ARTICLES

FOREIGN AFFAIRS PROSECUTIONS

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Contemporary global crime and cross-border law enforcement cooperation have multiplied "foreign affairs prosecutions," cases that encompass foreign apprehension, evidence gathering, and criminal conduct, as well as cases that implicate foreign nations' criminal justice interests. Robert Mueller's Russia investigation, the fugitive Edward Snowden, and the cross-border crimes of FIFA and El Chapo all exemplify such foreign affairs prosecutions. This Article argues that foreign affairs prosecutions represent a consequential shift in U.S. criminal law, offering the promise of closing global impunity gaps. At the same time, however, such cases risk defendant interests at home and U.S. foreign policy abroad. This Article calls for greater congressional engagement and judicial oversight to minimize such risks while still promoting accountability for cross-border, cyber, and international crime.

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Introduction

On April 2, 1990, U.S. law enforcement dramatically orchestrated the kidnapping of physician Humberto Alvarez-Machain from Mexico, bringing him to the United States on charges of allegedly participating in the torture and killing of a Drug Enforcement Administration (DEA) agent in Mexico.[1] In a 6-3 decision, the U.S. Supreme Court upheld the legality of this state-sponsored abduction, tainting U.S. relations with Mexico and triggering widespread condemnation from global media, foreign governments, and scholars alike.[2] Justice Stevens, writing for the dissent, called the decision "monstrous" and accused the majority of unduly deferring to the executive branch's "intense interest in punishing [Alvarez-Machain] in our courts."[3]

Although the case seemed anomalous at the time, it foreshadowed a criminal legal trend: Today, more U.S. prosecutions than ever involve criminal conduct, fugitives, and/or evidence outside of the United States, often touching on the criminal justice interests of for-

[1] United States v. Alvarez-Machain, 504 U.S. 655, 657 (1992).

[2] *Id.* at 669–70; *see, e.g.*, Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After* Alvarez-Machain, 45 Stan. L. Rev. 939, 942 (1993) ("Neighboring countries like Canada and most Latin American states, long-time friends including Switzerland and Australia, and more predictable critics, such as Cuba and Iran, agreed with this assessment. Internationally, voices echoed the outrage of Justice Stevens's dissent, which branded the decision 'shocking' and 'monstrous.'" (footnotes omitted)); Michael J. Glennon, *State-Sponsored Abduction: A Comment on* United States v. Alvarez-Machain, 86 Am. J. Int'l L. 746, 747 (1992) ("[I]t would seem equally sensible to think that the Treaty sets out the comprehensive and exclusive legal means for the two countries to obtain custody of criminal defendants from each other."); Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 Cardozo L. Rev. 513, 513 (1993) (agreeing with the dissent's characterization of the decision in *Alvarez-Machain* as "monstrous"); Anthony Lewis, *Abroad at Home; Whatever the King Wants*, N.Y. Times (June 21, 1992), https://www.nytimes.com/1992/06/21/opinion/abroad-at-home-whatever-the-king-wants.html ("Nothing the Supreme Court has done lately has aroused such widespread outrage, here and abroad, as its decision that our Government had the right to kidnap a Mexican suspect and bring him to this country for trial."); *see also infra* Section II.B.1 (discussing *Alvarez-Machain* in greater depth in the context of judicial deference in treaty interpretation). *But see* Malvina Halberstam, *In Defense of the Supreme Court Decision in* Alvarez-Machain, 86 Am. J. Int'l L. 736, 737 (1992) ("The Court's holding is consistent with existing international law, with its application of the Fourth Amendment to illegal arrests domestically, and with the broad powers and deference that it has historically accorded to the Executive in the conduct of foreign affairs.").

[3] *Alvarez-Machain*, 504 U.S. at 686 (Stevens, J., dissenting).

eign countries.[4] This Article calls such cases *foreign affairs prosecutions*—criminal cases in which the executive branch engages its prosecutorial power and foreign affairs power at the same time.[5] Indeed, the case of Russian meddling in the 2016 U.S. presidential election has become the archetype of how such cases have reached the highest level of political prominence and public importance. And other cases, such as the fugitive Edward Snowden and the 2014 Sony hack, remind us that many of the most consequential criminal cases today involve some foreign nation because criminal conduct, evidence, and/or a fugitive is located outside of U.S. territory.

This Article argues that foreign affairs prosecutions represent a consequential shift in U.S. criminal law, offering the promise of promoting criminal accountability and closing global impunity gaps.[6] However, such cases also present two central normative risks. First, they may undermine defendant interests when they overwhelm customary criminal process: In foreign affairs prosecutions, criminal defendants can lawfully be kidnapped from abroad[7] with evidence from another country obtained without a warrant[8] and be prosecuted for perpetrating a crime defined by the international community[9] up to three years after when the statute of limitations would typically have run.[10] Second, such cases may adversely impact U.S. foreign policy, given that criminal investigation, indictment, and prosecution unfold autonomously from traditional, foreign policy decisionmaking mechanisms.

Foreign affairs prosecutions fall into an inadvertent gap in legal scholarship: Foreign affairs law generally overlooks criminal prosecu-

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[4] *See infra* Section I.B.

[5] As described further, *infra* Section II.B, executive branch engagement of its foreign affairs power differentiates foreign affairs prosecutions from typical criminal prosecutions. Individual foreign affairs prosecutions need not necessarily have implications for diplomacy or foreign policy.

[6] As explained *infra* Section I.B, the accelerating rate of movement of people and information across borders has catalyzed a new era of transnational crime in the twenty-first century.

[7] *See, e.g.*, *Alvarez-Machain*, 504 U.S. at 669–70.

[8] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (holding that the Fourth Amendment does not apply to search and seizure by U.S. agents of property that is owned by a non-resident and is located in a foreign country).

[9] *See, e.g.*, 18 U.S.C. § 1091 (2012) (genocide); Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Convention on Genocide] (paralleling the definition of genocide in 18 U.S.C. § 1091 (2012)).

[10] *See, e.g.*, 18 U.S.C. § 3292 (2012) (allowing suspension of the statute of limitations up to three years under certain circumstances).

tions, while criminal law mostly overlooks foreign affairs.[11] Criminal legal scholarship is intensely preoccupied with the breadth of prosecutorial power and discretion,[12] but it has largely left unaddressed the expansion of such power in a growing body of transnational cases.[13] Meanwhile, the voluminous scholarship on "extraterritoriality"—cases in which courts apply U.S. statutes to conduct occurring abroad—has emphasized civil cases.[14] The emerging

[11] By foreign affairs law, I mean the "constitutional, statutory, and common law rules and doctrines that regulate how the United States interacts with the rest of the world." Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from "Exceptionalism*," 128 HARV. L. REV. F. 294, 294 (2015).

[12] *See, e.g.*, Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 469 (1996) (arguing that prosecutors should be given *Chevron* deference in the interpretation of federal criminal law); Daniel C. Richman, *Accounting for Prosecutors*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 40 (Máximo Langer & David Alan Sklansky eds., 2017) (considering the role prosecutors play in promoting democratic citizenship and the democratic means of holding prosecutors to account); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 758–59 (1999) (cautioning against reform proposals that would upset political decisions about prosecutorial power and enforcement of federal criminal law); Daniel C. Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 751–52 (2003) (modeling the relationship between agents and prosecutors); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 477 (2016) [hereinafter Sklansky, *Prosecutorial Power*] (complicating the picture for prosecutorial reform proposals by modeling the mediating role of prosecutors); David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 452 (2018) (discussing problematic aspects of prosecutorial power, including discretion, illegality, ideology, unaccountability, organizational inertia, and role ambiguity).

[13] By transnational, I mean cases involving "law which regulates actions or events that transcend national frontiers." PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

[14] *See, e.g.*, Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1090–99 (2015) (considering U.S. courts' avoidance of transnational litigation in cases concerning personal jurisdiction, forum non conveniens, abstention comity, and the presumption against extraterritoriality); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L. & POL'Y INT'L BUS. 1, 2 (1992) (arguing that an "international law" presumption is the most viable alternative to the territoriality presumption); Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 21–45 (2014) (considering replacements for the presumption against extraterritoriality in civil, criminal, and administrative law cases); Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1022 (2011) (arguing for rooting extraterritoriality statutory construction and due process analyses in the sources of Congress's lawmaking power); Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WM. & MARY L. REV. 341, 377–407 (2014) (considering an international relations rationale for the presumption against extraterritoriality). *But see* Zachary D. Clopton, Bowman *Lives: The Extraterritorial Application of U.S. Criminal Law After* Morrison v. National Australia Bank, 67 N.Y.U. ANN. SURV. AM. L. 137, 160–72 (2011) [hereinafter Clopton, Bowman *Lives*] (considering the development of the presumption against extraterritoriality in criminal cases under application of the Supreme Court's 1922 decision in *United States v. Bowman*); Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1069–95 (2018) (developing a framework for understanding

scholarship on criminal extraterritoriality, some of which even recognizes such cases as "an instrument of national security policy,"[15] has focused on discrete issues, such as due process limitations on extraterritorial criminal legislative jurisdiction and personal jurisdiction,[16] the borderlessness of electronic data,[17] and increasing congressional reliance on the Offences Clause and Foreign Commerce Clause to criminalize foreign conduct.[18] Other scholars analyze the global dynamics of the rising global frequency of a particular crime and suggest law and policy prescriptions to combat it,[19] while literature on

criminal extraterritoriality and calling for congressional intervention to clarify the extraterritorial scope of federal criminal statutes).

[15] Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625, 626 (2016).

