his vicinage, removed from the place where alone full evidence could be obtained, without money, without counsel, without friends, without exculpatory proof, is tried before judges predetermined to condemn." *Id.* at 128-29. Cf. U.S. CONST. amend. VI (establishing rights to trial where crime occurred, to confrontation of witnesses, and to counsel).

state).²³ Finally, these common law based aversions to nationality jurisdiction meshed nicely with the new U.S. brand of federalism, which relied upon each of the several states to prosecute violent crimes occurring within its territory.²⁴ By eschewing the nationality principle, the federal government could thus rely on other sovereigns to prosecute all ordinary crimes: the several states for domestic crimes and foreign states for foreign crimes.²⁵

The traditional common law view contrasted with the emerging view in civil law states such as France, which in 1795 established jurisdiction over all French nationals who committed serious crimes outside of France.²⁶ Nationality-based jurisdiction traced its roots to ancient times, when territorial boundaries were often vague, and communities were defined by "the religion, race or the nationality of the people rather than [by] the territory."²⁷ Thus "there was a King of the English rather than a King of England."²⁸ The ancient Egyptians, Babylonians, Greeks, and Romans all exercised some form of extraterritorial jurisdiction based on principles included in the modern concept of the nationality principle.²⁹ Feudal states adopted a more strictly territorial

23. "The system of tying the entire criminal law of a country round the neck of a subject, and of making him liable to its operations, in whatever part of the world he may be, converts the criminal law into a personal statute . . . [I]f the criminal law were a personal statute a foreigner would at the same time be subject to two criminal laws—the criminal law of his own state and that of the state of his domicile." 1 JEFFERSON, *supra* note 21, at 100.

24. The Constitution did not grant Congress the power to prosecute such "local" crimes. Instead, it left prosecution to the states, at least for common crimes occurring within the several states. *See* *Perez v. United States*, 402 U.S. 146, 158 (1971) (Stewart, J., dissenting) ("The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments."); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 75 (1972). Similarly, in civil matters, the Anglo-American tradition "generally looks to residence or domicile rather than to nationality." *RESTATEMENT*, *supra* note 3, § 402 reporters' note 1.

The several states have some power to legislate extraterritorially. *See* *George*, *supra* note 14, at 617. The states have legislated and enforced their criminal laws extraterritorially—usually on the basis of the territorial effects or the protective principle. *See* *HARVARD RESEARCH*, *supra* note 14, at 527. For example, Virginia at one time exercised jurisdiction over felonies committed by Virginians against other Virginians abroad—a foray into the dark forest of both nationality and passive personality jurisdiction. *Id.* The statute was applied at least once, in *Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172 (1819). *HARVARD RESEARCH*, *supra* note 14, at 52.

25. One notable exception to this regime of deference to other sovereigns has been federal regulation of major crimes in Indian territory. *See* *Indian Major Crimes Act*, 18 U.S.C. § 1153 (1988) (establishing federal jurisdiction over major crimes committed in Indian territory).

26. *See* *Code de 3 brumaire an 4*, art. 11 (Oct. 23, 1795), *reprinted in* ROBERT W. RAFUSE, *THE EXTRADITION OF NATIONALS* 135 (1939). *See also id.* at 139-41 (summarizing statutes establishing extraterritorial criminal jurisdiction based on nationality); *Royal French Edict of June, 1778, Regulating the Judicial Functions of French Consuls in the Levant and the Barbary States*, *reprinted in* S. MISC. DOC. NO. 89, 47th Cong., 1st Sess. 16 (1882) (noting that French consuls could conduct criminal prosecutions of French subjects); 1 JOHN BASSETT MOORE, *A TREATISE ON EXTRADITION AND INTERSTATE RENDITION* § 7, at 11 (1891) (asserting that 1777 Franco-Swiss extradition agreement did not require extradition of nationals because both countries prosecuted their nationals for crimes committed abroad).

27. Shalom Kassan, *Extraterritorial Jurisdiction in the Ancient World*, 29 *AM. J. INT'L L.* 237, 240 (1935).

28. H.R. Doc. No. 326, 59th Cong., 2d Sess. 197 (1906).

29. *See* *Kassan*, *supra* note 27, at 241-47; *see also* G. BIE RAVNDAL, *THE ORIGIN OF THE CAPITULATIONS AND OF THE CONSULAR INSTITUTION*, S. DOC. NO. 34, 67th Cong., 1st Sess. 3-8 (1921). Aeschylus

Offenders Abroad

approach to law that endured until the eighteenth and nineteenth centuries, when the civil law states of the continent reestablished extraterritorial jurisdiction based on nationality.³⁰ The civil law states, more tolerant of hearsay and thus more willing to receive deposition testimony than their common law counterparts, also proved more receptive to nationality-based jurisdiction, since their less strict evidentiary rules made a long-distance trial more feasible.³¹

Although the United States based its jurisdictional system on the territorial principle, this reliance was not exclusive. For example, the first crime listed in the first crime bill enacted by the first Congress in 1789³² provided that "[e]very person *owing allegiance to the United States*, who levies war against them, or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason."³³ This provision clearly contains an element of nationality-based jurisdiction, for it applies only to a person "owing allegiance" to the United States.³⁴ This provision may also rely on the protective principle, since it protects U.S. security and does not apply to treasonous acts against other sovereigns. Similarly, chapter nine of the first crime bill outlawed certain forms of piracy by U.S. nationals,³⁵ thus also incorporating an element of nationality jurisdiction.³⁶ Jurisdiction over piracy, however, is generally described as a form of universal jurisdiction, since

was familiar with the concept: "If the sons of Egypt exercise controul over you, maintaining that they are authorised to do so by the law of the state, *as being the nearest allied by blood*, who can resist them? It is for you to prove that, according to the laws of your country, they have no authority over you." AESCHYLUS, *THE TRAGEDY OF THE SUPPLIANTS*, quoted in HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 261 (Hyperion 1979) (1901) (emphasis added).

30. See generally EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 3-32 (reprint 1970) (1915); RAFUSE, *supra* note 26, at 135-43 (describing decline and revival of nationality-based jurisdiction in civil law states of Europe).

31. European states generally continue to refuse to extradite their nationals, promising instead to prosecute them for crimes committed abroad. See, e.g., HENKIN ET AL., *INTERNATIONAL LAW*, *supra* note 14, at 836 (citing examples from German and French penal codes); SATYA DEVA BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 94 (1968).

32. See David K. Watson, *Growth of the Criminal Law of the United States*, in H.R. DOC. NO. 362, 57th Cong., 1st Sess. 2, 4 (1902) (address delivered to Columbian Law School in Washington, D.C.) (discussing Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790) [hereinafter Act of Apr. 30, 1790]).

33. Act of Apr. 30, 1790, *supra* note 32, ch. 9 (emphasis added).

34. See Immigration and Naturalization Act, 8 U.S.C.A. § 1101(a)(22) (West Supp. 1991) (defining U.S. national as either citizen or a noncitizen who "owes permanent allegiance to the United States"); Bruce Zagaris & Jay Rosenthal, *United States Jurisdictional Considerations in International Criminal Law*, 15 CAL. W. INT'L. L.J. 303, 308-09 (1985); cf. J.W. Hall, *William Joyce: 1945*, in *FAMOUS TRIALS* 346, 363 (Harry Hodge et al. eds., 1961) (suggesting that alien may owe "allegiance" to Britain if she holds British passport, even if obtained by mistake or fraud).

35. See Act of Apr. 30, 1790, *supra* note 32, ch. 9.

36. Chapter 9 was not invoked as often as chapter 8 of the same act, since the application of chapter 8 was not limited to U.S. nationals. See *United States v. Klinton*, 18 U.S. (5 Wheat.) 144, 152 (1820). Cf. *United States v. Davis*, 25 F. Cas. 786 (C.C.D. Mass. 1837) (No. 14,932) (offense by U.S. national on non-piratical vessel was not cognizable).

piracy is an offense against all nations.³⁷ Finally, the Logan Act,³⁸ which prohibits all U.S. nationals at home or abroad from engaging in diplomatic correspondence with foreign governments, relies on both the nationality and the protective principles, as it applies only to U.S. nationals and seeks to protect national security.³⁹

The young U.S. government also exercised nationality-based criminal jurisdiction over U.S. civilians who accompanied military personnel abroad. This practice began during the War of Independence, when the Continental Congress adopted its Articles of War for the Continental Army. The Articles included a "camp follower" rule based on British practice, subjecting civilians to military jurisdiction when they served with the army in the field.⁴⁰

As early as 1782, the United States experimented with the idea of vesting its consuls in France with jurisdiction to try U.S. nationals for crimes committed in France. This idea did not originate in the United States: the French, seeking to protect their commercial interests, pressured the U.S. government to formalize existing consular relations, while state officials stoutly opposed giving more power to French consuls.⁴¹ Anxious to please its French ally, Congress authorized Benjamin Franklin to negotiate a consular convention with France along the lines of the plan proposed by the French government.⁴² Article 13 of the plan placed "offences committed in France by a citizen of the United States, against a citizen of the United States" under the jurisdiction of the U.S. consuls in France, and placed similar offenses committed by French nationals in the United States under the jurisdiction of French consuls

37. *Klintock*, 18 U.S. (5 Wheat.) at 152; see also *United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1820). For more on piracy in U.S. courts, see INTERNATIONAL MARITIME BUREAU, *PIRACY AT SEA* (Eric Ellen ed., 1989); ALFRED P. RUBIN, *THE LAW OF PIRACY* (1988).

38. Act of Jan. 30, 1799, ch. 1, 1 Stat. 613 (codified as amended at 18 U.S.C. § 953 (1988)).

39. There are other examples of early criminal statutes based on nationality jurisdiction. In 1797, for example, Congress forbade U.S. nationals to fit out privateers outside U.S. territory for use against friendly foreign powers or against U.S. nationals. Congress repealed the law in 1909. See Alfred P. Rubin, *The Concept of Neutrality in International Law*, 16 DEN. J. INT'L L. & POL'Y 353, 368 (citing 2 FRANCIS DEAK & PHILIP C. JESSUP, *NEUTRALITY LAWS, REGULATIONS AND TREATIES* 1083 (1988)). Congress forbade any U.S. national to hold property in a vessel engaged in the slave trade (Act of May 10, 1800, 2 Stat. 70), and in 1818, Congress prohibited nationals from taking on board, receiving, or transporting any "negro, mulatto, or person of colour" from Africa (Act of Apr. 20, 1818, 3 Stat. 451, § 4).

40. See Articles of War (1775), arts. XXXII, XLVIII, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS 111, 116, 119 (1st ed. 1775); see also Robert Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461, 482-83 (1961). Although this practice was originally confined to civilians "on active service," it was eventually expanded to permit trials of wagon drivers, suppliers, and, in remote areas where civilian courts were not available, civilian dependents of military personnel. *Id.* at 483-84. Until the twentieth century, however, military tribunals exercised jurisdiction over civilian dependents principally in time of war. See DRAPER, *supra* note 5, at 113-15.

41. See *The Consular Convention of 1788*, in 14 JEFFERSON, *supra* note 21, at 166-92. French consuls monitored U.S. trade with the French West Indies and deterred desertions from French ships visiting U.S. ports. Not surprisingly, the United States "feared that political surveillance was a chief object of French consuls in America." *Id.* at 68.

42. Resolution of January 25, 1782, in 3 SECRET JOURNALS OF CONGRESS 76 (1st ed. 1782).

Offenders Abroad

in the United States.⁴³ This arrangement for consular jurisdiction, in which a consul exercised exclusive jurisdiction over nationals of the consul's home state, incorporated a combination of the nationality and passive personality principles of jurisdiction.⁴⁴

B. Nineteenth-Century Practice: The Rise of Consular Jurisdiction⁴⁵

United States experimentation with consular jurisdiction grew into an enthusiastic embrace during the nineteenth century. The expansion of jurisdiction was at first confined to the civil sphere: the United States obtained extraterritorial rights in civil matters from a number of Moslem states, including Morocco (1787), Algiers (1795), Tunis (1797), Tripoli (1805), and Muscat (1833).⁴⁶ These agreements typically provided that the U.S. consul would judge all disputes between U.S. nationals and would serve on a mixed court in disputes between U.S. and local nationals. The consul could not adjudicate trials of U.S. nationals in criminal as opposed to civil matters but could merely "be present" or perhaps assist in the domestic adjudication.⁴⁷

As its commercial interests abroad became more extensive, however, the United States began to insist on retaining exclusive jurisdiction over U.S. nationals suspected of crimes abroad. The United States concluded a treaty with the Ottoman Empire in 1830 that permitted the United States to exercise jurisdiction over U.S. nationals in Turkey, but did not permit the Ottomans

43. *See id.* A committee report issued before adoption of the scheme criticized the approach to jurisdiction proposed in article 13. *See* 22 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 40, at 27 n.1. The consular jurisdiction proposed by the French in article 13 remained on the table for several years. *See id.*

44. Other provisions established extraterritorial jurisdiction in certain civil matters, as well as flag-state jurisdiction over vessels. Eventually, however, the United States and France amended the provision to provide simply that the host state would exercise criminal jurisdiction over crimes committed by foreigners. *See* Convention on the Functions and Privileges of Consuls and Vice Consuls, Nov. 14, 1798, U.S.-Fr., arts. 8-12, 7 Bevens 794.

45. "Extraterritoriality" is the term traditionally used to describe arrangements in which the western powers obtained exclusive and nonreciprocal jurisdiction over their nationals in foreign countries. To avoid confusion between "extraterritorial jurisdiction" and "extraterritoriality," which refers only to one specific manifestation of extraterritorial jurisdiction, this article will use the term "consular jurisdiction" instead of "extraterritoriality."

46. *See* Letter from Frederick T. Frelinghuysen, Secretary of State, to Hon. William Windom, Chairman Committee on Foreign Relations, in S. MISC. DOC. NO. 89, *supra* note 26, at 204-09 (summarizing relevant treaty provisions); H.R. DOC. NO. 326, *supra* note 28, at 214-15 (same); Treaty of Peace and Friendship, July 18, 1787, U.S.-Morocco, art. XX, *reprinted in* 5 SECRET JOURNALS OF CONGRESS, *supra* note 42, at 350, 357.