[16] *See* Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 516–17 (2016) (describing how due process limits extraterritorial legislative jurisdiction); Farbiarz, *supra* note 15, at 627 (arguing for due process limits on personal jurisdiction in extraterritorial criminal cases).

[17] *See, e.g.*, Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 365–78 (2015).

[18] *See* Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202, 2264 (2015) (identifying the Offenses Clause as an additional source of Congress's constitutional authority to implement certain treaty commitments); Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 951 (2010) (considering the nature of congressional power under the Foreign Commerce Clause); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations*," 42 WM. & MARY L. REV. 447, 454 (2000) (exploring the modern dispute and historical context of the Offenses Clause); DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, DEFINING FEDERAL CRIMES (unpublished manuscript) (manuscript ch. 2, at 32) (on file with New York University Law Review) (noting that issues of both foreign policy and international law may be implicated in Foreign Commerce Clause cases). In a forthcoming article, Pierre-Hugues Verdier also addresses an "unprecedented wave" of U.S. criminal cases against foreign banks for activities occurring abroad. *See* Pierre-Hugues Verdier, *The New Financial Extraterritoriality*, 87 GEO. WASH. L. REV. (forthcoming 2019).

[19] *See*, *e.g.*, Tara Helfman, *Marauders in the Courts: Why the Federal Courts Have Got the Problem of Maritime Piracy (Partly) Wrong*, 62 SYRACUSE L. REV. 53 (2012) (maritime piracy); James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 CASE WESTERN RES. J. INT'L L. 405 (1988) (bank secrecy); Regina Menachery Paulose, *Beyond the Core: Incorporating Transnational Crimes into the Rome Statute*, 21 CARDOZO J. INT'L & COMP. L. 77, 78–79 (2012) (transnational organized crime); M. Sornarajah, *Transnational Crimes: The Third Limb of the Criminal Law*, 2004 SING. J. LEGAL STUD. 390, 390, 395–96 (transnational organized crime); David Weissbrodt, *Cyber-Conflict, Cyber-Crime, and Cyber-Espionage*, 22 MINN. J. INT'L L. 347 (2013) (cyber offenses); Andrew Keane Woods, *Against Data Exceptionalism*, 68 STAN. L. REV. 729 (2016) (data and the cloud); Eileen Overbaugh, Comment, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635 (2009) (human trafficking). The long-standing debate about Guantanamo, detention, and the war on terror has similarly pointed to prosecutions in Article III courts as the preferred mode of promoting accountability. *See, e.g.*, Wesley S. McCann, *Indefinite Detention in the War on Terror: Why the Criminal Justice System Is the Answer*, 12 LOY. U. CHI. INT'L L. REV. 109, 110 (2015) ("[T]he American criminal justice system holds the key to resolving many of these aforementioned issues."); Laura K. Donohue, *Terrorism Trials in Article III*

multilateral cooperation focuses solely on the mechanics of investigation and extradition.[20] Finally, recent foreign affairs scholarship has not squarely addressed criminal law enforcement, focusing more often on national security cases in the Bush and Obama administrations.[21] None of the above characterizations accurately capture that these are all unified concepts playing out in criminal cases where the executive acts as both prosecutor and diplomat.[22]

Courts, 38 HARV. J.L. & PUB. POL'Y 105, 106 (2015) ("Article III courts have routinely, and successfully, managed international and domestic terrorist cases."); *see also* Robert M. Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163, 167–68 (2013) (arguing that the second post-9/11 decade will destabilize U.S. government use of military detention and lethal force in the counterterrorism setting). This Article focuses on such prosecutions, as opposed to national security-related cases playing out in other fora.

[20] *See, e.g.*, Roberto Iraola, *Statutes of Limitations and International Extradition*, 2010 MICH. ST. L. REV. 103, 103–04 (examining application of statutes of limitations to extradition requests); Yonatan L. Moskowitz, *MLATS and the Trusted Nation Club: The Proper Cost of Membership*, 41 YALE J. INT'L L. ONLINE, no. 2, 2016, at 1, 1–2, https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2016/09/moskowitz-macro-finished-1-1s9vmcy.pdf (proposing ways Mutual Legal Assistance Treaties can address the increase of evidence requests from foreign jurisdictions).

[21] *See, e.g.*, Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 785 (2011) (discussing interpretation of national security-related treaties and statutes); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1218–27 (2007) (focusing on difficult deference questions in the War on Terror); *see also* Daniel Abebe, *Great Power Politics and the Structure of Foreign Relations Law*, 10 CHI. J. INT'L L. 125, 125–26 (2009) (suggesting that American unipolar hegemony may be contributing to lower levels of judicial deference to the executive).

[22] Most helpfully, David Luban, Julie O'Sullivan, and David Stewart have brought together criminal procedure, transnational crime, and international crime into one subject of study. *See generally* DAVID LUBAN, JULIE R. O'SULLIVAN, & DAVID P. STEWART, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW (2d ed. 2014) (discussing procedural issues in transnational crime and international crime). This Article builds on such systematic work by exploring the implications of this sytem in individual cases, unifying foreign relations law and judicial deference, defendant interests and criminal process, and foreign policy ramifications. Additionally, a relatively small number of commentators outside of the United States have recognized the rise of transnational crimes as triggering a network of treaties and other agreements to criminalize shared criminal definitions and enhance cooperation. *See, e.g.*, ROBERT J. CURRIE & JOSEPH RIKHOF, INTERNATIONAL & TRANSNATIONAL CRIMINAL LAW (2012) (reviewing the rise of international and transnational criminal law enforcement in Canada); Neil Boister, *"Transnational Criminal Law"?*, 14 EUR. J. INT'L L. 953, 956 (2003) (arguing for the recognition of the field of transnational criminal law, one distinct from international criminal law). And courts have observed that the "complexities inherent in transnational criminal law enforcement can be vexing: ordinary tasks like securing the presence of the defendant, collecting evidence, and enforcing a judgment are transformed into hurdles that are difficult, or impossible, to pass." *See In re* Hijazi, 589 F.3d 401, 403 (7th Cir. 2009); *see also* Stephanie Clifford, *Growing Body of Law Allows Prosecution of Foreign Citizens on U.S. Soil*, N.Y. TIMES (June 9, 2015), http://www.nytimes.com/2015/06/10/nyregion/growing-body-of-law-allows-prosecution-of-foreign-citizens-on-us-soil.html?_r=0 ("Using a growing body of law that allows the United States to prosecute foreign citizens for some

This Article builds on this scholarship by defining foreign affairs prosecutions and considering their normatively desirable and undesirable consequences for U.S. criminal law and foreign policy. In Part I, this Article defines foreign affairs prosecutions, explains why such cases have multiplied, and affirms their necessity. Part II then demonstrates how such cases may undermine defendant interests. Specifically, it shows that the U.S. prosecutor often acts as a proxy for another nation when advocating for the interpretation of a relevant U.S. criminal treaty or statute; the judiciary then typically confers heightened deference on this executive interpretation. Part III raises the additional concern of foreign affairs prosecutions' adverse effects on U.S. foreign policy. Part IV prescribes solutions to address these normative concerns.

I
Foreign Affairs Prosecutions: A Consequential Shift in U.S. Criminal Law

Foreign affairs prosecutions represent a consequential shift in U.S. criminal law, offering an emerging model for combatting rising global crime. This Part makes this central argument by defining foreign affairs prosecutions and explaining their proliferation.

A. Defining Foreign Affairs Prosecutions

The classical conception of prosecution is familiar. The executive branch has the power and discretion to investigate and prosecute individuals whom it alleges have perpetrated crimes defined pursuant to statute. Such *classical prosecutions* typically occur in the district in which the crime occurred, with evidence and witnesses hailing from that same location.

Foreign affairs prosecutions differ from this classical conception. Consider the following example: On July 13, 2018, the U.S. Department of Justice (DOJ) announced that a grand jury in Washington, D.C., had returned an indictment presented by Special Counsel Robert Mueller.[23] The indictment charges thirteen Russian

actions, the government has been turning the federal courts into international law-enforcement arenas.").

[23] Indictment, United States v. Netyksho, No. 1:18-cr-00215-ABJ (D.D.C. July 13, 2018); Press Release, U.S. Dep't of Justice, Grand Jury Indicts 12 Russian Intelligence Officers for Hacking Offenses Related to the 2016 Election (July 13, 2018), https://www.justice.gov/opa/pr/grand-jury-indicts-12-russian-intelligence-officers-hacking-offenses-related-2016-election; *see also* Indictment at 2–3, United States v. Internet Research Agency, LLC, No. 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018) (indicting various Russian companies and individuals for "fraud and deceit for the purpose of interfering with the U.S. political and elections process"); Press Release, U.S. Dep't of Justice, Grand

intelligence officers with committing federal crimes intended to interfere with the 2016 U.S. presidential election.[24]

How did Mueller's team advance its investigation to the indictment stage?[25] First, it investigated events that occurred in the United States, for example by reviewing the electronic records of the Democratic National Committee's computer networks. Second, it investigated conduct abroad, such as how the twelve defendants working for the Main Intelligence Directorate of the General Staff, a Russian Federation intelligence agency, engaged a network of computers located in countries around the world. In doing so, Mueller's team likely both engaged U.S. agents abroad and coordinated with law enforcement in foreign countries. Third, it confirmed that the relevant federal statutes criminalized extraterritorial conduct, i.e., conduct occurring abroad. Finally, it needed to consider how to take custody of the indicted individuals, whether through extradition or otherwise.[26]

In other words, for Mueller's team to execute its investigation, it needed to operate within a pre-existing framework of treaty, statute, procedure, case law, and institutional capacity, all of which empower U.S. law enforcement institutions to investigate transnational crime. The indictments represent not only the climax of months of investigation by federal law enforcement, but also the culmination of years of evolution of U.S. criminal law to enable it to investigate, indict, and—ultimately—prosecute individuals who never set foot on U.S. soil but nonetheless committed crimes striking at the heart of U.S. democracy.