47. *See, e.g.,* Treaty of Friendship and Commerce, Jan. 17, 1878, U.S.-Samoa, art. IV, 11 Bevens 437; Treaty of Friendship and Commerce, Dec. 13, 1856, U.S.-Persia, art. V(1), 8 Bevens 1254; Treaty of Peace and Friendship, Sept. 16, 1836, U.S.-Morocco, art. XXI, 9 Bevens 1286; Treaty of Amity and Commerce, Sept. 21, 1833, U.S.-Muscat, art. IX, 9 Bevens 1291; Treaty of Amity, Commerce, and Navigation, Aug. 28, 1797, U.S.-Tunis, art. XXI, 11 Bevens 1088; *see also* S. MISC. DOC. NO. 89, *supra* note 26, at 204-09 (discussing relevant provisions of these treaties).

to exercise similar jurisdiction over Ottoman subjects in the United States.⁴⁸ The United States entered into similar arrangements with other countries, including China (1844),⁴⁹ Borneo (1850),⁵⁰ Persia (1856),⁵¹ Japan (1857),⁵² Madagascar (1867),⁵³ Samoa (1878),⁵⁴ and Tonga (1886).⁵⁵

The United States explicitly used consular jurisdiction to intrude upon foreign sovereignty in order to protect U.S. commercial interests,⁵⁶ a form of legal imperialism that some scholars and policymakers justified by arguing that "barbarous lands" did not enjoy full sovereignty because "local law" did not "exist" in "barbarous lands."⁵⁷ Others argued that consular jurisdiction was not demeaning, since it codified enlightened Roman concepts of jurisdiction based on nationality rather than territory.⁵⁸ Still others conceded the one-sided nature of consular jurisdiction but viewed it as a "necessary evil," since "neither Americans nor the citizens of any other civilized power would consent to live in Turkey [or other countries ruled by Islamic law] if they were not under the shelter and protection of such treaties."⁵⁹

48. See Treaty of Commerce and Navigation, May 7, 1830, U.S.-Ottoman Empire, art. IV, 10 Bevans 619.

49. See Treaty of Peace, Amity and Commerce, July 3, 1844, U.S.-China, art. XXI, 6 Bevans 647. For more on consular jurisdiction in China, see ELBERT D. THOMAS, EXTRATERRITORIALITY IN CHINA, S. DOC. NO. 102, 78th Cong., 1st Sess. (1943); JOHN K. FAIRBANK, THE UNITED STATES AND CHINA 161-71, 237, 248 (4th ed. 1983); Crawford M. Bishop, *American Extraterritorial Jurisdiction in China*, 20 AM. J. INT'L L. 281 (1926); Harold S. Quigley, *Extraterritoriality in China*, 20 AM. J. INT'L L. 46 (1926).

In 1844, the year the United States obtained extraterritorial rights from China, Secretary of State Calhoun reaffirmed the myth of exclusive territorial jurisdiction, declaring that "the criminal jurisdiction of a nation is limited to its own dominions and to vessels under its flag on the high seas, and . . . it cannot extend it to acts committed within the dominion of another without violating its sovereignty and independence." Letter from Secretary of State Calhoun to Mr. Everett (Sept. 25, 1844), in MOORE, *supra* note 19, at 113.

50. See U.S.-Borneo Treaty, June 23, 1850, art. IX, *excerpted in* H.R. DOC. NO. 326, *supra* note 28, at 214.

51. See Treaty of Friendship and Commerce, Dec. 13, 1856, U.S.-Persia, art. V, 8 Bevans 1254.

52. See Treaty on Rights of American Citizens in Japan, June 17, 1857, U.S.-Japan, art. IV, 9 Bevans 359.

53. See Treaty of Commerce, Feb. 14, 1867, U.S.-Madag., art. V, 9 Bevans 742.

54. See Treaty of Friendship and Commerce, Jan. 17, 1878, U.S.-Samoa, art. IV, 11 Bevans 437.

55. See Treaty of Amity, Commerce, and Navigation, Oct. 2, 1886, U.S.-Tonga, art. XII, 11 Bevans 1043. See generally H.R. DOC. NO. 326, *supra* note 28, at 214-22 (*excerpting relevant provisions*); S. MISC. DOC. NO. 89, *supra* note 26, at 204-09 (*same*).

56. See *In re Ross*, 140 U.S. 453, 480 (1891); H.R. DOC. NO. 326, *supra* note 28, at 199; PHILIP M. BROWN, FOREIGNERS IN TURKEY 3 (1914).

57. MOORE, *supra* note 19, at 35; see also Letter from Secretary of State Frederick T. Frelinghuysen to William Windom, Chairman of the Senate Foreign Relations Committee (Apr. 29, 1882), in S. MISC. DOC. NO. 89, *supra* note 26, at 2 (arguing that state of Turkish justice system necessitated exercise of extraterritorial jurisdiction over U.S. nationals in Turkey).

58. See, e.g., BROWN, *supra* note 56, at 4 (arguing that privileged status of foreigners was not "bitter humiliation" for Ottoman emperor, but rather "much to his credit," since it reflected "more enlightened" interpretation of law of nations).

59. Edwin Pears, *Legal Opinion on the Naturalization Treaty between the United States and Turkey*, 1887 FOREIGN RELATIONS OF THE UNITED STATES 1109, 1112.

Offenders Abroad

Congress actively supported adoption of treaties establishing consular jurisdiction.⁶⁰ In 1848, for example, Congress passed legislation that established jurisdiction in civil and criminal matters over U.S. nationals in countries in which the United States had been granted extraterritorial rights, such as China and Turkey.⁶¹ Congressional amendments in 1860 broadened the scope of consular jurisdiction by granting the consular courts jurisdiction to hear disputes in admiralty and equity, and by establishing more detailed rules of civil and criminal procedure. These amendments also extended consular jurisdiction to most countries in which the United States might exercise extraterritorial rights in the future.⁶²

In addition, the Senate ratified treaties establishing consular jurisdiction,⁶³ even though some Senators raised questions about the constitutionality of consular courts. Senator Jones, for example, argued that the United States could empower consuls to try U.S. nationals for violations of host-country laws, but could not enforce U.S. law abroad because the Constitution has "no extraterritorial operation" and enforcement of U.S. law on foreign soil could create a "clash of jurisdiction."⁶⁴ Senator Ingalls objected because the rules of consular courts allowed as few as three jurors in criminal cases.⁶⁵ Yet another Senator noted that the U.S. consular court in Shanghai had tried, convicted, and hanged a man without indictment or trial by jury, and that another man had been sentenced to death in Nagasaki under similar circumstances.⁶⁶ In reply, proponents of consular trials argued that nationals had no

60. But while Congress accepted exclusive jurisdiction over nationals by U.S. consuls, it never seriously considered authorizing courts in the United States to try U.S. nationals for ordinary crimes of violence committed abroad. Congressional materials from the mid-eighteenth century to the mid-twentieth century reveal little evidence that Congress ever considered legislation establishing nationality jurisdiction over a broad range of crimes committed abroad. Congress did occasionally commission studies of extraterritorial jurisdiction, which invariably reported that Congress had the power to enact nationality jurisdiction but that the difficulty in obtaining witnesses and evidence from overseas made it impractical. *E.g.*, H.R. REP. NO. 1652, 56th Cong, 1st Sess. 1 (1900). Beginning in the 1960s, Congress periodically entertained legislation to establish nationality-based criminal jurisdiction over civilian dependents of U.S. military personnel overseas. *See infra* note 112 and accompanying text.

In extradition practice the United States pressed its treaty partners to agree to the mutual extradition of their nationals, rather than the exercise of nationality-based jurisdiction. Indeed, during extradition negotiations with Switzerland, Secretary of State Buchanan argued to the Swiss that exemption of nationals was unwise not only because U.S. courts presently lacked the jurisdiction to prosecute U.S. nationals for crimes committed abroad, but also because the United States might lack the power to establish such jurisdiction. Letter from Secretary of State Buchanan to Mr. Rush, American Minister to France (Sept. 25, 1847), in 1 MOORE, *supra* note 26, § 140, at 174 n.2.

61. *See* Act of Aug. 11, 1848, ch. 150, 9 Stat. 276 (1848), *repealed as to Macao* by Act of Sept. 20, 1850, 9 Stat. 468 (1860) (no longer in force, never codified).

62. *See* Act of June 22, 1860, ch. 179, 12 Stat. 72 (1860) (codified at REVISED STATUTES OF THE UNITED STATES §§ 4083-4084 (2d ed. 1878)); H.R. DOC. NO. 326, *supra* note 28, at 223.

63. *See, e.g.*, Treaty of Peace, Amity, and Commerce, Dec. 31, 1845, U.S.-China, 6 Bevans 647; Treaty with the Ottoman Porte, Feb. 2, 1831, U.S.-Ottoman Empire, 8 Stat. 408.

64. 15 CONG. REC. 1617 (1884) (statement of Sen. Jones).

65. *Id.* at 1615 (statement of Sen. Ingalls).

66. The sentence was later commuted to life in prison. *Id.* at 1619 (statement of Sen. Pendleton).

right to claim the protections of the Constitution when they traveled abroad, particularly since the difficulty of finding suitable jurors and the "small amount at stake" made it impractical to require the consul to summon a certain number of jurors.⁶⁷

C. *Twentieth-Century Practice*

For more than a century consular jurisdiction allowed the United States to exercise jurisdiction over crimes committed abroad solely on the basis of the offender's U.S. nationality. Consular jurisdiction comported with common law ideals, since it ensured that U.S. nationals would be tried near the scene of the crime, with witnesses and evidence readily available. But the practice of stripping the host state of jurisdiction over U.S. nationals violated the principle of sovereignty, which holds that a state has the right to prosecute crimes within its territory.⁶⁸ The United States gradually stopped using consular jurisdiction in the first half of the twentieth century,⁶⁹ yet like all forms of imperialism, consular jurisdiction died slowly.⁷⁰

The need to regulate the conduct of U.S. nationals abroad grew even greater following World War II, however, when the United States permanently stationed large numbers of troops, along with their civilian dependents, in Europe and Asia. To address this and other needs, the United States negotiated the NATO Status of Forces Agreement (SOFA)⁷¹ and similar bilateral agreements with states hosting U.S. troops. These agreements provided U.S. courts-martial with nationality-based jurisdiction over certain types of crimes committed in the host state by civilian dependents of U.S. military personnel.⁷²

In a series of decisions in the 1950s and early 1960s, however, the U.S. Supreme Court held that courts-martial could not constitutionally try civilian dependents in peacetime because those courts did not provide trial by jury and other procedures guaranteed to civilians under the Constitution.⁷³ To prose-

67. *Id.* at 1617 (statements of Sen. Jones and Sen. Garland).

68. Compare *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824) (laws of one nation "can have no force to control the sovereignty or rights of any other nation") and *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) (territorial jurisdiction is "necessarily exclusive and absolute") with MOORE, *supra* note 19, at 35 (arguing that doctrine of sovereignty "of each nation over all persons within its territory does not completely apply" in "barbarous lands").

69. See, e.g., S. REP. NO. 2274, 84th Cong., 2d Sess. 1 (1956) (reporting favorably on resolution approving relinquishment of consular jurisdiction in Morocco and repealing its statutory foundation); H.R. REP. NO. 2697, 84th Cong., 2d Sess. 1 (1956) (similar); Treaty for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, Jan. 11, 1943, U.S.-China, reprinted in S. EXEC. REP. NO. 2, 78th Cong., 1st Sess. 5 (1943).

70. Cf., e.g., David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451 (1988) (arguing that consular jurisdiction lingered in Berlin until 1980s).

71. North Atlantic Treaty: Status of Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67.

72. See, e.g., *id.* art. VII(3); S. REP. NO. 1268, 84th Cong., 1st Sess. 3 (1955).

73. See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957).

Offenders Abroad

cute civilian dependents, the United States would have to establish full-fledged civilian courts in foreign countries, remodel courts-martial along civilian lines, or establish nationality-based jurisdiction with venue in courts in the United States. The U.S. government has not yet undertaken any of these options, and thus a jurisdictional gap still exists.⁷⁴

In other areas, Congress has occasionally accepted nationality-based criminal jurisdiction, particularly in legislation implementing multilateral conventions covering a narrow range of offenses. For example, the Hostage-Taking Act of 1984 applies specifically to terrorist-related hostage-taking committed by or against U.S. nationals overseas.⁷⁵ The Biological Weapons Anti-Terrorism Act of 1989, which criminalizes the development, handling and transfer of biological weapons, also applies to U.S. nationals outside the United States.⁷⁶ Finally, a bill to implement the Torture Convention would criminalize torture committed overseas by U.S. nationals.⁷⁷

Congress has also expanded nationality-based jurisdiction in some areas not covered by multilateral conventions. The "special maritime and territorial jurisdiction of the United States" was recently amended to include crimes committed by U.S. nationals "outside the jurisdiction of any nation."⁷⁸ In addition, the statutes on tax evasion,⁷⁹ perjury,⁸⁰ espionage,⁸¹ and operation of gambling ships⁸² apply to any U.S. national outside the United States.⁸³

This patchwork of nationality-based jurisdiction applies to only a handful of very specific crimes. It does not extend to violent crimes committed by U.S. nationals overseas, and this in part explains why the United States has seldom relied on nationality-based jurisdiction since the decline of consular jurisdiction.⁸⁴

74. See McClelland, *supra* note 5, at 179.

75. Hostage Taking Act of 1984, 18 U.S.C. § 1203(b)(1)(A) (1988).

76. Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C.A. § 175 (West Supp. 1991). A similar statute applies to nuclear materials. See Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, 18 U.S.C. § 8831 (1988).

77. See H.R. 3733, 102d Cong., 1st Sess. § 824 (1991), *reprinted in* 107 CONG. REC. H11,686, H11,699 (daily ed. Nov. 26, 1991).

78. See Department of the Interior and Related Agencies Appropriations Act of 1985, Pub. L. No. 98-473, tit. II, § 1210, 98 Stat. 1837, 2164 (1984) (codified at 18 U.S.C. § 7(7) (1988)).

79. See 26 U.S.C. § 7201 (1988) (tax evasion).

80. See 18 U.S.C. § 1621 (1988) (perjury).

81. See 18 U.S.C. §§ 793-794 (1988) (espionage).

82. See 18 U.S.C. § 1082(a) (1982) (gambling ships).

83. See Thurmond Amendment, discussed *infra* notes 118-120 and accompanying text.

84. One questionable exception, *United States v. Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973), is discussed below. See *infra* notes 99-101 and accompanying text.

D. *Summary*

The historical record reveals a number of explanations for U.S. reluctance to embrace nationality-based criminal jurisdiction, even though it embraced consular jurisdiction. From the eighteenth century to the early twentieth century, the dominant objection was logistical, centering on access to witnesses and evidence abroad. Consular jurisdiction, on the other hand, was not subject to the evidentiary objection and flourished because the United States wanted to protect its nationals from the vagaries of foreign law.

Other factors may also have inhibited nationality jurisdiction in courts within the United States. Nationality-based jurisdiction ran counter to the common law tradition of territorial jurisdiction. It implied lack of faith in another sovereign's system of law. It subjected U.S. nationals to two sets of laws while abroad. It ran the risk of offending foreign states. Finally, the constitutional legitimacy of nationality-based jurisdiction was unclear. While all of these objections also applied to consular jurisdiction, the characteristic that distinguished consular jurisdiction from nationality-based jurisdiction, emphasized by nineteenth century commentators, was the evidentiary concern. In the nineteenth century, a U.S. consular court in China could try a U.S. national who committed murder in Shanghai since the witnesses and evidence were nearby. A court in San Francisco, however, could not have conducted a fair trial as easily because the witnesses and evidence were half a world away. In the late twentieth century consular jurisdiction has disappeared.