While the Mueller investigation regularly garners front-page headlines, it is far from unusual. Today, U.S. criminal cases frequently have a nexus to a foreign nation,[27] which demands that the executive

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Jury Indicts Thirteen Russian Individuals and Three Russian Companies for Scheme to Interfere in the United States Political System (Feb. 16, 2018) (announcing the indictment), https://www.justice.gov/opa/pr/grand-jury-indicts-thirteen-russian-individuals-and-three-russian-companies-scheme-interfere.

[24] *See* Indictment at 2, United States v. Netyksho, No. 1:18-cr-00215-ABJ (D.D.C. July 13, 2018); Adam Goldman, *Justice Dept. Accuses Russians of Interfering in Midterm Elections*, N.Y. TIMES (Oct. 19, 2018), https://www.nytimes.com/2018/10/19/us/politics/russia-interference-midterm-elections.html.

[25] While public information on the investigative steps are unavailable, the following is inferred based on the author's knowledge of transnational criminal investigations.

[26] *See* Steven Arrigg Koh, *The Trump-Bolton Misdirection on Russian Extradition: Plenty of Legal Options Exist to Gain Custody of Russian Suspects*, JUST SECURITY (July 16, 2018), https://www.justsecurity.org/59474/trump-bolton-misdirection-russian-extradition-plenty-legal-options-exist-gain-custody-russian-suspects.

[27] *See, e.g.*, Press Release, U.S. Dep't of Justice, U.S. Seeks to Recover Approximately $540 Million Obtained from Corruption Involving Malaysian Sovereign Wealth Fund (June 15, 2017), https://www.justice.gov/opa/pr/us-seeks-recover-approximately-540-million-obtained-corruption-involving-malaysian-sovereign (describing the criminal investigation

branch engage its prosecutorial and foreign affairs powers concurrently to advance the case to conviction.[28] Although such cases are quite variegated, they may possess one or more of the following elements, each of which is sufficient to render a case a foreign affairs prosecution:

First, foreign affairs prosecutions may depend on another sovereign to *apprehend the fugitive or obtain evidence*.[29] Suppose a man shoots and kills a woman on a Manhattan street. The New York Police Department (NYPD) investigates the crime by inspecting bullet casings, reviewing surveillance video footage from an adjoining bank, and interviewing eyewitnesses present at the moment the crime is perpetrated. After further investigation, NYPD learns that the man has fled to Canada. The Manhattan District Attorney's Office contacts the DOJ, which in turn and in conjunction with the U.S. Department of State, extradites the man out of Canada with the assistance of the Canadian government. Or, as another example, a bank employee in Houston, Texas is suspected of using sophisticated electronic methods to siphon money out of U.S. bank accounts and transfer it to bank accounts in Switzerland. The DOJ makes a mutual legal assistance request to Switzerland for relevant bank records showing wire fraud and also applies to toll the statute of limitations while it awaits this evidence. The Swiss bank records are ultimately the basis for her indictment and the key evidence leading to her subsequent conviction.

Second, foreign affairs prosecutions include cases in which the substantive offense at issue encompasses *criminal conduct that itself occurred abroad* and in which the relevant U.S. statute criminalizes such extraterritorial conduct. The international community may have also defined such crimes pursuant to treaty, potentially overlapping

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into the alleged misappropriation of more than $4.5 billion in funds belonging to 1Malaysia Development Berhad).

[28] This Article largely focuses on federal criminal cases and the dual function of the federal executive as prosecutor and diplomat. The cross-border nature of these cases differentiates them from more typical federal criminal cases, which necessarily have some federal nexus but do not engage the executive's foreign relations power. Future research, however, could focus on these cases in state and local fora. Additional scholarship could also explore the federalism implications of such cases, given that state and local law enforcement authorities are increasingly recruiting federal government actors to engage with foreign nations for purposes of advancing investigation and prosecution. Along this dimension, responsibility for enforcement of criminal law may be shifting from the states to the federal government. For more information, see *infra* notes 57–65 and accompanying text.

[29] *See, e.g.*, United States v. Demirtas, 204 F. Supp. 3d 158, 168 (D.D.C. 2016) (dual Dutch-Turkish citizen extradited from Germany to the United States on terrorism-related charges).

with one of the "core crimes" of international criminal courts.[30] Consider, for example, a man who travels to Thailand in order to engage in sexual relations with minors. Upon return to the United States, he is prosecuted and ultimately convicted for such conduct, all of which occurred outside of the United States, under 18 U.S.C. § 2423(b), which proscribes travel in foreign commerce for purposes of engaging in sexual acts with minors.[31] Or take as another example a Serbian-American who is prosecuted in the United States for crimes committed during the Yugoslavian wars in the 1990s. The prosecution relies on 18 U.S.C. § 1091, which defines genocide and was incorporated into the U.S. Code in 1988 after U.S. ratification of the Convention on the Prevention and Punishment of the Crime of Genocide.[32]

Third, foreign affairs prosecutions may otherwise *implicate foreign nations' criminal justice interests*, including U.S. prosecution of foreign nationals and/or crimes over which other countries would have criminal jurisdiction. For example, the United States prosecutes a French national under the Foreign Corrupt Practices Act for bribing Brazilian government officials while working for a U.S. company in Brazil.[33] The case implicates criminal conduct over which Brazil would have territorial jurisdiction and, possibly, over which France could assert nationality jurisdiction.[34] It would also implicate French interests in consular access to the defendant pursuant to the Vienna Convention on Consular Relations.[35]

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[30] *See* Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (limiting the International Criminal Court's jurisdiction to genocide, crimes against humanity, war crimes, and the crime of aggression).

[31] 18 U.S.C. § 2423(a)–(b) (2012).

[32] *Id.* § 1091; Convention on Genocide, *supra* note 9.

[33] *See* Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2012).

[34] *See* Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41, 43 (1992) (discussing "five bases for extraterritorial jurisdiction," including nationality jurisdiction).

[35] *See* Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The hypotheticals above underscore that foreign affairs prosecutions need not constitute crimes that are inherently transnational, such as human trafficking across national borders. Nor need they involve only foreign nationals. For example, a foreign affairs prosecution may involve a U.S. national charged with purely domestic conduct who then escapes to a foreign country, triggering foreign affairs implications because of the logistics of apprehending her from abroad. And the government may assert jurisdiction over a person on a number of bases, including over someone who has committed a crime within U.S. territory (territorial jurisdiction), a U.S. national engaging in criminal conduct abroad (nationality jurisdiction), or a foreign national who has committed an international crime (universal jurisdiction). *See* Watson, *supra* note 34, at 43. And foreign affairs prosecutions exclude those taking place outside of Article III, state, or local courts, such as those in the Guantanamo military commissions. While the Guantanamo cases undoubtedly implicate some of the same issues, they largely involve the

Do these elements really create a unitary category of cases? It is true that the case of a U.S. national who flees to Mexico after committing a purely local drug trafficking operation may present legally distinct transnational issues from that of a Russian national in Russian territory interfering with U.S. elections. However, at a high level of generality, an inclusive category of foreign affairs prosecutions remains analytically useful because it focuses on the way cross-border considerations materially alter U.S. criminal process.[36] In both the New York murder and Russian election interference cases, for example, extradition and foreign conduct may influence which crimes are charged.[37] They also redound to the same normative benefit, namely, enabling the United States to investigate and/or prosecute; without a valid extradition treaty or extraterritorial criminal statutes, for example, such cases would be impossible.[38] Finally, they raise the same potential normative risks. For example, a Mexican delay or denial of a U.S. extradition request could negatively impact bilateral diplomatic relations, as could—for obvious reasons—prosecution of Russian intelligence officials.

Furthermore, the elements need not arise in isolation; often, they overlap within a single criminal case. For instance, the case of Joaquín Archivaldo Guzmán Loera ("El Chapo") encompasses all three of the above elements. On January 19, 2017, the eve of President Trump's inauguration, Mexico extradited El Chapo to the United States on charges of operating a continuing criminal enterprise and other drug-related charges.[39] Chapo, a Mexican national and head of the Sinaloa

lex specialis of the laws of war in a *sui generis* forum. *See generally The Guantanamo Trials*, HUM. RIGHTS WATCH, https://www.hrw.org/guantanamo-trials (last updated Aug. 9, 2018) (describing the use of Guantanamo Bay in military commissions to try detainees for violations of the laws of war). Of course, the Guantanamo cases likely represent another example of the executive branch wielding its foreign affairs authority to materially adapt classical criminal prosecutions from orthodox process. While such dynamics are too far afield for purposes of the present article, future scholarship could consider their creation from a foreign affairs prosecution lens.

[36] As will be seen *infra* Section II.B.2, classifying cases as "extraterritorial" or "territorial" has proven challenging and unhelpful. Foreign affairs prosecutions helpfully transcend such monikers and provide a more coherent category whose systematic analysis can help lawyers, judges, and scholars alike.

[37] The charges in the drug trafficking case may be constrained, for example, by the rule of specialty, which would restrict U.S. prosecution to the charges on which the Mexican courts had granted extradition. *See infra* note 177 and accompanying text. In the case of the Russian hackers, the Department of Justice (DOJ) may only charge under statutes that criminalize extraterritorial conduct.