The United States now relies on a system of deference to foreign prosecutions—a system that works well when a foreign prosecution actually takes place. The system does not work, however, when a foreign state fails to prosecute the offender. Part III examines the current jurisdictional system in more detail and considers whether a device other than nationality-based criminal jurisdiction can remedy the systemic defects.

III. CLOSING THE JURISDICTIONAL GAP: THE INADEQUATE ALTERNATIVES TO NATIONALITY-BASED CRIMINAL JURISDICTION

A. *Foreign Prosecution*

When a U.S. national commits a crime of violence abroad, the United States normally relies on the state in which the crime occurred to prosecute the offender. This is the most sensible approach to prosecuting crimes committed abroad by U.S. nationals if the host state is willing and able to prosecute, because it ensures that the offender's trial takes place near the scene of the crime (thus minimizing evidentiary problems), and avoids a conflict of jurisdic-

Offenders Abroad

tion with the host state. In most cases, this approach works well because the host state does indeed take jurisdiction.

A problem arises when the host state fails to prosecute. Even if the state in which the crime occurred wants to prosecute, the U.S. offender may have already returned to the United States, and U.S. law forbids extradition in the absence of an extradition treaty.⁸⁵ The United States has no extradition treaty with dozens of countries, including Korea, the Philippines, and Saudi Arabia.⁸⁶ Moreover, even some existing U.S. treaties, such as the treaty with Luxembourg, forbid extradition of U.S. nationals.⁸⁷ Still other extradition treaties do not apply to crimes outside the territory of the state requesting extradition.⁸⁸

Renegotiation of existing treaties to allow extradition of nationals, or extradition for crimes committed outside the territory of the requesting state, would be costly and unlikely to be accorded priority by the U.S. government. In modern practice, negotiation of a treaty usually takes more than one round of meetings and requires that three or four lawyers from the State and Justice Departments travel to the negotiation site. If there is relatively little intercourse between the United States and the country in question, negotiation of an extradition treaty is not likely to be a priority. Even if the will exists to negotiate a treaty, it may prove impossible to do so. For example, human rights considerations may prevent ratification,⁸⁹ even if the extradition treaty forbids extradition for a "political offense."⁹⁰ Additionally, the negotiating states may disagree over the circumstances in which they should extradite

85. See 18 U.S.C. § 3184 (1988). A proposal to abolish the treaty requirement is discussed *infra* notes 118-134 and accompanying text.

86. See U.S. DEP'T OF STATE, TREATIES IN FORCE 138, 193, 206 (1989).

87. See Treaty of Extradition, Oct. 29, 1883, U.S.-Lux., 23 Stat. 808; Supplementary Extradition Convention, Mar. 3, 1936, U.S.-Lux., 49 Stat. 3355. The Luxembourg treaty, like many early U.S. treaties, merely provided that neither party would be obliged to deliver up its nationals. The U.S. Supreme Court has interpreted such provisions to forbid the extradition of U.S. nationals because they do not create an affirmative obligation to extradite. See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936).

88. See, e.g., Extradition: Jurisdiction, 6 *Whiteman DIGEST* at 889-99 (noting examples from U.S. practice with Greece, Dominican Republic, Honduras, and Switzerland); Girard, *supra* note 40, at 508-09 (noting that some treaties speak of extradition for crimes committed within "jurisdiction" of requesting state). Other treaties, however, permit extradition for crimes committed outside the territory of the requested state, if the law of the requested state would permit prosecution in reverse circumstances. See, e.g., Extradition: Jurisdiction, *supra*, at 891 (citing U.S.-Belg. and Colom.-Pan. treaties).

89. The Senate scuttled a signed extradition treaty with the Philippines, for example, because of concerns about human-rights violations by the Marcos regime. See *Recent Actions Regarding Treaties to Which the United States Is a Party*, 21 *I.L.M.* 472, 474 (1982).

90. The political offense exception has been controversial in the United States since its successful invocation by Irish Republican Army members resisting extradition to the United Kingdom. See generally Miriam E. Sapiro, Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 *N.Y.U. L. REV.* 654 (1986) (discussing history of political offense objection). In response, the United States has over the past decade sought to narrow the scope of the political offense exception. See, e.g., Supplementary Treaty of Extradition, June 25, 1985, U.S.-U.K., art. I, T.I.A.S. No. 8468.

fugitives to face the death penalty,⁹¹ the scope of the political offense exception,⁹² the obligation to extradite nationals, the offenses for which extradition can be had, or the evidence sufficient to support extradition.⁹³

Even closing the extradition gap would not entirely solve the problem of offenders abroad who evade foreign prosecution for reasons unrelated to extradition. The offender might possess diplomatic immunity, for example. While the sending state has the option of waiving the immunity of its diplomat, states rarely do so.⁹⁴ Diplomatic immunity exists to eliminate any possibility that a diplomat will face prosecution merely for political reasons.⁹⁵ Any waiver of immunity undermines that bright-line rule, encouraging the receiving state to expect and demand waiver in more political cases. Presumably for this reason the sending state is often reluctant to waive the immunity of its diplomats, and the receiving state must then resort to expulsion of the offending individual.⁹⁶ A sending state with nationality-based criminal jurisdiction may prosecute its own diplomat,⁹⁷ eliminating the possibility of a politically motivated foreign prosecution. A state that cannot exercise nationality jurisdiction, such as the United States, faces an unappealing choice between waiver or nonprosecution.

Even if the diplomat commits a crime in a U.S. embassy or consulate overseas, the United States may not have jurisdiction to prosecute. Most observers and commentators now agree that a diplomatic mission is no longer considered a territorial enclave of the sending state,⁹⁸ and thus the United

91. See *Soering Case*, 161 Eur. Ct. H.R. (ser. A) at 4 (1989), reprinted in 11 Eur. H.R. Rep. 439 (1989) (enjoining extradition until requesting state gave firm assurances that it would not seek death penalty).

92. See Sapiro, *supra* note 90, at 655-56 (noting that states disagree over scope of political offense exception to extradition).

93. See, e.g., National of Requested State, 6 Whiteman DIGEST § 18, at 865-84 (describing scope of disagreement between states on extradition of nationals).

94. See Leslie S. Farhang, Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1526 (1986).

95. See Moira Griffin, *Diplomatic Impunity*, 13 STUDENT LAW. 18, 18-20 (Oct. 1984) (reporting U.S. official's view that 60% of U.S. diplomats would refuse to serve in certain foreign countries without diplomatic immunity).

96. See, e.g., EILEEN DENZA, DIPLOMATIC LAW 174-76 (1976) (describing British practice of requesting waiver and, if necessary, of expelling offending diplomat); Waiver of Immunity, 7 Whiteman DIGEST § 43, at 421-36 (describing State Department instructions to its personnel in Caracas not to waive immunity).

97. See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 31(4), 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95.

98. See *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) (criticizing rule of sovereign immunity that would make U.S. embassies part of U.S. territory "for jurisdictional purposes"); BARRY CARTER & PHILLIP TRIMBLE, INTERNATIONAL LAW 622 (1991). But see *Klinghoffer v. Palestine Liberation Organization*, 937 F.2d 44 (2d Cir. 1991) (repeating legal fiction that diplomatic missions in United States are foreign territory).

The *Klinghoffer* court apparently misinterpreted article 22(1) of the Vienna Convention on Diplomatic Relations, *supra* note 97, and its Optional Protocol on Disputes, June 29, 1961, 23 U.S.T. 3374, 500 U.N.T.S. 241, which provides that the diplomatic mission is "inviolable" and thus cannot be intruded on by the receiving state in the absence of consent or emergency. The Convention does not define a diplomatic

Offenders Abroad

States could not invoke the territorial principal of criminal jurisdiction to prosecute the diplomat in question. In *United States v. Erdos*,⁹⁹ however, the Fourth Circuit held that the United States could exercise criminal jurisdiction over a U.S. diplomat who killed another U.S. national on the premises of the U.S. Embassy in Equatorial Guinea. Although one court has construed *Erdos* as resting on the nationality principle of jurisdiction,¹⁰⁰ the *Erdos* court itself relied on the territorial principle by grounding its decision at least in part on the notion that a U.S. embassy abroad is part of U.S. territory.¹⁰¹ Insofar as this notion has been discredited, the precedential authority of *Erdos* is questionable.

The host state may fail to prosecute even when it can gain custody of the U.S. offender, if the conduct in question is not prosecutable under the host state's laws. The host state may have a stricter standard of proof for crimes such as rape, may impose an unduly light sentence for the offense, may be barred from prosecuting by its own statute of limitations, or may not regard certain conduct, such as child abduction or fraud, as criminal. The host state may fail to prosecute for reasons based on the nationality of the parties involved, or on the cost of prosecution.¹⁰² For example, the host state may have no interest in prosecuting a crime committed by one U.S. national against another, particularly when a civilian dependent of a U.S. soldier stationed overseas commits a crime against another U.S. national.¹⁰³ Prosecution is even less likely if the host state and United States have entered into a Status of Forces Agreement envisioning that the United States will take jurisdiction over some offenses committed by its civilian dependents stationed abroad.

Civilian dependents of U.S. soldiers commit thousands of crimes abroad every year.¹⁰⁴ A significant number of serious crimes go unprosecuted be-

mission as territory of the sending state.

99. 474 F.2d 157 (4th Cir. 1973), *cert. denied*, 414 U.S. 876 (1973).

100. See *Persinger*, 729 F.2d at 842 n.11.

101. The *Erdos* court emphasized that the murder occurred on the premises of a U.S. consular mission abroad, and it asserted that a U.S. consular mission "is a part of the territory of the United States of America." 474 F.2d at 159 (quoting *United States v. Archer*, 51 F. Supp. 708, 709 (S.D. Cal. 1943)). This assumption may have influenced the court's conclusion that a diplomatic or consular mission is part of the "special maritime or territorial jurisdiction" of the United States, which includes "land[] reserved or acquired for the use of the United States" under 18 U.S.C. § 7 (1988). 474 F.2d at 159-60.

The Justice Department has taken the position that *Erdos* should not be extended to U.S. military bases overseas, noting that such an interpretation of 18 U.S.C. § 7 would "likely incur serious international repercussions." Letter from Ass't Att'y Gen. Kevin D. Rooney to Mr. Allen R. Voss, Director, General Government Division, U.S. GAO, in *GAO Report*, *supra* note 5, at 49.

102. See DRAPER, *supra* note 5, at 140-41; *Hearing on Law Enforcement*, *supra* note 5, at 8 (statement of Rep. Rangel).

103. See, e.g., 1965 SOFA Hearing, *supra* note 9 (statement of Gen. Hodson) (citing British reluctance to prosecute U.S. civilian who committed crime on Ascension Island, on grounds that it was matter "between United States personnel").

104. See, e.g., Office of the Judge Advocate Gen., Dep't of Defense, Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals over United States Personnel, 1 December 1987-30 November 1988 (unpublished, on file with author).

cause the host state does not prosecute, and because the United States cannot constitutionally try civilians in courts-martial as they do not conform to constitutional standards, such as providing trial by jury.¹⁰⁵ According to the Pentagon, for example, some of the U.S. servicemen involved in the My Lai massacre (including several who admitted complicity in the incident) escaped prosecution because they left the military before charges were brought, and thus evaded the jurisdiction of the courts-martial.¹⁰⁶

One possible solution to this dilemma would involve reforming military tribunals to permit the prosecution of civilians.¹⁰⁷ The U.S. Supreme Court has expressed skepticism, however, asserting that military tribunals "probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."¹⁰⁸ Most commentators share this view, noting that a reform of military tribunals would probably require the establishment of civilian courts abroad, complete with civilian judges protected by life tenure and a guaranteed salary, civilian jurors paid for their time, and perhaps a more comprehensive public defender system than currently available.¹⁰⁹ These new civilian institutions would operate alongside existing military tribunals because the military is unlikely to abandon traditional courts-martial, which are based

105. *Id.* at 14-15; see also cases cited *supra* note 73.

106. See *Extraterritorial Criminal Jurisdiction: Hearing Before the Subcomm. on Immigration, Citizenship and International Law of the House Judiciary Comm.*, 95th Cong., 1st Sess. 49-50 (1989) [hereinafter *Hearing on Criminal Jurisdiction*] (statement of Benjamin Forman, Assistant General Counsel, Department of Defense). Commentators have argued that the United States currently has the authority to prosecute ex-soldiers in federal district court for violations of the law of war. See Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 33-34 (1971). Efforts to "bring internationally recognized human rights into our domestic legal process as treaty law" have been unsuccessful, since courts typically find that treaty obligations are not self-executing. See Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 233 & nn.9-10 (1975).

107. See DRAPER, *supra* note 5, at 48. One commentator suggested circumventing this problem by amending the Constitution to allow courts-martial to exercise jurisdiction over civilian dependents, or by persuading civilian dependents to waive constitutional rights, such as the right to trial by jury, as a precondition to employment or sponsorship by the military overseas. See McClelland, *supra* note 5, at 195-98; see also Everett O. Robinson & Laurent R. Hourcle, *Crime Without Punishment—Ex-Servicemen, Civilian Employees and Dependents*, 13 JAG L. REV. 184, 197 (1971) (discussing waiver of constitutional guarantees).

108. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

109. See *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (denouncing overseas courts as "new extraterritoriality"); Petitioners' Brief at 95-98, *McElroy* (No. 59-21); George, *supra* note 14, at 620 (arguing this is one area in which "clear recognition of the nationality principle as a basis for criminal legislation is needed"); McClelland, *supra* note 5, at 202-05. *But cf.* Girard, *supra* note 40, at 511-19 (arguing for civilian-style courts abroad, complete with federally-funded public defenders).

Since the decline of consular jurisdiction, the United States has not found it expedient to establish civilian courts abroad. One recent endeavor, the U.S. Court for Berlin, closed operations after entertaining precisely one case. See *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979); Letter from U.S. Ambassador Stoessel to Herbert J. Stern (May 29, 1979), in HERBERT J. STERN, *JUDGMENT IN BERLIN* 374 (1984).