[38] *See* 18 U.S.C. § 3181(a) (2012) (requiring a treaty in order to extradite); *see also*, *e.g.*, Small v. United States, 544 U.S. 385 (2005) (holding that 18 U.S.C. § 922(g)(1) does not apply to foreign convictions).

[39] Azam Ahmed, *El Chapo, Mexican Drug Kingpin, Is Extradited to U.S.*, N.Y. TIMES (Jan. 19, 2017), https://www.nytimes.com/2017/01/19/world/el-chapo-extradited-

drug cartel, had escaped from Mexican custody in 2001, only to be arrested and incarcerated again in 2014.[40] During this period, Mexico resisted extraditing Guzmán on charges of drug trafficking and murder.[41] However, after El Chapo's second prison escape in 2015 and re-arrest in 2016, the Mexican government decided to extradite him to the United States.[42] In February 2019, after a three-month trial, El Chapo was found guilty on all counts.[43] In sum, this case possessed all three elements of a foreign affairs prosecution: a fugitive who was located in Mexico, had perpetrated crimes there, and whose U.S. pre-trial detention and prosecution directly impacted Mexico's criminal justice interests.

This categorization raises a final question: Are foreign affairs prosecutions a new phenomenon? Some may point to the long history of piracy prosecutions in the United States,[44] the century-plus history of extradition treaties,[45] or even well-known historical prosecutions in this, or other, countries with significant foreign policy implications, such as the Israeli prosecution of Adolf Eichmann in the 1960s[46] or the Roman Polanski case in the 1970s.[47] Regardless of such history, in the twenty-first century, foreign affairs prosecutions have rapidly developed into a distinctive category of cases that are increasing in frequency, number, and complexity—and thus warrant systematic

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mexico.html; Press Release, U.S. Dep't of Justice, Joaquín "El Chapo" Guzmán Loera Faces Charges in New York for Leading a Continuing Criminal Enterprise and Other Drug-Related Charges (Jan. 20, 2017), https://www.justice.gov/opa/pr/joaquin-el-chapo-guzman-loera-faces-charges-new-york-leading-continuing-criminal-enterprise.

[40] *See* Tim Weiner, *Mexican Jail Easy to Flee: Just Pay Up*, N.Y. TIMES (Jan. 29, 2001), http://www.nytimes.com/2001/01/29/world/mexican-jail-easy-to-flee-just-pay-up.html.

[41] Clare Ribando Seelke, June S. Beittel & Liana W. Rosen, *"El Chapo" Guzmán's Extradition: What's Next for U.S.-Mexican Security Cooperation?*, CRS INSIGHT (Feb. 3, 2017), https://fas.org/sgp/crs/row/IN10326.pdf ("Following Guzmán's 2014 capture by Mexican marines supported by U.S. intelligence, the Mexican government was resistant to extradite Guzmán to the United States.").

[42] Ahmed, *supra* note 39.

[43] Alan Feuer, *El Chapo Found Guilty on All Counts; Faces Life in Prison*, N.Y. TIMES (Feb. 12, 2019), https://www.nytimes.com/2019/02/12/nyregion/el-chapo-verdict.html.

[44] *See, e.g.*, Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 186 (2004) (challenging "the generally accepted view that piracy was universally cognizable because of its heinousness," thus calling into doubt modern rationales for universal jurisdiction).

[45] *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 42–43 (6th ed. 2014) (reviewing the history of U.S. extradition treaties since the late 1800s).

[46] *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 220–52 (Penguin Books 1994) (1963) (describing the Israeli trial of Adolf Eichmann, who had fled to Argentina after committing war crimes in Nazi Germany and beyond).

[47] *See* John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 104 AM. J. INT'L L. 654, 673 (2010) (reviewing the history of, and more recent developments in, the Polanski extradition).

study.[48] An apt analogy is to the concept of globalization: Although it was historically always true that trade, capital, and labor crossed borders, the acceleration of such trends in the late twentieth century provided an opportunity to analyze a qualitatively distinct era of transnational integration under the banner of "globalization."

B. The Necessity of a New Paradigm

Plainly, foreign affairs prosecutions represent a consequential, necessary shift in U.S. criminal law. Such cases address one of the central concerns of international criminal law: that global crime metastasizes more rapidly than any domestic or international institution can legally adapt to promote criminal accountability, creating impunity gaps.[49]

Two examples underscore the role that foreign affairs prosecutions play in closing such impunity gaps, i.e., where a U.S. criminal prosecution addresses a cross-jurisdictional need to prosecute certain criminal conduct. First, in the early morning of May 27, 2015, plainclothes Swiss police officers arrested seven senior International Federation of Association Football (FIFA) officials on the eve of their congress in Zurich.[50] They did so at the request of the United States, based on a forty-seven-count indictment unsealed that same day in the Eastern District of New York, which charged fourteen defendants with, *inter alia*, racketeering, wire fraud, and money laundering conspiracies in connection with the FIFA defendants' participation in a twenty-four-year scheme to enrich themselves through the corruption of international soccer.[51] Many countries lauded the United States for

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[48] Pierre-Hugues Verdier has made a similar argument regarding the recent wave of foreign affairs prosecutions regarding foreign banks. Verdier, *supra* note 18, at 11.

[49] *See, e.g.*, Rome Statute, *supra* note 30, Pmbl. ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation . . . ."); Justice Hassan B. Jallow, Prosecutor, United Nations Int'l Criminal Tribunal for Rwanda and United Nations Int'l Residual Mechanism for Criminal Tribunals, Closing the Impunity Gap, Address at the 6th INTERPOL International Expert Meeting on Genocide, War Crimes and Crimes Against Humanity (Apr. 14, 2014), http://www.unmict.org/sites/default/files/statements-and-speeches/140414_prosecutor_jallow_interpol_en.pdf (emphasizing the need to strengthen the role of national jurisdictions, alongside international tribunals, in closing impunity gaps for perpetrators of international crimes).

[50] Owen Gibson & Damien Gayle, *Fifa Officials Arrested on Corruption Charges as World Cup Inquiry Launched*, GUARDIAN (May 27, 2015), https://www.theguardian.com/football/2015/may/27/several-top-fifa-officials-arrested.

[51] Press Release, U.S. Dep't of Justice, Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption (May 27, 2015), https://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and.

finally holding accountable what was widely recognized around the world to be a corrupt organization.[52] Or, as a second example, in 2008 Charles "Chuckie" Taylor, Jr.—son of former Liberian President Charles Taylor—was convicted of perpetrating torture while serving as head of the Liberian Anti-Terrorism Unit from 1999 to 2002.[53] The first individual to be prosecuted under the Torture Act,[54] Taylor, a U.S. national, was taken into U.S. custody upon entering the Miami International Airport in 2006.[55] The case was hailed as a victory for criminal accountability because, at the time, no international tribunal existed that had territorial jurisdiction over crimes committed in Liberia before 2002, and prosecution in Liberian courts was unlikely.[56]

The FIFA and Taylor cases exemplify the transnational and international criminal challenge to national criminal justice systems. Since the 1970s, countries have increasingly confronted the challenge of effectively combatting transnational crime.[57] In the twenty-first cen-

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[52] *See, e.g.*, M.V., *How America Is Pursuing FIFA*, ECONOMIST (June 1, 2015), https://www.economist.com/the-economist-explains/2015/06/01/how-america-is-pursuing-fifa ("America has a long history of being tougher on white-collar crime and corruption than other countries. . . . Most of Europe is happy, believing that FIFA has long been a cesspit of corruption in desperate need of fresh faces and reform."); Ben Wright, *Fifa Is About to Learn a Stern Lesson About the Vigour of American Prosecution*, TELEGRAPH (May 27, 2015), https://www.telegraph.co.uk/sport/football/international/11632230/Fifa-about-to-learn-a-stern-lesson-about-the-vigour-of-American-prosecution.html ("There's been more than a whiff of malfeasance hanging around Fifa [sic] for years now. . . . And yet most countries appeared powerless to do anything about it, perhaps . . . because they weren't prepared to make the necessary sacrifices for their principles.").

[53] Press Release, U.S. Dep't of Justice, Roy Belfast Jr. A/K/A Chuckie Taylor Convicted on Torture Charges (Oct. 30, 2008), https://www.justice.gov/archive/opa/pr/2008/October/08-crm-971.html.

[54] *Id.*; *see also* 18 U.S.C. §§ 2340–2340A (2012) (defining torture).

[55] *Q & A: Charles "Chuckie" Taylor, Jr.'s Trial in the United States for Torture Committed in Liberia*, HUM. RIGHTS WATCH (Sept. 23, 2008), https://www.hrw.org/news/2008/09/23/q-charles-chuckie-taylor-jrs-trial-united-states-torture-committed-liberia. On appeal, the Eleventh Circuit held that Congress had acted constitutionally when it passed the Torture Act to implement the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) after U.S. ratification. United States v. Belfast, 611 F.3d 783, 806 (11th Cir. 2010) ("Applying the rational relationship test in this case, we are satisfied that the Torture Act is a valid exercise of congressional power under the Necessary and Proper Clause, because the Torture Act tracks the provisions of the CAT in all material respects.").

[56] *See, e.g.*, HUM. RIGHTS WATCH, *supra* note 55.

[57] The concept of "transnational crime" arose in the 1970s, first amongst international relations theorists, and then in both the Fifth U.N. Congress on Crime Prevention and the Treatment of Offenders (1975) and the Fourth U.N. Survey of Crime Trends and Operations of Criminal Justice Systems (1976). *See* NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 3–4 (2012). Though the unavailability and unreliability of crime statistics represents a challenge to understanding the scope of transnational crime, the U.N. Office on Drugs and Crime, the main administrative organ in the U.N. criminal justice system, has amassed a report on the globalization of crime. UNITED NATIONS

tury in particular, the accelerating rate of movement of people and information across borders has catalyzed a new era of global crime.[58] Today, national jurisdictions are combating cross-border criminal activity such as human trafficking, money laundering, migrant smuggling, drug and firearms trafficking, and maritime piracy.[59] As stated by an Obama Administration Assistant Attorney General heading the DOJ Criminal Division, a central, contemporary issue for U.S. law enforcement is "when criminal schemes cross international borders," thus "requir[ing] international cooperation to be successful."[60] DOJ has stated that foreign requests to the United States for evidence within U.S. territory have increased by sixty percent, while requests for electronic evidence have increased tenfold.[61] This tracks broader transnational trends within the U.S. courts: Justice Breyer's recent book, entitled *The Court and the World*, notes that it is now common that two of the six cases argued weekly before the Supreme Court involve foreign activity.[62] Cyberspace has further facilitated cross-border crime, enabling those who have not even set foot in the

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OFFICE ON DRUGS & CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT (2010).

[58] O'Sullivan, *supra* note 14, at 1024 ("With the explosion in cross-border criminality made possible by modern technology and transportation systems, the globalization of commerce and finance, and the Internet, these are issues that courts attempt to answer on a daily basis.").

[59] *See* UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 57, at 1 (including some of these examples in a non-exhaustive list of transnational organized crime). *See generally* BOISTER, *supra* note 57, at 27–132 (reviewing different types of transnational crime); CURRIE & RIKHOF, *supra* note 22, at 325–436; JOHN KERRY, THE NEW WAR 18–19 (1997) (acknowledging that transnational crimes have become a security threat for the United States and the world); DAVID P. STEWART, INTERNATIONAL CRIMINAL LAW IN A NUTSHELL 267–68 (2014) (noting the increase of transnational crime and the difficulties for individual states to deal with such crime); Edgardo Rotman, *The Globalization of Criminal Violence*, 10 CORNELL J.L. & PUB. POL'Y 1, 8–24 (2000) (considering the development of transnational organized crime and terrorism, including specific types of crime and their relationship to local crime); Bruce Zagaris, *International Enforcement Law Trends for 2010 and Beyond: Can the Cops Keep Up with the Criminals?*, 34 SUFFOLK TRANSNAT'L L. REV. 1, 2 (2011) (discussing international white collar crime).

[60] Leslie R. Caldwell, U.S. Assistant Attorney Gen., Remarks at the CCIPS-CSIS Cybercrime Symposium 2016: Cooperation and Electronic Evidence Gathering Across Borders (June 6, 2016), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-ccips-csis-cybercrime-symposium-2016 ("[T]wo emerging challenges to public safety and national security [are] the challenge posed when criminals use new technologies to victimize innocent people and avoid accountability [and] when criminal schemes cross international borders and legitimate law enforcement efforts . . . require international cooperation to be successful.").

[61] U.S. DEP'T OF JUSTICE, FY 2015 BUDGET REQUEST: MUTUAL LEGAL ASSISTANCE TREATY PROCESS REFORM, https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/mut-legal-assist.pdf (last visited Feb. 16, 2019).

[62] STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 3–4 (2015).

country to perpetrate crimes in or concerning the United States.[63] Thus, the U.S. criminal justice system has become more aware that while its borders delimit the geographical boundaries of its enforcement jurisdiction, criminality increasingly transcends such borders.[64] These borders now represent an advantage for criminals, who exploit "national sanctuaries" to live in impunity.[65]

Until now, a disproportionate amount of scholarly attention has understandably focused on the role that international tribunals play in addressing this problem. And yet these tribunals are dwindling in number, and the principal remaining tribunal—the International Criminal Court (ICC)—is facing structural problems of capacity, state cooperation, and Rome Statute ratification.[66] Furthermore, many cri-

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[63] *See* PWC, U.S. CYBERSECURITY: PROGRESS STALLED, KEY FINDINGS FROM THE 2015 U.S. STATE OF CYBERCRIME SURVEY 3 (2015), https://www.pwc.com/us/en/increasing-it-effectiveness/publications/assets/2015-us-cybercrime-survey.pdf ("Cybersecurity incidents are not only increasing in number, they are also becoming progressively destructive and target a broadening array of information and attack vectors."). For example, North Korea is suspected to have hacked into Sony Pictures Entertainment's system, destroyed parts of it, and stolen personal and commercial data. Press Release, FBI, Update on Sony Investigation (Dec. 19, 2014), https://www.fbi.gov/news/pressrel/press-releases/update-on-sony-investigation. The attack also rendered thousands of computers inoperable and disrupted the company's business operations. *Id.* The preliminary investigation from the FBI suggested North Korean involvement, given the malware used in the attack, internet protocol addresses used, and similarities to previous attacks against South Korean banks and media outlets. *See id.* In September 2019, the United States charged a North Korean spy with computer fraud and wire fraud after a years-long investigation. *See* David E. Sanger & Katie Benner, *U.S. Accuses North Korea of Plot to Hurt Economy as Spy Is Charged in Sony Hack*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/us/politics/north-korea-sony-hack-wannacry-indictment.html. More recently, Venezuela extradited to the United States a Cuban national indicted for hacking into the University of Pittsburgh Medical Center database and using such information to file almost a thousand fraudulent tax returns and redeem them through Amazon.com. *See* Joe Mandak, *Cuban Man Pleads Not Guilty to UPMC ID Theft Charges*, PITTSBURGH POST-GAZETTE (Aug. 19, 2016), https://www.post-gazette.com/business/healthcare-business/2016/08/19/Cuban-man-pleads-not-guilty-to-US-hospital-ID-theft-charges-UPMC-Pittsburgh/stories/201608190235.

[64] *See* BOISTER, *supra* note 57, at 3 (noting that criminals appear to work in a borderless world while still using borders to their advantage).

[65] *Id.*

[66] *See* Beth Van Schaack, *International Justice Year-in-Review: Looking Backwards, Looking Forwards (Part 2)*, JUST SECURITY (Jan. 19, 2016), https://www.justsecurity.org/28870/international-criminal-justice-2015-part-2/ ("[The ICC] is plagued by challenges to its legitimacy, erratic state cooperation, and persistent perceptions of inefficacy and inefficiency. . . . [T]here is an enduring need for the international community to create, enable, and support additional accountability mechanisms. . . ."); *see also* Olympia Bekou, *Building National Capacity for the ICC: Prospects and Challenges*, *in* THE INTERNATIONAL CRIMINAL COURT IN SEARCH OF ITS PURPOSE AND IDENTITY 133, 133 (Triestino Mariniello ed., 2015) ("Over 10 years have passed since the Court became operational and with such passing of time came the realization that, due to the high numbers of both victims and perpetrators, the ICC is simply unable to deal with each and every case that may arise in situations of mass atrocity."). Other existing tribunals, such as the Special

tique its administration of justice as being expensive, slow, and/or prone to judicial error given that it is still maturing as an institution.[67] More generally, some commentators are critiquing the entire anti-impunity project,[68] while broader populist and nationalist trends are threatening existing international legal institutions and may thwart the creation of new international and regional criminal justice mechanisms.[69] Despite this, scholars and practitioners have argued for the

Tribunal for Lebanon, Extraordinary Chambers in the Courts of Cambodia, Kosovo Specialist Chambers and Specialist Prosecutor's Office, are limited in institutional lifespan and jurisdiction, with some closing in the near future. *See generally* Harry Hobbs, *International Criminal Justice Redux: A New Wave of Hybrid Courts*, JUST. CONFLICT (Mar. 13, 2018), https://justiceinconflict.org/2018/03/13/international-criminal-justice-redux-a-new-wave-of-hybrid-courts (reviewing the modern history of hybrid criminal tribunals, including those relating to Sierra Leone, Cambodia, Lebanon, Central African Republic, and Kosovo); *see also* ECCC AT A GLANCE, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (2014), https://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf (illustrating set timeframe of Cambodia's criminal tribunal); *Frequently Asked Questions*, KOS. SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR'S OFF., https://www.scp-ks.org/en/newsmedia/frequently-asked-questions (last visited Feb. 16, 2019) (explaining limited life span of Kosovo tribunal).

[67] *See, e.g.*, Daniel Abebe, Opinion, *I.C.C.'s Dismal Record Comes at Too High a Price*, N.Y. TIMES: ROOM FOR DEBATE (Dec. 12, 2014), https://www.nytimes.com/roomfordebate/2014/12/11/do-we-need-the-international-criminal-court/iccs-dismal-record-comes-at-too-high-a-price ("Since 2002, the court has spent over $1 billion, with a yearly budget of over $100 million, all for 36 indictments, two convictions and six acquittals, with several decisions pending. Two convictions hardly constitute a serious deterrent and one wonders if it is money well spent."); Leila N. Sadat, *Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in* Prosecutor v. Jean-Pierre Bemba Gombo, EJIL: TALK! (June 12, 2018), https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo ("Much of the decision to acquit [Jean-Pierre Bemba Gombo] rests upon a controversy about which charges were actually confirmed and tried . . . . No matter which side is 'correct' about this issue, the fact that 8 judges of the Court . . . could not agree upon this fundamental and simple point represents a complete failure of the Court's judicial process.").