Offenders Abroad

on the belief that military personnel should judge each other for violations of military rules.¹¹⁰

For these reasons, the Department of Defense and Congress have focused on establishing nationality-based criminal jurisdiction in courts in the United States, rather than on reforming courts-martial to provide the requisite procedural guarantees. In the late 1960s and 1970s, the Department of Defense urged Congress to establish nationality-based criminal jurisdiction over crimes committed by civilian dependents, with venue to lie in federal courts within the United States.¹¹¹ Congress has yet to establish such jurisdiction, much to the dismay of military prosecutors.¹¹² A Senate subcommittee chaired by Senator Ervin held hearings on the matter for a number of years.¹¹³ Senator Ervin introduced two bills to establish nationality jurisdiction over civilian dependents,¹¹⁴ although he had doubts that the bills conformed with the U.S. Constitution or with the common law tradition of territoriality.¹¹⁵ If reform of courts-martial is unrealistic, and if some civilian dependents continue to escape prosecution by host states, the United States has only two alternatives: either to exercise nationality-based jurisdiction over civilian dependents, or to forego prosecution altogether.¹¹⁶

The conclusion seems inescapable: some U.S. nationals who commit serious crimes on a foreign state's soil will go unprosecuted by the foreign government. Extradition problems will stand in the way of some prosecutions,

110. "It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military . . ." *Toth*, 350 U.S. at 18.

111. Interestingly, the Department of Justice appeared reluctant to endorse the Department of Defense's proposal for a longer prosecutorial arm, apparently out of concern that these cases would unduly burden federal prosecutors with garden-variety crimes. See *Hearing on Criminal Jurisdiction*, *supra* note 106, at 52 (statement of Benjamin Forman, Assistant General Counsel, Department of Defense). See also *Operation of Article VII, NATO Status of Forces Treaty: Hearing before a Subcomm. of the Senate Armed Services Comm.*, 91st Cong., 1st Sess. 20 (1969) [hereinafter *1969 SOFA Hearing*] (statement of Benjamin Forman) (noting failure of Department of Defense to secure approval for legislation to establish jurisdiction over civilian dependents overseas); *1965 SOFA Hearing*, *supra* note 9, at 14 (statement of Benjamin Forman) (relating "difficulty in getting a consensus within the Pentagon and within the Government" on jurisdiction over civilian dependents). However, many of the crimes in question are serious crimes. See *supra* note 5 (citing statistics).

112. See McClelland, *supra* note 5, at 212-13.

113. See, e.g., *Operation of Article VII, NATO Status of Forces Treaty: Hearing before a Subcomm. of the Senate Armed Services Comm.*, 92d Cong., 2d Sess. (1972) [hereinafter *1972 SOFA Hearing*]; *1970 SOFA Hearing*, *supra* note 5; *1969 SOFA Hearing*, *supra* note 111; *1965 SOFA Hearing*, *supra* note 9.

The House has held fewer hearings on nationality jurisdiction, and has focused those hearings on civilian dependents of military personnel overseas as well as jurisdiction in Antarctica. See, e.g., *Hearing on Criminal Jurisdiction*, *supra* note 106.

114. See S. 3188, 91st Cong., 1st Sess. (1969); S. 3189, 91st Cong., 1st Sess. (1969).

115. "There are some serious constitutional questions involved as to whether we can assume jurisdiction of civilians even though they are Americans in a foreign country. It is a notion I think that is rather hostile to the common law system." *1965 SOFA Hearing*, *supra* note 9, at 15 (statement of Sen. Ervin).

116. For a general discussion on the prosecution of military personnel and civilian dependents, see RONALD J. STANGER, *CRIMINAL JURISDICTION OVER VISITING ARMED FORCES* (Naval War College International Law Studies 1957-1958, 1965).

while diplomatic immunity will block others. In many cases, the foreign state's own law may bar prosecution, or it may not wish to incur the expense of prosecuting one foreigner for a crime committed against another foreigner.

B. Alternative Bases for U.S. Jurisdiction

Given that foreign states will not always prosecute U.S. offenders abroad, the next question is whether the United States can undertake such a prosecution on a jurisdictional basis other than the nationality principle. International law recognizes four alternatives to nationality-based criminal jurisdiction: the territorial effects principle, the protective principle, the universal principle, and the passive personality principle. Three of the alternatives do not apply to crimes of violence committed by a U.S. national on foreign soil. The territorial-effects principle applies to crimes committed in foreign states that have a discernible effect on U.S. territory. The importation of narcotics or other contraband is the paradigmatic example. The protective principle applies to crimes committed against the United States itself, such as treason or espionage; it does not apply to crimes committed against private parties. The universal principle applies to genocide, war crimes, and other offenses so universally repugnant that every state has jurisdiction over them.

The final basis, the passive personality principle, grounds jurisdiction on the nationality of the victim. It thus could allow prosecution of crimes committed against U.S. nationals abroad. This basis of jurisdiction, however, does not provide jurisdiction over crimes committed by U.S. nationals in foreign states against nationals of a third country. It could be argued that the United States has no valid policy interest in prosecuting crimes committed by U.S. nationals against foreigners abroad. But surely such an interest exists if the host state or the victim's state of nationality either requests a U.S. prosecution, or acquiesces to one. Although the passive personality remedy is incomplete, Congress seems quite taken with this alternative. Reacting to the alleged murder of one U.S. national by another in Korea,¹¹⁷ the U.S. Senate adopted a provision known as the Thurmond Amendment in 1991.¹¹⁸ The bill would establish jurisdiction over cases involving the murder of U.S. nationals on foreign soil, regardless of the nationality of the offender, provided that a senior Justice Department official certifies that no prosecution "has been previously undertaken by a foreign country for the same act or omission," and that the

117. See 137 CONG. REC. S4750-51 (daily ed. Apr. 18, 1991) (statement of Sen. Thurmond) (introducing passive personality bill and arguing that it would help address cases such as murder of Carolyn Abel in Korea); *id.* at S4751-52 (statement of Sen. Hollings) (supporting bill for similar reasons).

118. H.R. 3371, 102d Cong., 1st Sess. § 110(a) (1991), reprinted in 137 CONG. REC. H11,686 (daily ed. Nov. 26, 1991). The bill passed both houses of Congress, and the House adopted a conference report on the bill, but the bill stalled in late November when the Senate voted not to close debate.

Offenders Abroad

Attorney General, in consultation with the Secretary of State, determines that the conduct "took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return."¹¹⁹ The bill would also remove the longstanding statutory bar to extradition from the United States in the absence of treaty, if the offense in question involves a violent crime against a U.S. national.¹²⁰

The Thurmond Amendment misfires in several directions. It errs first by adopting the most controversial form of extraterritorial criminal jurisdiction—the passive personality principle.¹²¹ This principle is controversial because it focuses criminal responsibility not on the conduct of the offender, but on the status of the victim, a variable irrelevant to universal deterrence. As the U.S. Department of State said more than one hundred years ago, a foreign state establishing passive personality jurisdiction would subject all U.S. nationals

not merely to a dual, but to an indefinite responsibility It would expose citizens and all other persons in the United States to liability to as many penal systems as there happened to be nationalities represented in the foreign population. Every fresh accession to that population would extend the operation, and potentially increase the variety, of foreign penal systems in force in this country.¹²²

The most extreme example would be a state that imposed the death penalty for any crime committed against one of its nationals. This problem could be ameliorated by restricting passive personality jurisdiction to those serious crimes that carry similar punishments everywhere. The Thurmond Amendment itself is limited to murder. Nonetheless, while everyone knows that murder is a serious crime, regardless of the identity of the victim, it may be less fair to presume that foreigners know how seriously the United States punishes lesser crimes. Moreover, because of the U.S. reputation for aggressively exercising extraterritorial jurisdiction, foreign states may view any U.S. attempts to exercise passive personality jurisdiction with suspicion.

Another problem with passive personality jurisdiction is that third-party states might be reluctant to extradite to the United States, particularly if there are competing extradition requests. Modern extradition treaties typically give

119. S. 1241, 101st Cong., 1st Sess. §§ 3201-3203 (1990), *reprinted in* 137 CONG. REC. S10,018-19 (daily ed. July 15, 1991) (Comprehensive Crime Control Act of 1991).

120. *See id.* § 3203.

121. *See, e.g.*, RESTATEMENT, *supra* note 3, § 402 cmt. g (noting that passive personality principle "has not been generally accepted for ordinary torts or crimes"); BROWNLIE, *supra* note 11, at 303 (describing passive personality as "least justifiable" basis of jurisdiction).

122. MOORE, *supra* note 19, at 101. The State Department remains committed to this view. *See* 137 CONG. REC. S4750, S4752 (1991) (statement of Sen. Hollings) (reprinting letter from Assistant Secretary of State Janet G. Mullins to Sen. Hollings (Dec. 26, 1989)) [hereinafter Mullins's Letter to Hollings]. *See also* Edward R. Harris, Note, *Reaching the Extraterritorial Criminal Offender: Jurisdiction to Prescribe and Enforce United States Law Extraterritorially Under Section 204 of the Proposed Federal Criminal Code*, 1 B.U. INT'L L.J. 207, 213 (1982) (arguing that offender can "reasonably foresee" punishment for violating law of state in which crime occurred, but not that of victim's home state).

the requested state discretion to choose between requesting states. While some treaties list the place of commission of the offense and the nationality of the offender as relevant factors, they generally do not mention the nationality of the victim.¹²³ Thus other states might frustrate U.S. reliance on passive personality jurisdiction by refusing to accept it as a legitimate basis of jurisdiction.

A further problem with the Thurmond Amendment is that it repeals the statutory bar to extradition in the absence of a treaty,¹²⁴ provided that the fugitive is sought for a nonpolitical crime of violence against a U.S. national. In so doing the Amendment deprives fugitives, including U.S. fugitives, of all the important safeguards contained in extradition treaties, including the rule of specialty (limiting prosecution to the crimes for which the fugitive was extradited), the principle of *non bis in idem* (the treaty analogue of double jeopardy), the requirement that extradition be limited principally to felonies, and the principle that extradition may be barred by a statute of limitations.¹²⁵ In addition, elimination of the treaty requirement would diminish the Senate's constitutional role in deciding which states should have extradition relations with the United States. Furthermore, facilitating extradition would not guarantee prosecution in all cases because the host state often cannot or will not prosecute even if the accused is returned to the host state.

Finally, the Thurmond Amendment repeats the mistake made in the so-called Specter Bill on Terrorism, in which the Congress provided that subject-matter jurisdiction would turn on an unreviewable decision by the Attorney General that the conduct at issue was related to a terrorist incident.¹²⁶ The Thurmond Amendment provides for jurisdiction if the Attorney General makes an unreviewable determination that the fugitive is not in the host state and that the host state "lacks the ability to lawfully secure the person's return."¹²⁷ Such provisions have been justly criticized as providing the executive with a say in subject-matter jurisdiction, a matter that must ultimately be determined by the judiciary.¹²⁸ A better approach would require the executive to make some showing that the foreign state could not prosecute, and to allow the court to find whether the facts presented justify a finding of jurisdiction.

123. *E.g.*, Treaty of Extradition, May 4, 1978, U.S.-Mex., art. I(2)(a), 31 U.S.T. 5059; Treaty of Extradition, June 20, 1978, U.S.-F.R.G., art. XVII(1), 32 U.S.T. 1485; Treaty of Extradition, Jan. 12, 1970, U.S.-N.Z., art. XIV, 22 U.S.T. 1.

124. United States law currently permits extradition only pursuant to treaty or convention. 18 U.S.C. § 3184 (1988). As a constitutional matter, the executive may extradite U.S. nationals only if authorized by treaty or statute. *See* *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936).

125. *See, e.g.*, Treaty of Extradition, Oct. 21, 1976, U.S.-U.K., art. III(1)(c), 28 U.S.T. 227 [hereinafter U.S.-U.K. Extradition Treaty] (felony requirement); *id.* art. V (*non bis in idem*); *id.* art. V(1)(b) (statute of limitations); *id.* art. XII (specialty).

126. *See* Antiterrorism Act of 1990, 18 U.S.C.A. § 2331 (West Supp. 1991).

127. H.R. 3371, 102d Cong., 1st Sess. § 110(a) (1991), reprinted in 137 CONG. REC. H11,686 (daily ed. Nov. 26, 1991).

128. *See* Lowenfeld, *supra* note 15, at 891-92.

Offenders Abroad

Whatever the merits of passive personality jurisdiction, its controversial nature argues for caution. Although some states have experimented with passive personality jurisdiction,¹²⁹ and although it enjoys some legitimacy as a basis for prosecution of terrorists,¹³⁰ it is still not a generally accepted basis for exercising jurisdiction over common crimes.¹³¹ Other, less controversial, bases of jurisdiction are available that avoid the problems inherent in the Thurmond Amendment. In particular, nationality-based criminal jurisdiction is a much less controversial basis that would have easily addressed the facts of the Korean case, as well as the facts of *United States v. Erdos*.¹³² The State Department, which criticized the Thurmond Amendment, has said it would support a bill founded on the nationality principle.¹³³ Unfortunately, Congress seems oblivious to the difference between nationality and passive personality jurisdiction and has incorporated passive personality jurisdiction into those few recent instances in which it has adopted nationality-based jurisdiction.¹³⁴

In light of the lack of feasible alternatives to nationality-based jurisdiction, Part IV considers whether the application of this principle to crimes committed abroad would be consistent with the U.S. Constitution and with international law.

IV. LEGAL AUTHORITY FOR NATIONALITY-BASED CRIMINAL JURISDICTION

A. Constitutional Law

The unenumerated foreign affairs power is the most appropriate basis for congressional regulation of U.S. nationals abroad.¹³⁵ Congress has "power

129. See, e.g., S. 1241, 101st Cong., 1st Sess. (1991); *supra* notes 118-122 and accompanying text; Criminal Jurisdiction, 6 Whiteman DIGEST § 5, at 103-05 (describing examples from Mexican practice).

130. See RESTATEMENT, *supra* note 3, § 402 reporters' note 3. Even the problem of terrorism may not require the use of passive personality jurisdiction because terrorist crimes implicate the more widely accepted protective principle. See Christopher L. Blakesley, *Jurisdiction as Legal Protection Against Terrorism*, 19 CONN. L. REV. 895, 941-42 (1987).

131. See RESTATEMENT, *supra* note 3, § 402 cmt. g.

132. 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973); see *supra* notes 99-101 and accompanying text.

133. See Letter from Janet G. Mullins, Assistant Secretary of State for Legislative Affairs, to Richard Darman, Chairman of the Office of Management and Budget 2 (July 29, 1991) [hereinafter Mullins's Letter to Darman]. Ms. Mullins's letter apparently refers to the murder of Carolyn Abel in Korea in December, 1988. See also *Oregonian Returns Home*, *supra* note 8. The Department expressed a similar view a century ago. "A state may, if it see fit, tie its criminal law about the neck of its citizen and hold him answerable for its violation everywhere." MOORE, *supra* note 19, at 125.

134. See, e.g., Hostage-Taking Act, 18 U.S.C. § 1203 (1988) (providing for jurisdiction over offenses committed by or against U.S. nationals); 18 U.S.C. § 7(7) (1988) (establishing extraterritorial jurisdiction in cases "outside the jurisdiction of any nation with respect to an offense by or against a national of the United States").