[68] *See, e.g.*, ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA (Karen Engle, Zinaida Miller & D.M. Davis eds., 2016) (questioning the human rights movements' turn to criminal prosecution); Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1070–71 (2015) (same).

[69] *See, e.g.*, Eric A. Posner, *Liberal Internationalism and the Populist Backlash*, 49 ARIZ. ST. L.J. 795, 795 (2017) ("An upswing in populist sentiment around the world poses the greatest threat to liberal international legal institutions since the Cold War."); Kenneth Roth, *The Dangerous Rise of Populism: Global Attacks on Human Rights Values*, *in* WORLD REPORT 2017 1, 1 (Human Rights Watch ed., 2017) (discussing the rise of populism and threat to accomplishments of the modern human rights movement). *But see* Andrew Hudson & Alexandra W. Taylor, *The International Commission Against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms*, 8 J. INT'L CRIM. JUST. 53 (2010); *Are International Tribunals Running Out of Steam?*, ECONOMIST (Jan. 29, 2019), https://www.economist.com/europe/2019/01/26/are-international-tribunals-running-out-of-steam (describing new hybrid criminal courts established in recent years to address crimes in Kosovo, Senegal, and South Sudan); Ayen Bior, John Tanza, & Dimo Silva, *South Sudan Inches Closer to Hybrid Court on Conflict's Four-Year Anniversary*, VOA (Dec. 17,

establishment of international tribunals to prosecute, *inter alia*, piracy,[70] cybercrime,[71] nuclear smuggling,[72] and transnational economic crime.[73] Putting aside the merits of such proposals, the international criminal legal literature itself recognizes international tribunals as a second-best approach, given that, ideally, criminal justice should always be local.[74] For this reason, the ICC will only hear a case if a member state is unwilling or unable to genuinely carry out an investigation or prosecution.[75] Foreign affairs prosecutions thus dovetail with the work of international courts and in many instances are preferable for purposes of investigating and prosecuting cross-border, cyber, and international crime.[76] To better and more systematically understand

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2017), https://www.voanews.com/a/south-sudan-inches-closer-to-hybrid-court/4167383.html; Teri Schultz, *Syrian War Crimes Accountability Mechanism Short on Funds*, DW (Mar. 16, 2018), https://www.dw.com/en/syrian-war-crimes-accountability-mechanism-short-on-funds/a-43001282.

70 *See, e.g.*, James D. Fry, *Towards an International Piracy Tribunal: Curing the Legal Limbo of Captured Pirates*, 22 AFR. J. INT'L & COMP. L. 341, 341 (2014) (suggesting the establishment of an international judicial body to aid in deterring piracy through prosecution).

71 *See, e.g.*, Weissbrodt, *supra* note 19, at 368–69 (reviewing the proposal for an international tribunal on cyber crimes).

72 *See, e.g.*, Leonard S. Spector, *Nuclear Material and Commodity Trafficking as International Crimes: Current Status, Gaps in Coverage, and Potential Steps Forward*, 105 AM. SOC'Y INT'L L. PROC. 133, 137 (2011) ("Another still more challenging approach, which French President Nicolas Sarkozy broached at the 2010 Nuclear Security Summit, would be to create a new international tribunal [to adjudicate nuclear trafficking offenses].").

73 *See, e.g.*, Lucinda A. Low et al., *The "Demand Side" of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 FORDHAM L. REV. 563, 589 (2015) ("One option to combat demand-side bribery would be a new international criminal tribunal for transnational economic crime with jurisdiction over grand corruption, money laundering, fraud, and other serious organized criminal activities of a transnational nature . . . .").

74 *See* Antonio Cassese, *The Rationale for International Criminal Justice*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 123, 123 (Antonio Cassese ed., 2009) (noting that the best forum for a criminal prosecution is the court of the territory where the crime has been committed).

75 *See* Rome Statute, *supra* note 30, art. 17; ANDREW NOVAK, THE INTERNATIONAL CRIMINAL COURT: AN INTRODUCTION 54–56 (2015) (discussing the principle of ICC complementarity with national courts). This contrasts with the *ad hoc* tribunals, for example, which had primary jurisdiction over national courts. *See* S.C. Res. 955, annex art. 8, ¶ 2 (Nov. 8, 1994) ("The International Tribunal for Rwanda shall have primacy over the national courts of all States."); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, annex art. 9, ¶ 2, U.N. Doc. S/25704 (May 3, 1993) ("The International Tribunal [for the former Yugoslavia] shall have primacy over national courts."); NOVAK, *supra*, at 55.

76 The United States is not alone in pursuing foreign affairs prosecutions; other countries are modifying their criminal laws and procedures to increase their extraterritorial criminal reach. *See, e.g.*, Frederick T. Davis, *Where Are We Today in the International Fight Against Overseas Corruption: An Historical Perspective, and Two Problems Going Forward*, 23 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 337, 340 (2017) (discussing

the shift that foreign affairs prosecutions represent in U.S. criminal law, let us consider how the U.S. political branches are rightly changing U.S. criminal law and procedure to address this issue. This change is occurring along two fronts, aligning with both domestic and foreign interests.

First, the political branches have advanced domestic criminal justice interests.[77] They have created a global network of bilateral and multilateral treaties to facilitate domestic prosecutions. It is well known that the United States has ratified several multilateral treaties that define certain transnational and international crimes and obligate states to extradite or prosecute alleged perpetrators of such crimes.[78] Less discussed is the dense network of bilateral treaties regulating law enforcement cooperation around extradition and mutual legal assistance. State Department and DOJ negotiators lead this process,[79] meeting with foreign counterparts to negotiate such treaties based on existing models and, in some instances, negotiating new treaties to replace those that are outdated.[80] Once such treaties have been negotiated, the President always ratifies them with the advice and consent

French legislative efforts to address overseas bribery). Future scholarship should consider the dynamics of this growing web of overlapping jurisdictions engaging in such cross-border law enforcement.

[77] While both political branches are integral to the law- and treaty-making processes, the executive branch in particular has catalyzed changes to criminal treaty, statute, and procedure. As discussed in more detail below, *see infra* notes 99–102 and accompanying text, this resembles the executive branch's lead in initiating other changes to federal criminal law. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 544–45 (2001) ("[F]ederal criminal legislation often begins with the Justice Department and responds to pressure from that department. . . . [I]f the Justice Department says federal prosecutors need a given statute in order to punish serious criminals, the claim will have immediate credibility with the public . . . .").

[78] *See, e.g.*, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 7(1), Dec. 20, 1988, 1582 U.N.T.S. 165 ("The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1.").

[79] *See* Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 533–34 (2011).

[80] *See* CONG. RESEARCH SERV., 98-958, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND CONTEMPORARY TREATIES 5 (2016), https://www.everycrsreport.com/files/20161004_98-958_53c6c09c590214876fb5959c6fdb0d78942b5cc6.pdf ("Although the United States periodically renegotiates replacements or supplements for existing treaties to make contemporary adjustments, the United States has a number of treaties that pre-date the dissolution of a colonial bond or some other adjustment in governmental status."); *Office of International Affairs*, U.S. DEP'T JUST. (June 9, 2015), https://www.justice.gov/criminal-oia/office-international-affairs ("OIA is responsible, along with the Department of State, for the negotiation of bilateral extradition and legal assistance treaties and multilateral law enforcement conventions.").

of the Senate.[81] Indeed, despite a widespread scholarly claim that Article II treaty-making has slowed, the U.S. government continues to ratify bilateral law enforcement treaties apace. In the last three years alone, the United States has ratified extradition treaties with the Dominican Republic and Chile, as well as mutual legal assistance treaties with Algeria and Kazakhstan, the latter occurring during the Trump Administration.[82] In fact, as Oona Hathaway has noted, extradition is the "foremost" area of law in which the political branches have used the Article II treaty process.[83]

Beyond treatymaking, this advancement of domestic interests also encompasses changes to federal statutes and procedure necessary to close impunity gaps. Since the enactment of Title 18 of the U.S. Code in 1948, for example, each decade has witnessed the enactment of more federal statutes explicitly proscribing extraterritorial conduct—not fewer.[84] In many instances, DOJ and U.S. Attorneys' Offices (USAOs) call for such federal criminal legislation.[85] For example, DOJ advocated for the enactment of 18 U.S.C. § 3292, which authorizes the extension of the statute of limitations due to the delays inherent in obtaining evidence pursuant to mutual legal assistance.[86] Another familiar example is a push for laws criminalizing foreign bribery by U.S. companies, which led to the passage of the

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[81] Andy Olson, Senate Foreign Relations Comm., Speech at the 112th Annual Meeting of the American Society of International Law (Apr. 6, 2018).

[82] *See 2016 Treaties and Agreements*, U.S. DEP'T STATE, https://www.state.gov/s/l/treaty/tias/2016 (last visited Jan. 13, 2019) (mutual legal assistance treaty with Kazakhstan); *2017 Treaties and Agreements*, U.S. DEP'T STATE, https://www.state.gov/s/l/treaty/tias/2017/index.htm (last visited Jan. 13, 2019) (mutual legal assistance treaty with Algeria); John Bellinger, *Senate Approves Two More Treaties, Bringing Obama Administration's Treaty Record to Fifteen*, LAWFARE (July 16, 2016, 3:34 PM), https://www.lawfareblog.com/senate-approves-two-more-treaties-bringing-obama-administrations-treaty-record-fifteen (noting Senate approval of extradition treaties with Chile and the Dominican Republic); Daily Log of Senate Activity, U.S. SENATE PRESS GALLERY (July 14, 2016), http://www.dailypress.senate.gov/?p=11799 (same); *see also* Treaty with Jordan on Mutual Legal Assistance in Criminal Matters, Jordan-U.S., Oct. 1, 2013, S. TREATY DOC. NO. 114-4 (2015), https://www.congress.gov/treaty-document/114th-congress/4.