135. Professor Lowenfeld believes that jurisdiction based solely on the nationality of the offender is "questionable under the Constitution without some additional link to the United States." See Lowenfeld,

to deal with foreign affairs,"¹³⁶ and appears to have used this power to enact a wide variety of laws touching on foreign affairs, including nationality-based statutes, while declining to explain their constitutional basis.¹³⁷ The courts have repeatedly upheld such laws, although they have generally failed to explain which congressional power applies.¹³⁸ The Supreme Court itself has hinted that the United States could establish nationality-based criminal jurisdiction over civilian dependents of military personnel overseas, and that venue could lie within the United States.¹³⁹

This reliance on the foreign affairs power is well-justified. The foreign affairs power confers on the national government all the powers to regulate foreign policy that inhere in national sovereignty.¹⁴⁰ The State Department has taken the same position, arguing that the exercise of nationality jurisdiction is an attribute of sovereignty, and that the enumeration of powers in Article I of the U.S. Constitution was not intended to diminish the powers inherent in sovereignty.¹⁴¹

The practice of the Framers of the Constitution, many of whom also participated in the young Republic's government, supports the conclusion that

supra note 15, at 881-82, 886-92.

A number of other observers argue that Congress does have this authority, but they disagree on its source, suggesting alternatives such as the unenumerated "foreign affairs power," the power to regulate foreign commerce, the power to define and punish certain offenses, and the power to implement treaties. *See, e.g.*, H.R. DOC. NO. 326, *supra* note 28, at 204 (citing treaty-making power, foreign commerce power, and international affairs power); HENKIN, *supra* note 24, at 75-76 (citing foreign affairs power); George, *supra* note 14, at 615-16 (citing wide variety of congressional powers); Girard, *supra* note 40, at 41 (citing foreign commerce power and others); McClelland, *supra* note 5, at 67 (citing foreign affairs and foreign commerce powers).

136. *Perez v. Brownell*, 356 U.S. 44, 59 (1958).

137. *See* HENKIN, *supra* note 24, at 74-76 (arguing that Congress has relied on foreign affairs power to enact statutes regarding foreign diplomatic activity and immigration laws, to adopt nationality-based extraterritorial jurisdiction over both civil and criminal matters, and to justify act of state doctrine).

138. *See, e.g.*, *Blackmer v. United States*, 284 U.S. 421 (1932); *United States v. Black*, 291 F. Supp. 262, 266 (S.D.N.Y. 1968) ("[T]he power of Congress to enact statutes in the national interest extending to all its citizens—even those upon the high seas—cannot be doubted.") (citing cases); *United States v. Baker*, 136 F. Supp. 546, 548 (S.D.N.Y. 1955) ("An American citizen is subject to the laws of the United States wherever he may be.") (dictum).

139. *See* *Kinsella v. United States*, 361 U.S. 234, 246 (1960); *see also* *Toth v. Quarles*, 350 U.S. 11, 21 (1955) (Constitution allows Congress to establish jurisdiction over discharged soldiers). The power to regulate the armed forces might also support jurisdiction over civilian dependents, but it obviously has no application to other U.S. offenders abroad.

140. *See* *Blackmer*, 284 U.S. at 437 ("Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal.") (emphasis added); *see also* HENKIN, *supra* note 24, at 74.

141. Although the Justice Department has suggested that the constitutional issue has been settled, the Department did not specify which power of Congress supports the establishment of this jurisdiction. *See* *Hearing on Criminal Jurisdiction*, *supra* note 106, at 31 (statement of Robert L. Keuch, Deputy Assistant Attorney General, Department of Justice) (asserting that "[i]t is settled that there is no constitutional impediment" to establishment of nationality-based criminal jurisdiction). The Department of Defense has reached the same conclusion, again without specifying which power of Congress it has in mind. *See* *1970 SOFA Hearing*, *supra* note 5, at 6.

Offenders Abroad

the foreign affairs power includes the power to criminalize the conduct of U.S. nationals abroad solely on the basis of their U.S. nationality. As discussed in Part III, the first Congresses made U.S. citizenship an indispensable element of a host of crimes, including treason, piracy, communicating with foreign governments, engaging in the slave trade, and committing any sort of crime while accompanying armed forces in the field.¹⁴² Even if each of these early statutes can individually be explained as the enactment of some other form of extraterritorial jurisdiction, such as the protective principle, they each contain an element of the nationality principle. In addition, the early Republic's flirtation with and eventual embrace of consular jurisdiction in the nineteenth century suggests that U.S. nationals acquiesced in the extension U.S. laws while abroad, especially if the alternative was obedience to foreign law.

This historical reliance on the foreign affairs power continues to make sense in that the nationality principle can play an important role in the regulation of U.S. foreign affairs. Although diplomatic relations rarely stand or fall on the disposition of any one criminal case, the criminal acts of U.S. nationals abroad can strain international relations.¹⁴³ In such cases, the foreign affairs power would be the most appropriate basis for nationality-based criminal jurisdiction. Arguably, the power might extend to any crime of any magnitude committed by a U.S. national abroad. Even the most petty thief can damage the reputation of the United States.

Another possible source of authority for nationality-based jurisdiction is the Foreign Commerce Clause of the U.S. Constitution.¹⁴⁴ A number of commentators have asserted that the authority for regulating the activities of U.S. nationals abroad comes from this power.¹⁴⁵ If interstate commerce jurisprudence is any guide, the Foreign Commerce Clause may supply a constitutional basis for regulation in at least some cases. United States courts have interpreted the Interstate Commerce Clause very broadly to authorize regulation of all activity that has an interstate effect, making it the "chief source of congressional regulatory power."¹⁴⁶ The Foreign Commerce Clause, though not often addressed by the Supreme Court, has been accorded

142. Professor Girard warns against excessive reliance on evidence that the early U.S. army exercised criminal jurisdiction over civilian employees and dependents in the field. He argues that such jurisdiction was rarely exercised, generally only in time of war, and bore little relation to the exercise of criminal jurisdiction over civilian dependents of today's military services. See Girard, *supra* note 40, at 482-88.

143. See *infra* note 163 and accompanying text.

144. "The Congress shall have Power [to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. CONST. art. I, § 8, cl. 3.

145. DRAPER, *supra* note 5, at 144 (trial of civilian dependents of military personnel may be justified under either foreign commerce power or power to regulate armies); McClelland, *supra* note 5, at 198 ("Congress derives the power to legislate extraterritorial jurisdiction over citizens as an incident of its power to regulate foreign relations and commerce.").

146. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4, at 305-06 (2d ed. 1988) (citing *Lord v. Steamship Co.*, 102 U.S. 541, 544 (1881)).

a broad scope similar to that of the Interstate Commerce Clause.¹⁴⁷ While the commerce power "might be sufficient to support virtually any legislation that relates to foreign intercourse, i.e., to foreign relations,"¹⁴⁸ the foreign commerce power is generally thought to be no broader than the interstate commerce power.¹⁴⁹

Congress could attempt to regulate crimes committed by U.S. nationals abroad on the theory that their travel outside the United States is foreign intercourse. The foreign commerce power might, for example, extend to the actions of a U.S. national who traveled to a foreign country with the express purpose of kidnapping someone there, just as kidnapping across state lines triggers federal jurisdiction in the domestic sphere. But this theory loses force if the travel is unrelated to the crime. Alternatively, Congress could regulate crimes committed by U.S. nationals abroad on the theory that any transaction by a U.S. national overseas is a form of foreign commerce. This "personality theory" of the Foreign Commerce Clause would arguably expand its scope beyond that of the Interstate Commerce Clause. Still, even assuming that a broad interpretation of the Foreign Commerce Clause would support nationality-based criminal jurisdiction, a less tenuous alternative basis is preferable.

One final candidate is the congressional power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."¹⁵⁰ This power, however, rarely encompasses nationality-based jurisdiction over crimes committed on foreign soil because very few crimes constitute "Offences against the Law of Nations." Indeed, it is difficult to see how any one individual can commit an offense against the "Law of Nations," since international law normally applies only to states.¹⁵¹ Still, the Congress and the Supreme Court have apparently interpreted the Offences Clause broadly, and have invoked it, along with the power to implement treaties, to justify the establishment of nationality-based jurisdiction over crimes like genocide, terrorist-related hostage-taking, torture, and aircraft sabotage.¹⁵² For other crimes, the power to implement treaties is unavailable because no treaty or principle of international law currently requires a state to establish nationality-based jurisdiction over its nationals for crimes such as

147. See HENKIN, *supra* note 24, at 70 n.9.

148. *Id.* at 70.

149. It has been argued that the Foreign Commerce Clause should be interpreted more broadly, since the interstate commerce power came at the "expense of the reserved powers of the States" while the foreign commerce power derived from the federal government's unshared power over foreign relations. That view, however, has generally been abandoned. *Id.* at 70 n.9.

150. U.S. CONST. art. I, § 8, cl. 10.

151. See HENKIN, *supra* note 24, at 72-73.

152. See *id.* at 73-74 (quoting *United States v. Arjona*, 120 U.S. 479, 487-88 (1887)). Such implementing legislation could, of course, be justified under other sources of congressional authority, such as the power to implement treaties or the foreign affairs power. See *id.* at 73.

Offenders Abroad

murder or rape, which are not considered "Offences against the Law of Nations."

The U.S. Congress therefore possesses constitutionality authority to regulate the conduct of U.S. nationals overseas. The unenumerated foreign affairs power is the most plausible source of this authority. The question remains whether international law can place any limits on the foreign affairs power.

B. *International Law and Practice*

It is unclear whether the limits of the foreign affairs power, or any other federal power relating to international relations, can be defined by reference to international law.¹⁵³ United States courts have repeatedly held that the Constitution permits the federal government to enact and enforce legislation that is inconsistent with international law.¹⁵⁴ Nevertheless, international law may limit jurisdiction, particularly when Congress acts to define an offense against the law of nations, or when it exercises powers of sovereignty derived from international law, such as the foreign affairs power.¹⁵⁵

Although international law may limit jurisdiction, it is beyond dispute that the United States may exercise criminal jurisdiction over U.S. nationals abroad in at least some circumstances.¹⁵⁶ The notion that a state may exercise nationality-based criminal jurisdiction over an individual is uncontroversial.¹⁵⁷ Many civil law states, as well as some common law states, exercise jurisdiction in this fashion.¹⁵⁸ Nevertheless, there are limits to the nationality principle. Indeed, the United States has been criticized for stretching the nationality principle to apply civil laws in the face of conflicting foreign laws, or to foreign-incorporated subsidiaries of U.S. corporations that are not easily categorized as "nationals."¹⁵⁹

153. "No one knows the reaches of the foreign affairs power of Congress." *id.* at 76. International law, of course, recognizes only the five principles of jurisdiction outlined above. *See supra* text accompanying notes 11-14.

154. *See, e.g.,* United States v. Palestine Liberation Organization, 695 F. Supp. 1456, 1564 (S.D.N.Y. 1988) (noting that Act of Congress may supersede treaty obligation if such purpose is expressly stated in Act).

155. *See* Lowenfeld, *supra* note 15, at 881-82.

156. *See* RESTATEMENT, *supra* note 3, § 404.

157. *See generally* HARVARD RESEARCH, *supra* note 14, at 435 (comments on Draft Convention on Jurisdiction with Respect to Crime).

158. *See* National of Requested State, 6 Whiteman DIGEST § 18, at 876-78.

159. *See, e.g.,* John Kennedy, *Rich Papers' Availability is Under Debate*, WASH. POST, Sept. 21, 1983, at F1 (reporting that Switzerland complained of U.S. efforts "to apply its laws in Switzerland"); Tamar Levin, *Business and the Law: United States vs. Bank of Nova Scotia*, N.Y. TIMES, Dec. 13, 1983, at D2 (quoting Canadian official criticizing U.S. efforts to enforce subpoenas extraterritorially as showing "profound lack of respect for Canadian sovereignty and for the rules of international law"); *cf.* LOWE, *supra* note 4, at xv (1983) (noting that United States "is much the most prominent of the claimants to extraterritorial jurisdiction").

In civil law and common law systems alike, nationality jurisdiction is normally justified by the theory that the national owes allegiance to the home state both while at home and while abroad.¹⁶⁰ According to this view, the state provides its national the benefits of nationality, including protection at home and abroad, in exchange for the national's obedience.¹⁶¹ The reciprocal obligations may be fewer abroad, but they still exist. For example, the U.S. government provides diplomatic protection in the form of consular services to its nationals in distress,¹⁶² while the U.S. national remains subject to important U.S. criminal laws, such as treason.

The allegiance theory does not entirely explain why a state should have an interest in regulating the behavior of its nationals while they are abroad, especially if their conduct does not directly harm the security or territory of the home state. This interest is justified by two concerns. First, the home state has an interest in deterring its nationals from engaging in conduct that damages that state's reputation and foreign relations. Second, the international community as a whole has an interest in deterring serious crimes that currently go unpunished because no state exercises jurisdiction.

The first justification rests on the possibility that the crimes a national commits abroad will be associated with the home state itself. Crimes committed abroad by a state's nationals can significantly strain the home state's relations with other states, particularly if other states expect the home state to prosecute and the home state lacks jurisdiction to do so. If, for example, a

160. See, e.g., *Blackmer v. United States*, 284 U.S. 421, 427 (1932) (referring to "duties of the citizen in relation to his own government"); *United States v. Bowman*, 260 U.S. 94, 102 (1922) (nationality jurisdiction justified on grounds of defendant's "allegiance"); *United States v. King*, 552 F.2d 833, 851 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977) ("American authority over [U.S. nationals abroad] could be based upon the allegiance they owe this country and its laws . . ."); Chase, *supra* note 1, at 557; HARVARD RESEARCH, *supra* note 14, at 519; Everett P. Wheeler, *The Relation of the Citizen Domiciled in a Foreign Country to His Home Government*, 3 AM. J. INT'L L. 869, 874 (1909) (asserting that national "must do nothing with his native allegiance or be found in hostility to his native country") (citations omitted). But see BORCHARD, *supra* note 30, § 5, at 9-10 (arguing that national's "allegiance" grows out of relationship resembling adoption more than contract); EDWARD S. STIMSON, CONFLICT OF CRIMINAL LAWS 1-2 (1936) ("The government has no interest in the conduct of its citizens abroad except when that conduct results in injury to it, because the peace and good order of its territory is not disturbed.") (citing *People v. Tyler*, 7 Mich. 161, 221 (1859)); WESTLAKE, *supra* note 18, at 253 (arguing that exercise of nationality-based jurisdiction is "intervention on behalf of morality").

161. In antiquity, the consideration for the social contract—a citizen's obedience to Roman law while abroad—was a price worth paying since it was a privilege to be governed by Roman law, which the Romans considered superior to the law of the barbarians. See BORCHARD, *supra* note 30, at 4-5; Kassan, *supra* note 27, at 240.