[83] *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1261 (2008).

[84] *See* CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 42–52 (2016), https://fas.org/sgp/crs/misc/94-166.pdf (listing federal criminal laws with extraterritorial application). An initial survey of these extraterritorial statutes reveals the increasing inclusion of express extraterritorial language in more recent decades, both as amendments to prior-enacted laws and as part of newly enacted provisions. *See id.*

[85] *See* Stuntz, *supra* note 77, at 544–45 (noting that both Congress and the public will give great weight to the concerns and demands of federal prosecutors).

[86] *See* H.R. REP. NO. 98-907, at 2 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3578, 3579 ("Deputy Assistant Attorney General Mark M. Richard, in testimony before the subcommittee on criminal justice, illustrated the difficulties confronting federal

Foreign Corrupt Practices Act of 1977, and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which came into force in 1999.[87] And in the last decade, DOJ has advocated for amendment of the Federal Rules of Criminal Procedure to allow for a broader executive and/or judicial power to summons business organizations located abroad,[88] turn over grand jury materials to foreign law enforcement,[89] take depositions abroad in the absence of the defendant,[90] subpoena U.S. nationals abroad,[91] take testimony of individuals not in open court,[92] and issue search warrants for property outside of the United States.[93] More generally, Rules 1 (scope and definitions), 5 (initial appearance), 26.1 (foreign law determination), and 58 (petty offenses and other misdemeanors) all now have some nexus to foreign states.[94]

Second, the political branches are adapting U.S. criminal law and procedure to address impunity gaps bearing on other nations' inter-

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prosecutors. He cited the example of a prosecution that required records located in Switzerland and three other countries.").

[87] *See* MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41466, FOREIGN CORRUPT PRACTICES ACT (FCPA): CONGRESSIONAL INTEREST AND EXECUTIVE ENFORCEMENT, IN BRIEF 1 (2016), https://fas.org/sgp/crs/misc/R41466.pdf ("Government officials and administrators contended that more direct prohibitions on foreign bribery and more detailed requirements concerning corporate recordkeeping and accountability were needed to deal effectively with the problem [of illegal payments by United States corporations to foreign government officials].").

[88] *See, e.g.*, FED. R. CRIM. P. 4(c)(3)(D) (outlining procedures for summonsing an organization not within a judicial district of the United States); JUDICIAL CONFERENCE OF THE U.S., COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES 2 (2015), https://www.uscourts.gov/sites/default/files/2015-05-criminal_rules_report_0.pdf ("The proposed amendment originated in an October 2012 letter from Assistant Attorney General Lanny Breuer, who advised the Committee that Rule 4 now poses an obstacle to the prosecution of foreign corporations that have committed offenses that may be punished in the United States.").

[89] FED. R. CRIM. P. 6(e)(3)(A) (authorizing disclosure of grand jury matters to foreign governments).

[90] FED. R. CRIM. P. 15(c)(3) (permitting the taking of depositions outside the United States without the defendant's presence under certain circumstances).

[91] *See* 28 U.S.C. § 1783 (2012) ("A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it . . . of a national or resident of the United States who is in a foreign country . . . ."); FED. R. CRIM. P. 17(e)(2) (noting that 28 U.S.C. § 1783 governs service of subpoenas on a witness in a foreign country).

[92] FED. R. CRIM. P. 26 (noting that trial testimony must be in open court unless otherwise provided in rules).

[93] FED. R. CRIM. P. 41(b)(5) (permitting magistrate judges to issue a warrant for property located outside of the jurisdiction of any state or district).

[94] *See* FED. R. CRIM. P. 1(a)(5) (excluding certain proceedings from application of the FRCP because they are governed separately by treaties and/or statutes providing the rules based on treaty authority); FED. R. CRIM. P. 5(c)(4), (d)(1)(F) (governing initial appearances for persons extradited and consular rights for felony cases); FED. R. CRIM. P. 26.1 (foreign law determination); FED. R. CRIM. P. 58(b)(2)(H) (consular rights for petty offenses and other misdemeanors).

ests. For example, the United States amended the Mann Act to criminalize the act of traveling or conspiring to travel abroad with the intent to engage in sexual activity with a minor, in part because of an awareness of the effects of such travel on Thailand.[95] Sometimes this accommodation manifests itself in a change in prosecutorial priorities within the existing statutory structure, such as the recent U.S. practice of extraditing drug traffickers from Colombia and prosecuting them as part of a broader engagement to assist Colombia in its battle against narcotics.[96] This accommodation may be particularly useful when providing assistance to countries that have a lesser capacity to effectuate foreign affairs prosecutions due to legal impediments, lack of resources, or both. For instance, cooperation between the United States, Brazil, and Switzerland has led to the guilty pleas of Odebrecht, a global construction conglomerate, and Braskem S.A., a Brazilian petrochemical company, both of which agreed to pay a combined $3.5 billion in penalties due to their roles in a global bribery scheme of public officials.[97] The corruption scandal and investigation are the largest in the history of Latin America, implicating, *inter alia*, a Colombian senator, a former vice president of Ecuador, Venezuelan President Nicolás Maduro, former Brazilian President Luiz Inácio Lula da Silva, and three former Peruvian presidents, including one forced to resign in March 2018.[98]

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[95] *See* Vickie F. Li, Comment, *Child Sex Tourism to Thailand: The Role of the United States as a Consumer Country*, 4 PAC. RIM L. & POL'Y J. 505, 505–06 (1995) (analyzing the effects of sex tourism on Thailand and the role of consumer countries like the United States).

[96] *See* U.S. DEP'T OF STATE, REPORT ON INTERNATIONAL EXTRADITION SUBMITTED TO CONGRESS PURSUANT TO SECTION 3203 OF THE EMERGENCY SUPPLEMENTAL ACT, 2000, AS ENACTED IN THE MILITARY CONSTRUCTION APPROPRIATIONS ACT, 2001, PUBLIC LAW 106-246 RELATED TO PLAN COLOMBIA (2001), https://www.state.gov/s/l/16162.htm (reviewing extradition practice with Central and South American countries as part of the counternarcotics assistance effort under Plan Colombia); *see also* Farbiarz, *Extraterritorial Criminal Jurisdiction*, *supra* note 16, at 513 (noting the many Colombian extraditions, as well as extraterritorial prosecutions of Iranian weapons procurement).

[97] Press Release, U.S. Dep't of Justice, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

[98] *See* Anthony Faiola, *The Corruption Scandal Started in Brazil. Now It's Wreaking Havoc in Peru.*, WASH. POST (Jan. 23, 2018), https://www.washingtonpost.com/world/the_americas/the-corruption-scandal-started-in-brazil-now-its-wreaking-havoc-in-peru/2018/01/23/0f9bc4ca-fad2-11e7-9b5d-bbf0da31214d_story.html?utm_term=.f99c77953f0c; Simeon Tegel, *The Corruption Scandal That's Ensnared Not One, but Three Peruvian Presidents*, WASH. POST (Mar. 22, 2018), https://www.washingtonpost.com/world/the_americas/the-corruption-scandal-thats-ensnared-not-one-but-three-peruvian-presidents/2018/03/22/7d15a75a-2c50-11e8-8dc9-3b51e028b845_story.html?utm_term=.d1687b01b189.

Although it is analytically useful to understand the above changes to U.S. law from both domestic and foreign perspectives, it is often difficult to isolate the explicit and implicit motivations that may animate U.S. policymakers in this regard. Often, executive branch officials espouse a desire to promote criminal accountability.[99] But the political branches may also view such laws as a tool for fostering diplomatic relations, or a means of spreading the American empire.[100] Such varied motivations may also animate domestic and foreign criminal justice actors. For example, it is an advantage for both U.S. law enforcement and U.S. foreign policy to detain and prosecute El Chapo, an individual who has escaped from Mexican detention twice and previously committed crimes in both Mexico and the United States; it similarly inured to the benefit of the government of Mexico to extradite Chapo to the United States.[101] Suffice it to say, however, that U.S. criminal law is increasingly global, given U.S. government preoccupation to some degree with both domestic and foreign crime. Such legal adaptations invariably lead to increasing numbers of foreign affairs prosecutions.

In sum, investigation and prosecution by individual states represent the most promising approach for closing impunity gaps and promoting criminal accountability.[102] Recent changes to U.S. criminal law and procedure help redress criminality both domestically and in foreign states. Rather than creating ever more international institutions, the more effective paradigm is to globalize existing domestic criminal legal institutions to address cross-border, cyber, and international crime.

II
Executive Aggrandizement and Risk to Defendant Interests

While foreign affairs prosecutions close impunity gaps, they may also undermine defendant interests and even raise the specter of over-

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[99] *See, e.g.*, Caldwell, *supra* note 60.

[100] *See* Kal Raustiala, Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law 180 (2009) ("In short, extraterritorial policing and extraterritorial regulation in the postwar era both demonstrate an often overlooked face of postwar American hegemony: a marked willingness to project power and law, sometimes unilaterally, within the territorial borders of other sovereign states in an effort to better control and deter transboundary threats.").