162. It is the longstanding policy of the United States to send diplomatic or consular representatives to watch foreign criminal proceedings involving U.S. nationals. Diplomatic protests over assertedly unfair trials are occasionally successful. See Act of July 27, 1868, ch. 249 (codified at REVISED STATUTES OF THE UNITED STATES § 2001 (2d ed. 1878)) (requiring President to demand release of U.S. nationals wrongfully held abroad), reprinted in NATIONALITY LAWS 578-79 (Richard W. Fluornoy & Manley O. Hudson eds., 1929); BORCHARD, *supra* note 30, at 98-102 (citing examples from U.S. diplomatic practice). In 1961, the international community codified this practice in the Vienna Convention on Consular Relations, Apr. 18, 1961, art. 36(c), 23 U.S.T. 3227, which guarantees states consular access to their nationals in custody abroad.

Offenders Abroad

U.S. national committed a series of murders in the Philippines and then returned to the United States, the Philippines would probably request that the fugitive be extradited or prosecuted. If extradition were not possible—which is likely given the absence of a U.S.-Philippine extradition treaty—and if the United States did not prosecute for lack of jurisdiction, then relations between the United States and the Philippines would be strained.¹⁶³ In such a case, the United States would have a valid interest in exercising jurisdiction to preserve good relations with the Philippines and to deter similar conduct by U.S. nationals in the future.¹⁶⁴

The second justification rests on the conviction that the international community has a collective interest in deterring crime. Consequently, the international community has an interest in ensuring that serious offenders do not escape prosecution when the host state wishes to prosecute but cannot do so. The international community can further this interest by establishing a reliable alternative to host-state jurisdiction, such as nationality-based criminal jurisdiction, to be exercised in the event that the host state does not prosecute.

Nationality jurisdiction is universally accepted as a basis for extraterritorial jurisdiction.¹⁶⁵ As a political matter, some foreign states might resent *any* expansion of U.S. jurisdiction. While conceding that the United States has concurrent jurisdiction over its own nationals, a state might nonetheless resent the implication that its administration of justice is insufficient. Alternatively, a state might oppose establishment of nationality-based jurisdiction in U.S. law on the grounds that the United States would use it to coerce other states to relinquish jurisdiction over U.S. nationals suspected of committing a crime abroad.

In general, however, other states are unlikely to object. Most states are not likely to take offense at U.S. prosecution of U.S. nationals for crimes committed abroad, particularly if the state in which the crime occurred declines to prosecute. United States indictment of a U.S. drug lord operating in Colombia or Venezuela will not induce the same resentment that U.S. indictment of a Colombian or Venezuelan would. The State Department has argued that such an indictment of a U.S. national for a crime committed abroad might actually benefit bilateral relations, because it might reduce pressure on host states to

163. See Stephen B. Swigert, Note, *Extraterritorial Reach of Proposed Federal Criminal Code*, 13 HARV. INT'L L.J. 346, 362 (1972) (arguing that nationality jurisdiction is appropriate because actions of private nationals may affect foreign policy interests).

164. See WESTLAKE, *supra* note 18, at 253 (characterizing many British statutes with nationality provisions as serving self-defense interests).

165. "[I]t has never been considered a violation of sovereignty for a state to apply its laws to its nationals in the territory of another state even without the latter's consent." HENKIN ET AL., INTERNATIONAL LAW, *supra* note 14, at 266.

prosecute.¹⁶⁶ The foreign state is even less likely to resent a U.S. prosecution if it wants the U.S. national prosecuted but cannot do so.

In summary, there is a clear basis in international law for the exercise of nationality-based criminal jurisdiction. The principle is accepted on the allegiance theory, though it derives more strength from a state's interest in controlling its own foreign policy. Foreign states could conceivably express policy concerns about any expansion of U.S. criminal jurisdiction, but many such states exercise nationality jurisdiction themselves. Any potential dispute over the scope of jurisdiction can be minimized by carefully delimiting the scope of nationality-based criminal jurisdiction. With this last concern in mind, Part V examines the various shapes that criminal jurisdiction over U.S. nationals abroad might take.

V. FASHIONING NATIONALITY-BASED CRIMINAL JURISDICTION

The United States should continue to rely primarily on other states to prosecute U.S. nationals for crimes committed overseas. The alternative, prosecuting all such crimes in U.S. courts, would impose an intolerable burden on the resources of our criminal justice system and would offend foreign states. Nevertheless, a discernible jurisdictional gap remains in U.S. criminal law. To fill this gap, a federal statute should establish nationality-based criminal jurisdiction over crimes committed abroad by U.S. nationals. Such a statute must address several practical issues. The first and most significant issue is the need to obtain evidence from abroad to support nationality-based prosecutions and to ensure that the defendant receives a fair trial. A second issue is whether to authorize the exercise of jurisdiction in the absence of dual criminality. A third issue is whether to authorize the exercise of jurisdiction even when the foreign state is prepared to prosecute. A fourth issue is whether such a statute should cover all crimes, including misdemeanors, or whether it should include only more serious crimes.

A. *Evidentiary and Confrontation Considerations*

Although problems in procuring evidence from abroad were particularly pronounced in the eighteenth and nineteenth centuries, when intercontinental travel and communication were much slower than today,¹⁶⁷ the U.S. Consti-

166. *Hearing on Criminal Jurisdiction*, *supra* note 106, at 66 (statement of James H. Michel, Assistant Legal Adviser, Department of State). There is, however, the possibility that the United States might put "pressure" on host states *not* to prosecute.

167. *See supra* notes 21-22; S. REP. NO. 1515, 56th Cong., 1st Sess. 2 (1900) (noting that attendance of witnesses from Cuba could only be obtained "with great difficulty"); MOORE, *supra* note 19, at 101 (as result of distant prosecutions, "guilty men might occasionally be brought to justice; but innocent men, charged with the commission of crimes in distant parts of the world, would be almost incapable of

Offenders Abroad

tution expressly contemplates that federal courts can extend jurisdiction over criminal acts committed outside the United States.¹⁶⁸ Article III provides that Congress may establish venue for crimes "not committed within any state,"¹⁶⁹ and the early congresses enacted statutes on treason, piracy, and other crimes committed outside the United States. The Congresses of the nineteenth century pursued consular jurisdiction, but minimized evidentiary problems by establishing venue for the presiding U.S. court in the host state.¹⁷⁰

An advantage of extradition, as opposed to trial in the United States for extraterritorial crimes, is that it does not require that witnesses be present, since documentary proof is sufficient.¹⁷¹ On occasion, Congress has explicitly cited concerns about the right to confront one's accuser as a reason for rejecting nationality-based jurisdiction.¹⁷² However, the United States has already overcome the confrontation problem in a variety of analogous situations. In recent years, Congress has enacted criminal statutes with extraterritorial effects, such as laws forbidding the importation of narcotics, the Hostage-Taking Act of 1984¹⁷³, and the Foreign Corrupt Practices Act.¹⁷⁴ The Justice Department has successfully prosecuted violations of each of these statutes.¹⁷⁵

Nationality-based prosecutions might present more problems than effects-based cases, since no aspect of a case may have affected the United States or

defending themselves . . .") (quoting GEORGE C. LEWIS, ON FOREIGN JURISDICTION AND THE EXTRADITION OF CRIMINALS 29 (1859)).

168. George, *supra* note 14, at 629.

169. U.S. CONST. art. II, § 2, cl. 3.

170. One commentator has suggested that the United States establish extraterritorial courts abroad with jurisdiction concurrent with that of the host state. See Girard, *supra* note 40, at 511-19. This approach would minimize confrontation problems but would require the consent of host states, which may believe that it smacks of the old, imperialist consular jurisdiction. See Petitioners' Brief at 95-98, *McElroy v. United States ex rel. Guagliardo*, 371 U.S. 281 (1960) (No. 59-21) (denouncing overseas courts as "new extraterritoriality"), quoted in Girard, *supra* note 40, at 518. Even Girard acknowledges the possibility that host states might object. Girard, *supra* note 40, at 518. He proposes extraterritorial courts only in those countries hosting U.S. military personnel and their dependents. *Id.*

A more recent and exotic proposal would involve the establishment of an international criminal court, but its purpose would apparently be limited to prosecution of terrorists. See generally BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS (1980). In theory, such a court could prosecute U.S. nationals when no state can or will exercise jurisdiction over them, but in practice most of the existing problems would persist. A state, including the United States, might decline to "extradite" to the international court if it did not view the U.S. national's conduct as a crime, or if the U.S. national were a diplomat or a dependent of a soldier. More importantly, the rules of such a court would probably not comply with U.S. constitutional standards. For additional information on an international criminal court, see Michael P. Scharf, *The Jury Is Still Out on the Need for an International Criminal Court*, 1991 DUKE J. COMP. & INT'L L. 135.

171. See 18 U.S.C. § 3190 (1988) (documentary proof sufficient); U.S.-U.K. Extradition Treaty, *supra* note 125 (same).

172. See S. REP. NO. 1515, *supra* note 167 (regarding Cuba).

173. 18 U.S.C. § 1203 (1988).

174. 15 U.S.C. §§ 78m, 78dd1-2, 78ff (1988).

175. See, e.g., *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (hostage-taking); *United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991) (Foreign Corrupt Practices Act).

taken place in U.S. territory. In a drug-importation case, the defendant may have had a collaborator in the United States who can be compelled to testify in a U.S. court. But in a murder prosecution based on nationality, all witnesses and evidence may be located abroad, and it may be difficult for either party to locate much less produce them in court.

Physical and documentary evidence abroad can sometimes be obtained through cooperation with the foreign state, a method more easily employed by the prosecution than the defense. Litigants currently have a modest range of devices through which they can request foreign legal assistance. Either party can simply ask a foreign government or individual for assistance, which might include the provision of documents or other physical evidence, the attendance at trial of a witness, the taking of a deposition in the foreign state, or permission to conduct an investigation in the foreign state. The defense may have less success persuading foreign police to help, and may have to rely on private investigators (if it can afford to conduct a private investigation at all).

In addition, the parties can turn to the more formal device of letters rogatory.¹⁷⁶ Letters rogatory are formal requests for judicial assistance from a court in a foreign country. They are typically passed from the requesting court to its state's foreign ministry, then to the requested state's foreign ministry, and then to the foreign court, which establishes a commission to carry out the request. A U.S. court can use letters rogatory at the request of either party to ask a foreign state to provide physical and documentary evidence as a matter of comity, even if the requested state is not required by treaty to do so.¹⁷⁷ U.S. law permits the issuance of letters rogatory at the preindictment phase, while foreign states may require the existence of a proceeding more formal than a mere investigation.¹⁷⁸ Letters rogatory are very slow, however, because the letters must travel through several bureaucracies before they arrive at the foreign court.¹⁷⁹ Once there, the requests often go unanswered for months or even years (if they are answered at all).¹⁸⁰

176. 28 U.S.C. §§ 1781-1783 (1988). See generally Heinrich Grützner, *International Judicial Assistance and Cooperation in Criminal Matter*, in 2 TREATISE ON INTERNATIONAL CRIMINAL LAW 202-44 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

177. 28 U.S.C. § 1782 (1988). Although letters rogatory statutes do not by their terms apply to criminal proceedings, U.S. courts have found an "inherent" power to apply them. See *United States v. Reagan*, 453 F.2d 165, 172 (6th Cir. 1971).

178. Compare *Reagan*, 453 F.2d at 173 (permitting use of letters rogatory at preindictment phase) with *In re Request for International Judicial Assistance*, 49 Can. Crim. Cas. 2d 276 (Alta. Q.B. 1979) (declining U.S. request for assistance at pretrial stage), *rev'd on other grounds*, 58 Can. Crim. Cas. 2d 274 (Alta. C.A. 1981).

179. See MUTUAL LEGAL ASSISTANCE TREATY CONCERNING THE CAYMAN ISLANDS, S. EXEC. REP. NO. 26, 100th Cong., 2d Sess. 60 (1988) (quoting testimony of Mary V. Mochary, Principal Deputy Legal Adviser, U.S. Department of State).

180. See, e.g., *United States v. Bastanipour*, 697 F.2d 170, 178 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091 (1983) (noting trial delay of several months while parties waited for letters rogatory addressed to Iran, and that letters never produced any results); SENATE COMM. ON FOREIGN RELATIONS, LEGIS. ACTIVITIES REP., S. REP. NO. 30, 102d Cong., 1st Sess. 15 (1991) (noting that letters rogatory produce

Offenders Abroad

Moreover, even if foreign officials cooperate with the prosecution or the defense, they may not produce evidence that is admissible in a U.S. court.¹⁸¹ After the decision in *United States v. Verdugo-Urquidez*,¹⁸² however, it seems unlikely that the Fourth Amendment will bar admission of evidence obtained abroad.¹⁸³

Even if foreign cooperation to obtain necessary evidence is not possible, domestic compulsion may still be available. The U.S. government, for example, has served subpoenas on corporations located in the United States for documents located in corporate branches or headquarters overseas.¹⁸⁴ This type of compulsion can be useful when foreign law does not prohibit production in such circumstances. However, enforcing such a subpoena in the face of contrary foreign law may be seen as a violation of foreign sovereignty. Such compulsion also may be of only limited usefulness, since nationality-based prosecutions of violent crimes often fail without a witness present at trial.

Securing the attendance of a witness from abroad, particularly one who is recalcitrant, raises difficult problems. Either party can request attendance, and either party can reimburse the witness for expenses incurred as a result of the appearance. However, the government will almost certainly have more resources to devote to such efforts than the defense. Moreover, a defense request carries less clout because a foreign state rarely has an interest in preserving good relations with an individual criminal defendant. Using letters rogatory can add to the apparent weight of a defense request, but even so, a foreign state will probably not respond as helpfully as if the request had come from the government prosecution.

The U.S. government has occasionally succeeded in persuading foreign states to arrange for their own officials and private nationals to testify at criminal proceedings in the United States.¹⁸⁵ Requests from the U.S. govern-

"limited results").

181. See Lee Paikin, *Problems of Obtaining Evidence in Foreign States for Use in Federal Criminal Prosecutions*, 22 COLUM. J. TRANSNAT'L L. 233, 239 (1984) (citing Fourth Amendment, Sixth Amendment, and evidentiary rules).

182. 494 U.S. 259 (1990).

183. The *Verdugo-Urquidez* Court held that evidence obtained as a result of an unreasonable search and seizure by U.S. and foreign agents abroad was nonetheless admissible, since the Fourth Amendment applies only to persons who are part of the national community or who have otherwise developed sufficient connection with the United States to be considered part of its community. *Id.* at 266. Evidence obtained through unlawful searches by foreign officials was already admissible under the "silver platter" doctrine. See, e.g., *United States v. Rose*, 570 F.2d 1358, 1361-62 (9th Cir. 1978) (allowing admission of evidence seized by Canadian law enforcement officials). For criticism of *Verdugo-Urquidez*, see Andreas Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 491-93 (1990); see also Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672 (1989).

184. See *supra* note 159 and accompanying text.

185. See, e.g., *United States v. Liebo*, 923 F.2d 1308, 1308-10 (8th Cir. 1991) (U.S. government arranged for officials of government of Niger to attend criminal trial of U.S. corporation indicted for violations of Foreign Corrupt Practices Act).

ment asking foreign states to persuade their nationals to testify in the U.S. may, however, invite coercion or encourage human rights violations. To guard against coercion, a U.S. court might question the witnesses themselves, or at least request a report from the government on how and why the witnesses decided to testify.

If a recalcitrant witness is a U.S. national or a third-country national, the prospects for securing his attendance may be slightly better since the requested state can deport or expel nonnationals. These procedures, especially deportation, take time. If deportation or expulsion is not possible, then the possibility of compelling the witness to attend diminishes significantly.¹⁸⁶

Even if a foreign state is unwilling or unable to compel a witness to travel abroad to testify, it can still compel that individual to appear before its own courts. The Confrontation Clause, however, normally prohibits the use of deposition testimony by the prosecution,¹⁸⁷ and evidentiary rules limit its use by the defense.¹⁸⁸ In *Ohio v. Roberts*,¹⁸⁹ however, the Supreme Court held that the use of prior trial testimony is permissible if the declarant is "unavailable" at the time of trial and the statements bear "indicia of reliability."¹⁹⁰ A U.S. court would likely consider a witness unavailable if he or she could not be persuaded or compelled to attend.¹⁹¹ Some suggest that foreign deposition procedures that resemble those of the United States might satisfy Sixth Amendment standards.¹⁹² Even U.S. depositions, however, are a far cry from full-blown trial testimony since they carry fewer "indicia of reliability" than prior trial testimony. In the United States, the witness is sworn in and may be represented by counsel, but there is no judge or jury present, often no vigorous cross-examination, and the atmosphere is less formal and perhaps less likely to induce truth-telling than the solemn atmosphere of a courtroom. Still, the Supreme Court's relaxed approach to confrontation problems in *Roberts* suggests that use of depositions at trial will become more common.¹⁹³

The difficulties encountered in obtaining evidence from abroad have led the U.S. government to seek alternative methods. In recent years, it has embarked on a campaign to make requests for evidence the subject of bilateral

186. States have the authority to transfer prisoners temporarily to other states in order for them to testify. See Grünzer, *supra* note 176, at 212. Generally, however, it is a misuse of the term to speak of the extradition of witnesses. *Id.* (noting that transfer of prisoners to testify abroad is "not an extradition").

187. See Paikin, *supra* note 181, at 241. But see McClelland, *supra* note 5, at 214 (arguing that Supreme Court would permit use of deposition testimony).

188. See FED. R. EVID. 802 (hearsay rule).

189. 448 U.S. 56 (1981).

190. *Id.* at 66.

191. See Paikin, *supra* note 181, at 242 (noting that U.S. courts have assessed unavailability leniently).

192. See *id.* at 243.

193. See, e.g., *United States v. Johnpoll*, 739 F.2d 702 (2d Cir. 1984) (admitting deposition at which defense had opportunity to cross-examine); *United States v. King*, 552 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) (admitting videotaped depositions of co-conspirators in Japan).

Offenders Abroad

treaties, known as Mutual Legal Assistance Treaties (MLATs), designed to procure documentary and testimonial evidence from abroad for use in domestic prosecutions.¹⁹⁴ The MLAT procedure is designed to work more quickly than letters rogatory since the MLATs impose an international legal obligation on the requested state to respond, whereas letters rogatory can only request a response.¹⁹⁵ The executive branch reports that these treaties have been invaluable in obtaining a number of major convictions.¹⁹⁶ The U.S. government has negotiated a dozen MLATs, most of which are now in force.¹⁹⁷ Continued negotiation and use of MLATs remains a major priority of both Congress and the Bush Administration.¹⁹⁸

Despite their advantages, one problem with MLATs is that they are not designed for use by the defendant. The Justice Department has taken the position that these treaties are law-enforcement tools for the benefit of the prosecution only.¹⁹⁹ Accordingly, some recent MLATs contain provisions preventing their use by criminal defendants.²⁰⁰ While some commentators have suggested that these provisions may violate the defendant's due process rights,²⁰¹ Congress has given its advice and consent to ratification of the

194. The United States has signed MLATs with eighteen states. Of these, eight are currently in force. See SENATE COMM. ON FOREIGN RELATIONS, TREATY WITH THE BAHAMAS ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, S. EXEC. REP. NO. 12, 101st Cong., 1st Sess. (1989); Treaty for Mutual Legal Assistance, Dec. 9, 1987, U.S.-Mex., 27 I.L.M. 443 (1988) [hereinafter U.S.-Mex. MLAT]; Treaty Concerning Cayman Islands and Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K., 26 I.L.M. 536 (1987); Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Can., 24 I.L.M. 1092 (1985) [hereinafter U.S.-Can. MLAT]; SENATE COMM. ON FOREIGN RELATIONS, MUTUAL LEGAL ASSISTANCE TREATY WITH ITALY, S. EXEC. REP. NO. 36, 98th Cong., 1st Sess. 5-8 (1983); Treaty on Mutual Legal Assistance in Criminal Matters, June 12, 1983, U.S.-Neth., T.I.A.S. No. 10,734; Treaty on Extradition and Mutual Legal Assistance in Criminal Matters, June 7, 1979, U.S.-Turk., 32 U.S.T. 3111; Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019 [hereinafter U.S.-Switz. MLAT].

195. For a general description of MLATs, see S. REP. NO. 30, *supra* note 180, at 14-17.

196. See S. EXEC. REP. NO. 26, *supra* note 179, at 57-58 (excerpting hearing) (testimony of Mary V. Mochary, Principal Deputy Legal Adviser, U.S. Department of State, April 20, 1988). See also 135 CONG. REC. S13,880 (daily ed. Oct. 24, 1989) (remarks of Sen. Kerrey) (noting dramatic effectiveness of MLATs in obtaining bank records, depositions, recordings of telephone conversations, and appearance of witnesses from Switzerland, Italy, and Turkey in recent Pizza Connection case).

197. See S. REP. NO. 30, *supra* note 180, at 14-17 (describing status of existing MLATs). Some states have also entered into multilateral arrangements for mutual legal assistance. See, e.g., European Convention on Mutual Assistance in Criminal Matters, Apr. 20, 1959, Europ. T.S. No. 30 (entered into force June 12, 1962).

198. See, e.g., HOUSE COMM. ON FOREIGN AFFAIRS, MONEY LAUNDERING AMENDMENTS OF 1991, H.R. REP. NO. 28, pt. 2, 102d Cong., 1st Sess. 2 (1991) (urging continued negotiation and use of MLATs).

199. See S. EXEC. REP. NO. 26, *supra* note 179, at 10-11 (technical analysis of U.S.-Cayman Islands MLAT).

200. See, e.g., U.S.-Mex. MLAT, *supra* note 194, art. I(5); U.S.-Can. MLAT, *supra* note 194, art. II(4).

201. See, e.g., S. EXEC. REP. NO. 26, *supra* note 179, at 164-65 (reprinting hearing testimony of Robert L. Pisani, June 14, 1988) (arguing that MLATs should be available to defendants for depositions and compulsory process); *id.* at 167 (testimony of Bruce Zagaris) (similar). See also Michael Isikoff, *Cartel Defendants' D.C. Lawyer—Ex-Prosecutor Angers Former Justice Department Colleagues*, WASH. POST, Oct. 2, 1989, at A1 (reporting that former Justice Department official argued that MLATs should be

treaties without objecting to these provisions.²⁰² While no court has yet held that the exclusive-use provisions are unconstitutional, the U.S. Constitution may require that the defense have at least limited access to the MLAT mechanism, particularly if such access is necessary to obtain exculpatory evidence.²⁰³ It seems unlikely, however, that the Constitution requires that defendants have full and free access to the MLAT process, any more than it requires full access to other investigatory resources of the government, such as the FBI or Interpol.

Whether or not constitutionally required, justice requires that the defendant have at least limited access to MLATs. If the government continues to negotiate exclusive-use provisions, the courts may have other means of ensuring some access for the defense. At the very least, the defense is entitled to discovery of exculpatory material uncovered by the prosecution's MLAT requests. A broader scope of discovery may be granted depending on the type of case and the MLAT in question. In one case, for example, a federal district court insisted that the U.S. government either make an MLAT request on behalf of the defense or dismiss the case.²⁰⁴ The Justice Department acquiesced and made the request. The U.S.-Switzerland MLAT, moreover, provides that the defense can ask the court to order the government to make a request on behalf of the defense.²⁰⁵

The defense may not always wish to use an MLAT request, however, because making a request through the government may reveal trial strategy.²⁰⁶ Even if MLATs can be used fairly by both sides, there is still the predicament of the Confrontation Clause, since the scope of assistance under MLATs, while somewhat broader than under letters rogatory, still does not oblige foreign states to produce witnesses for trial.

Taken as a whole, the evidentiary obstacles to prosecutions based on nationality jurisdiction resemble the obstacles that confront successful prosecutions based on other forms of extraterritorial criminal jurisdiction, such as territorial-effects jurisdiction and protective jurisdiction. A prosecution for

available to defense as well as prosecution).

202. See, e.g., S. EXEC. REP. NO. 8, 101st Cong., 1st Sess. 1 (1989) (reporting favorably on MLATs). Even the most conservative members of Congress have nonetheless expressed concern about the constitutional rights of defendants prosecuted with the assistance of MLATs. See, e.g., 135 CONG. REC. S13,881, 13,882-84 (daily ed. Oct. 8, 1987) (remarks of Senator Helms).

203. But see Alan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT'L LAW. 189, 221 (1985) ("[I]t is not at all clear that the government could be compelled to make a request for information that contained exculpatory evidence.").

204. *United States v. Sindona*, 636 F.2d 792 (2d Cir. 1980), cert. denied, 451 U.S. 912 (1981). The published reports of the case do not discuss this procedure, but apparently it did take place. See Ellis & Pisani, *supra* note 203, at 221-22 n.181; William S. Kenney, *Structures and Methods of International and Regional Cooperation in Penal Matters*, 29 N.Y.L. SCH. L. REV. 39, 65 n.165 (1984).

205. See U.S.-Switz. MLAT, *supra* note 194, art. 28(2).

206. See Ellis & Pisani, *supra* note 203, at 221.

Offenders Abroad

conspiracy to import narcotics may rely on physical evidence obtained by an MLAT request. A prosecution for offshore money laundering may rely on documentary evidence obtained through letters rogatory or less formal means of interstate cooperation. No obvious reasons bar nationality-based prosecutions from using these evidence-gathering techniques. While evidentiary problems may bar some nationality-based prosecutions, the same is true of prosecutions based on other forms of extraterritorial jurisdiction.

B. *Dual Criminality*

A second difficult question is whether the United States should establish and exercise jurisdiction over U.S. nationals abroad for conduct that is criminal in the United States but not in the foreign state. The host state might argue that prosecution by United States is inappropriate and offensive in such circumstances. Alternatively, the host state might point to the dual-criminality rule imposed by most extradition treaties, which limits extradition to offenses punishable as felonies in both nations.²⁰⁷ The host state might argue, as some commentators have, that this dual-criminality requirement should extend to any prosecution by a state exercising nationality-based criminal jurisdiction, whether or not the prosecution involves extradition.²⁰⁸

In practice, the absence of dual criminality is rare, particularly for crimes that are serious enough to warrant the exercise of nationality-based jurisdiction.²⁰⁹ Inevitably, some serious crimes of violence will be defined more narrowly by some states than by others, but the dual-criminality doctrine merely requires the crimes to be "substantially similar."²¹⁰ As a result, states have not often confronted the question of whether a nationality-based prosecution must satisfy the dual-criminality requirement, especially when the case involves no foreign legal assistance.

The dearth of state practice makes it premature to infer a dual-criminality requirement for all such prosecutions. If anything, international practice suggests the opposite conclusion. Outside the context of extradition and mutual legal assistance, there are few examples in which a state has foregone an extraterritorial prosecution because the territorial state objected on dual crimi-

207. See, e.g., U.S.-U.K. Extradition Treaty, *supra* note 125, art. III(1).

208. See 2 M. CHERIF BASSIOUNI & VED P. NANDA, *INTERNATIONAL CRIMINAL LAW* § 3.3 (1973) (arguing that requirement of dual criminality applies or should apply in at least some circumstances); Swigert, *supra* note 163, at 363.

209. States are unwilling to incur the expense of an extraterritorial prosecution for a minor offense. See *Hearing on Criminal Jurisdiction*, *supra* note 106, at 52 (statement of Benjamin Forman, Assistant General Counsel, Department of Defense) (noting Justice Department's reluctance to establish jurisdiction over "minor crimes").

210. G. Nicholas Herman et al., *Double Criminality and Complex Cases*, in *INTERNATIONAL CRIMINAL LAW: A GUIDE TO UNITED STATES PRACTICE AND PROCEDURE* 365, 367-74 (Ved P. Nanda & M. Cherif Bassiouni eds., 1987) [hereinafter *INTERNATIONAL CRIMINAL LAW*].

nality grounds.²¹¹ Even in cases involving mutual legal assistance, the trend seems to be away from requiring dual criminality.²¹² Nor do states appear to impose such restrictions in their own municipal law. For example, states do not condition their exercise of extraterritorial jurisdiction on the existence of a similar criminal statute in the host country. A state might well forbid prosecution if another state has prosecuted for the same offense, on a double jeopardy or *autrefois convict* theory, but not if the other state has chosen not to criminalize the conduct at all.

Although rare, cases will arise in which dual criminality is lacking. Two states may define a crime of violence so differently that it fails the "substantially similar" test. One state's definition of rape, for example, may exclude spousal rape. Some nonviolent offenses, such as the U.S. crimes of racketeering²¹³ and continuing criminal enterprise,²¹⁴ raise similar problems.²¹⁵ In addition, political offenses will sometimes be defined in one state but not in the other. Cases such as these do raise the question whether a nationality-based prosecution is possible when the territorial state does not view the conduct as criminal.

A dual-criminality requirement serves an important function in extradition and mutual legal assistance cases. It frees the requested state from any obligation to actively participate in the prosecution of a fugitive for conduct that the requested state does not criminalize. A state can argue that mandatory extradition or assistance would require it to violate its own public policy.²¹⁶ For this reason, the dual-criminality requirement has been written into many modern extradition and mutual legal assistance treaties.²¹⁷ But the United States and other members of the international community are moving away from dual criminality even when the prosecuting state requests judicial assistance from a state that does not criminalize the conduct at issue. Of the six MLATs recently ratified by the United States, three contain no dual-criminality require-

211. See BASSIOUNI & NANDA, *supra* note 208, § 3.3.

212. See, e.g., S. EXEC. REP. NO. 13, 101st Cong., 1st Sess. (1989) (noting that MLAT with Thailand does not contain dual-criminality requirement); SENATE COMM. ON FOREIGN RELATIONS, TREATY WITH CANADA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, S. EXEC. REP. NO. 10, 101st Cong., 1st Sess. (1989) (same); SENATE COMM. ON FOREIGN RELATIONS, MUTUAL LEGAL ASSISTANCE TREATY WITH MEXICO, S. EXEC. REP. NO. 9, 101st Cong., 1st Sess. 11-12 (1989) (same).

213. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988).

214. See Controlled Substances Act, 21 U.S.C. § 848(b) (1988).

215. See Herman et al., *supra* note 210, at 374-91 (noting that foreign states might punish predicate offenses but not aggregation of such offenses).

216. *But cf.* BASSIOUNI & NANDA, *supra* note 208, § 4.1 (arguing that dual criminality is appropriate only when requested state is required to participate in execution of judgment, or when requested state is required to execute searches or seizures on behalf of requesting state, since searches and seizures interfere with third parties to much greater extent than do other acts of assistance such as interrogations and service of process).

217. See, e.g., Treaty of Extradition, Sept. 24, 1984, U.S.-Italy, T.I.A.S. No. 10,837; TREATY WITH BELGIUM ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, S. EXEC. REP. NO. 11, 101st Cong., 1st Sess. 3 (1989).

Offenders Abroad

ment at all, two require dual criminality only for certain crimes, and only one requires dual criminality in all cases.²¹⁸ Apparently not all states find it unacceptable to provide assistance in prosecuting a crime not included in their domestic criminal code.²¹⁹

A dual-criminality requirement seems much less rational when the host state is not required to assist the state undertaking prosecution. Although the host state might, in arguing for a dual-criminality requirement, complain of an affront to its dignity and resent the implication that its criminal law is inadequate, these complaints are essentially diplomatic in nature and can be handled best through diplomatic channels. The territorial state could, for example, express its views to the prosecuting state's foreign ministry, or even in some cases, to the presiding court. In any event, the host state may refuse to assist in prosecutions with which it takes exception.

The defendant might also argue for dual criminality by claiming that it is unfair to prosecute an individual for conduct undertaken abroad if that conduct is legal in the host state: that it is unjust to subject an individual to two potentially conflicting sets of law. Criminal law, however, tends to impose negative rather than affirmative duties. It is thus unlikely that one state's criminal law will direct an individual to act in a specific way, while another state's criminal law directs him to act in a contradictory manner.²²⁰ In those rare cases in which conflicting obligations do apply to a U.S. national abroad, U.S. law should accept the foreign obligation as a valid defense to enforcement of a conflicting U.S. criminal law.

Rather than conflict, criminal laws usually differ only in the sense that one state imposes higher standards of conduct than the other. If a state imposes high standards of conduct on an individual and presumes that the individual is aware of those standards, then it is not unreasonable to expect the individual to abide by the same standards when abroad, even if the standards in the foreign country are lower. Requiring U.S. travelers to adhere to a higher standard of conduct than those around them is neither unfair nor unusual.

218. The mutual legal assistance treaties with Mexico, Canada, and Thailand do not require dual criminality, while the treaties with the Cayman Islands and the Bahamas require dual criminality for some offenses. The treaty with Belgium requires dual criminality for all offenses because Belgian municipal law demands it. See S. REP. NO. 30, *supra* note 180, at 14-17 (discussing status of existing MLATs).

219. Indeed, the several states extradite fugitives to each other even when the offense in question is not criminalized in the asylum state. See 18 U.S.C. § 3182 (1988) (requiring only that conduct be criminal in requesting state); Uniform Criminal Extradition Act, WASH. REV. CODE ANN. § 10.88.220 (West 1990) (similar).

220. One exception has grown out of U.S. efforts to enforce subpoenas for documents located overseas. A number of foreign states have enacted "blocking statutes" imposing criminal penalties on corporations that produce such documents. Thus corporate defendants have sometimes found themselves caught between two sovereigns, one demanding production of documents, the other forbidding production of the documents, and both threatening criminal penalties for noncompliance. See, e.g., *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1388-91 (11th Cir. 1982). Statutes on treason and draft registration may also give rise to conflicting obligations, but such cases are unusual.

Foreign states routinely subject U.S. nationals to laws different from those applied to the host state's own nationals.

In addition, extraterritorial jurisdiction is founded on the belief that the law of the state in which conduct occurs does not always govern that conduct. For example, violation of a law grounded in local religious custom will offend only the local sovereign and will subject the offender only to local law. Other conduct will offend both the host state and another state, thus subjecting the offender to two or more sets of law. For example, narcotics trafficking will offend the state of exportation as well as the state of importation. Still other conduct will not offend the host state but will offend a foreign state, and thus will subject the offender only to foreign law. Treason and espionage are two examples.

While the host state should not have a legal obligation to subject a visitor to a foreign prosecution that will violate her human rights, the imposition of a dual-criminality standard is not necessary to guard against this problem. If the host state is asked to extradite an individual for a "political offense," the host state is not required to comply.²²¹ The term "political offense" is defined broadly to cover pure political offenses aimed directly at the government, such as treason, sedition, espionage, prohibited speech, unlawful assembly, and unauthorized departure, as well as relative political offenses, which are crimes such as murder and assault that are linked to a political act or cause.²²² This political offense exception protects the requested individual's human rights, protects the right to promote political change generally, and permits the requested state to avoid taking sides in political conflict internal to the requesting state.²²³ In addition, any state may deny a request for evidence or other judicial assistance if it relates to a prosecution for a political offense.²²⁴ Finally, states may pursue the limited remedies provided by international human rights law. These remedies may include resort to the International Court of Justice, regional human rights tribunals such as the European Court of Human Rights, U.N. organizations such as the Security Council, bilateral trade sanctions, and perhaps humanitarian intervention.²²⁵

221. See, e.g., Convention of Extradition, Dec. 10, 1962, U.S.-Israel, 14 U.S.T. 1707 (political offense exception); Commission on Int'l Terrorism of the Am. Branch of the Int'l Law Ass'n, *Report on Efforts to Revise U.S. Legislation on Extradition as It May Impact on Combatting International Terrorism*, in INTERNATIONAL CRIMINAL LAW, *supra* note 210, at 333, 353-59 (noting that political offense exception is found in every U.S. extradition treaty).

222. See Sapiro, *supra* note 90, at 660 n.33. Many states also refuse to extradite unless the requesting state provides assurances that the fugitive will not be put to death. See, e.g., U.S.-U.K. Extradition Treaty, *supra* note 125.

223. See *Quinn v. Robinson*, 783 F.2d 776, 793 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

224. See U.S.-Switz. MLAT, *supra* note 194; Grützner, *supra* note 176, at 222.

225. See U.N. SCOR RESOLUTIONS AND DECISIONS, 32d Sess., 2045th mtg. at 5, U.N. Doc. S/INF/33 (1977) (sanctions against South Africa); *Soering Case*, 161 Eur. Ct. H.R. (ser. A) at 44-45 (1989) (holding that extradition of fugitive to United States would violate European Convention on Human Rights because United States had not provided firm assurances that fugitive would not be put on death row). See

Offenders Abroad

In sum, Congress should not limit nationality-based criminal jurisdiction to cases in which the host state recognizes the conduct in question as criminal. Such a limitation would allow U.S. nationals to escape punishment for conduct that U.S. law recognizes as criminal. A U.S. national who is accused of a serious crime such as rape should not be exempted from U.S. criminal law merely because the state in which the conduct occurred does not view such conduct as a criminal offense.

C. Deference to Foreign Prosecution

The United States should exercise nationality-based jurisdiction only if the host state is unwilling or unable to prosecute. Such an exercise of self-restraint would honor the most fundamental principle of criminal jurisdiction, which is that a state has the primary right to enforce its own criminal laws within its own territory.²²⁶ It would also comport with long-standing U.S. policy to permit extradition of U.S. nationals to foreign countries.²²⁷ The establishment of concurrent jurisdiction and a primary right to exercise jurisdiction in the host state would reduce the number of potential conflicts.²²⁸

The mechanics of such a scheme, however, still pose some problems. A policy of deference to the foreign state will work if the foreign state finds and prosecutes the U.S. offender before the United States can do so. If the United States requests extradition after the foreign prosecution, both the offender and the requested state could contest extradition on the grounds of *non bis in idem*. Alternatively, if indicted after returning to the United States, the U.S. offender could presumably plead *autrefois convict*.

If, however, the U.S. offender is found first in the United States, the executive branch might be tempted to disregard the foreign state's interest in prosecuting, particularly if the foreign state is unaware of the offender's presence in the United States. To avoid this problem, the statute establishing nationality jurisdiction should include a deference provision requiring the executive to present evidence that the foreign state will not prosecute, and

generally RESTATEMENT, *supra* note 3, § 703 cmts. & reporters' notes (discussing remedies for violation of human rights obligations).

Some states, including the United States, may also provide tort and other remedies to individuals whose rights have been violated. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (remedies provided by Alien Tort Claims Act, 28 U.S.C. § 1350 (1988)).

226. Statistics gathered by the Department of Defense suggest that civilian dependents of U.S. military personnel prosecuted by foreign states receive lighter sentences than they would receive for comparable offenses prosecuted in U.S. courts. See *1969 SOFA Hearing*, *supra* note 111, at 18 (statements of Sen. Ervin and Gen. Parker).

227. HARVARD RESEARCH, *supra* note 14, at 128.

228. George, *supra* note 14, at 637; see *Hearing on Criminal Jurisdiction*, *supra* note 106, at 64 (statement of James H. Michel, Assistant Legal Adviser, Department of State) (reporting that State Department supports such deference).

should allow a court to rule on the sufficiency of that evidence.²²⁹ In many cases it would be easy for a court to evaluate objective evidence showing that a foreign prosecution is impossible. If, for example, the offender were found in the United States, and no extradition treaty existed, or if an existing treaty prohibited extradition of U.S. nationals, the prosecution could present this information to the court. The executive could also present evidence showing that a foreign prosecution is barred either by a statute of limitations or because the suspect enjoyed diplomatic immunity. Prosecutors could also follow current extradition practice and present a State Department affidavit and a copy of a diplomatic note stating the foreign state's lack of interest in prosecuting.

Australia has adopted an alternative procedure and established a bright-line rule to determine whether the foreign state can prosecute. Under the Extradition Act of 1988, Australia retains extraterritorial jurisdiction whenever it declines to extradite a fugitive on the grounds that the suspect is an Australian national.²³⁰ A U.S. nationality statute, however, should allow prosecution in a broader range of circumstances—whenever it can be demonstrated that the host state will not prosecute, for whatever reason.

Although complex problems might arise under such a broad scope of jurisdiction, the problems would be no different than the problems that currently arise in extradition cases. One of the troubling possibilities is that the United States might use its economic and political clout to coerce a state into relinquishing jurisdiction. If the requested state presents a diplomatic note to the U.S. government disavowing intention to prosecute, the U.S. court can do little to question the methods used to obtain the concession. After all, some aspects of foreign policy are the exclusive domain of the executive. The same problem exists in extradition relations in that the executive may pressure a state to extradite rather than prosecute a fugitive. In some cases, foreign intent might be genuinely ambiguous, which raises the possibility that the court will embarrass the executive by rejecting its assertion that the host state will not prosecute. The potential for embarrassment, however, seems no greater than in an extradition case. In sum, deference to the host state's primary right to exercise territorial jurisdiction will prevent jurisdictional conflicts with the host state and will not frustrate the operation of nationality-based criminal jurisdiction.

D. *Other Considerations*

For practical and political reasons, a statute establishing nationality-based criminal jurisdiction should limit its application to serious crimes of violence and nonviolent felonies, such as fraud, that most states criminalize. This

229. See, e.g., *Filariga*, 630 F.2d at 892.

230. See Extradition Act of 1988, § 45 (Austl., Mar. 9, 1988).

Offenders Abroad

approach would minimize problems of dual criminality and avoid burdening the Justice Department with the responsibility for prosecuting U.S. nationals for minor offenses committed overseas.²³¹

In addition, nationality jurisdiction should be established only at the federal level. Although the individual states do have some power to regulate extraterritorial crime,²³² the federal government has a prevailing interest in establishing a unified national practice in international criminal law. For this reason, the federal government handles international extradition even when the party requesting extradition is one of the individual states.²³³

Finally, a nationality-based statute should limit itself to crimes not already prosecutable under some other theory of extraterritorial jurisdiction, such as the territorial-effects principle. Conspiracy to import narcotics from abroad, for example, is already punishable by the United States under the territorial-effects principle. Adding a redundant nationality-based element would only augment the impression that the United States is abusing its exercise of extraterritorial jurisdiction.

VI. CONCLUSION

The United States, the crusading champion of extraterritorial jurisdiction, continues to reject one of the least controversial forms of extraterritorial criminal jurisdiction, nationality-based jurisdiction. As a result, U.S. nationals commit serious crimes overseas and escape prosecution.

A nationality-based criminal statute would establish jurisdiction over U.S. offenders abroad whenever the host state does not prosecute them and whenever the United States would not otherwise have jurisdiction over them. The statute would encompass a variety of serious crimes committed by U.S. nationals abroad, including murder, rape, arson, robbery, assaults, kidnapping, and fraud. Although such jurisdiction would be invoked most often in connection with crimes committed by civilian dependents of military personnel stationed overseas, it would also allow the United States to prosecute diplomats and others who cannot be extradited to, or prosecuted by, the host state.

Nationality-based jurisdiction would conform with existing international and domestic law. Because international law clearly recognizes nationality jurisdiction, foreign states should not object to its adoption by the United States, especially if the United States limits its exercise of nationality-based

231. The Justice Department has expressed concern about the added burden of nationality-based prosecutions in the past. See *Hearing on Criminal Jurisdiction*, *supra* note 106, at 52 (statement of Benjamin Forman, Assistant General Counsel, Department of Defense).

232. See George, *supra* note 14, at 617.

233. See John E. Harris, U.S. Dep't of Justice, *Procedure for Requesting International Extradition* (1989) (unpublished, on file with author).

jurisdiction to those cases in which the host state does not prosecute. Moreover, the international legal system, which values international cooperation in law enforcement, has an interest in deterring and prosecuting crimes that currently are not prosecuted by any state.

This is not to suggest that the United States should expand its extraterritorial jurisdiction in other areas. On the contrary, the United States often seems too eager to exercise jurisdiction over foreign nationals for conduct that only incidentally affects U.S. interests. Nevertheless, the United States should take more responsibility for the crimes committed by its nationals abroad.