[101] The Mexican government may avoid public criticism for more prisoner escapes, outsource law enforcement to the United States, and avoid corruption-related reforms.

[102] As discussed *infra* Part III, not all states offer the same promise, given foreign affairs prosecutions are outward projections of both the strengths and weaknesses of domestic criminal justice systems.

whelming customary criminal process. Such risk first derives from the new and amended treaty, statute, and procedure at issue in these cases; in many instances, these changes foster the involvement of foreign nations' executive branches, which further bolsters U.S. prosecutorial authority. Heightened judicial deference then contributes to further executive aggrandizement.

A. Formal Rule Changes and the "Supercharged" Executive

The new and amended treaty, statute, and procedure described above represent the first step in potentially aggrandizing the executive in foreign affairs prosecutions. As discussed above, many of these formal black-letter rule changes are necessary and normatively desirable. For example, in 2016 the Advisory Committee on Rules eliminated a requirement in Federal Rule of Criminal Procedure 4 that a summons served on an organization be mailed to a last known U.S. address, given that, increasingly, organizations committing crimes in the United States have never had a physical address in U.S. territory.[103]

However, such changes may also demonstrably shift power towards prosecutors in both subtle and overt ways. Take, for example, statute of limitation provisions in foreign affairs prosecutions. Generally, for non-capital offenses, the government must indict an accused within five years of commission of the criminal conduct.[104] However, in foreign affairs prosecutions, statutes of limitations for such offenses may in fact be suspended for up to three years, giving the government a total of eight years—as opposed to five—to indict.[105] Pursuant to 18 U.S.C. § 3292, the United States may apply to the district court before which a grand jury is impaneled and show that evidence of an offense

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[103] *See* FED. R. CRIM. P. 4(c)(3)(C) advisory committee's note to 2016 amendment ("Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.").

[104] *See* 18 U.S.C. § 3282(a) (2012).

[105] *See id.* § 3292. Passed in 1984, just seven years after ratification of the first mutual legal assistance treaty, § 3292 represents a significant departure from the five-year statute of limitations period first prescribed in 1954. *See* An Act to Prohibit Payment of Annuities to Officers and Employees of the United States Convicted of Certain Offenses, and for Other Purposes, Pub. L. No. 83-769, § 10(a), 68 Stat. 1142, 1145 (1954); *see also* Paul D. Swanson, Note, *Limitless Limitations: How War Overwhelms Criminal Statutes of Limitations*, 97 CORNELL L. REV. 1557, 1563 & n.37 (2012) (listing 18 U.S.C. § 3292 as an example of a tolling mechanism that allows deviation from the 1954 five-year limitations period). It constitutes one of several criminal statutory tolling exceptions to apply generally to all criminal statutes of limitations, and equitable tolling is very rare in criminal cases. *Id.* at 1563 n.37.

is in a foreign country.[106] If the court finds that the United States has officially requested such evidence and that the evidence is in fact abroad, it will then toll the statute of limitations for up to three years.[107]

Section 3292 exemplifies how novel federal statutes, while necessary to effectuate a foreign affairs prosecution, potentially undermine defendant interests. On one hand, obtaining evidence abroad takes more time than it does in the United States. At the same time, the domestic policy rationales for statutes of limitations are unchanged for individual defendants: Statutes of limitations are useful for, *inter alia*, promoting repose, minimizing the deterioration of evidence, placing defendants on an equal footing, and encouraging prompt enforcement of the law.[108] A statute of limitations extended by sixty percent pressures such rationales.[109]

Formal rule changes may also hardwire into U.S. criminal law a role for foreign executive branches, further bolstering U.S. prosecutorial authority. Indeed, in such cases, criminal defendants may confront the reality of facing not one executive prosecutorial authority, but multiple. This "supercharged" executive effectively doubles down on common critiques regarding the inequality of arms in criminal prosecutions, given that coordination between nations may minimize or even eliminate defendant voice.

Specifically, foreign executive branches may fortify U.S. prosecutors in advocating for judicial resolution of questions of both fact and law. Regarding the former, for example, the Maritime Drug Law Enforcement Act (MDLEA) provides that the Secretary of State may "conclusively" certify that a vessel engaged in drug-related activity is

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106 18 U.S.C. § 3292(a).

107 *Id.* The official request may take many forms, including that of a letter rogatory or treaty-based mutual legal assistance request. *Id.* § 3292(d).

108 Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453 (1997) (discussing the various policies favoring statutes of limitations).

109 Statutes of limitation provide "the primary guarantee against bringing overly stale criminal charges." United States v. Marion, 404 U.S. 307, 322 (1971) (citing United States v. Ewell, 383 U.S. 116, 122 (1966)). The Due Process clause plays a "limited role" in protecting against oppressive pre-trial delay, whereas Sixth Amendment speedy trial protections attach after a person has been accused of a crime. *See* United States v. Lovasco, 431 U.S. 783, 789 (1977); *see also Marion*, 404 U.S. at 312. A defendant moving for dismissal of the charges due to pre-indictment delay must establish actual prejudice and that the government engaged in intentional delay to gain a tactical advantage. *Marion*, 404 U.S. at 325–26; *Lovasco*, 432 U.S. at 795. Given such a limited constitutional backstop, the political branches have considerable leeway in modifying statutes of limitation. And while such changes may not inherently violate constitutional rights, in most cases, defendants' interests are more pressured when the state has a longer time window in which to prosecute.

one "without nationality"—a threshold jurisdictional determination that the defendant cannot challenge.[110] In other words, in such instances the U.S. executive branch has final authority to speak with not one but two executive branch voices, and that determination forecloses any judicial inquiry into the actual veracity of the claim.[111] As the Eleventh Circuit has held, "any battle over the United States' compliance with international law in obtaining MDLEA jurisdiction should be resolved nation-to-nation in the international arena, not between criminal defendants and the United States in the U.S. criminal justice system."[112] Regarding questions of law, foreign executive branches' representations about their own law may become a basis for conviction in the United States. The Lacey Act, for example, makes it unlawful to trade in fish or wildlife taken "in violation of any foreign law."[113] As noted by Dan Richman, Kate Stith, and Bill Stuntz, the Lacey Act thus represents an example of delegation of federal criminal lawmaking, and one that may similarly become hardwired into U.S. criminal jurisprudence.[114] The Eleventh Circuit has even upheld the conviction of defendants for violations of Honduran law after the Honduran executive later changed its representations regarding its law.[115]

B. From Slight to Extreme: Foreign Affairs Deference in Criminal Cases

The judiciary may also aggrandize executive authority in foreign affairs prosecutions when it confers great deference on the executive branch. As a formal matter, such deference in a classical criminal case is highly unusual: The Supreme Court has consistently maintained that "[a] court owes no deference to the prosecution's interpretation of a criminal law."[116] From a realist perspective, of course, the executive's

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110 46 U.S.C. § 70502 (2012).

111 *See* United States v. Hernandez, 864 F.3d 1292, 1299 (11th Cir. 2017) ("MDLEA statelessness does not turn on actual statelessness, but rather on the response of the foreign government. Arguing actual registry against the certification therefore misses the mark.").

112 *Id.* at 1302.

113 16 U.S.C. § 3372(a)(2)(A) (2012).

114 RICHMAN, STITH & STUNTZ, *supra* note 18 (manuscript ch. 12, at 24–25).

115 *See* United States v. McNab, 331 F.3d 1228, 1241 (11th Cir. 2003) ("When . . . a foreign government changes its original position regarding the validity of its laws after a defendant has been convicted, our courts are not required to revise their prior determinations of foreign law solely upon the basis of the foreign government's new position."); RICHMAN, STITH & STUNTZ, *supra* note 18 (manuscript ch. 12, at 25).

116 Whitman v. United States, 135 S. Ct. 352, 352 (2014) (Scalia, J., respecting denial of certiorari); *see also* Abramski v. United States, 134 S. Ct. 2259, 2274 (2014) ("The critical point is that criminal laws are for courts, not for the Government, to construe."); United States v. Apel, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's

extensive expertise regarding law enforcement capabilities and necessities does influence the judiciary in criminal cases.[117] Nonetheless, as a general rule, "the rule of lenity forbids deference to the executive branch's interpretation of a crime-creating law."[118]

In foreign affairs cases, by contrast, courts both explicitly and implicitly defer to the executive regarding its conduct in foreign relations.[119] Broadly speaking, these cases include executive foreign policy judgments relating to application of separation of powers rules, such as the act of state doctrine;[120] the political question doctrine, which may involve not only a justiciability determination but also judicial acceptance of an executive determination of a legal issue as binding;[121] matters that fall within the executive's exclusive lawmaking authority;[122] and the executive determination of "interna-

reading of a criminal statute is entitled to any deference."); Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

117 This implicit deference in criminal law is under-recognized in the literature, except for some scholarship on the role of prosecutors' charging decisions. *See, e.g.*, Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 513 (1993) ("The judicial deference shown to prosecutors generally is most noticeable with respect to the charging function."); Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 145 (2016) ("U.S. Supreme Court decisions and other case law establish that federal judges presiding over criminal cases are generally required, for reasons relating to constitutional separation of powers, to defer to prosecutors' decisions about whether to initiate or dismiss criminal charges."); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 964 (1999) ("When reviewing prosecutorial decisions—such as selective prosecution and claims for potential discriminatory jury selection—courts again are highly deferential."); *see also* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1231 (2016) (explaining and challenging rationales for the lack of constitutional review of plea bargaining); *see also* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 149 (1974) ("[T]he architecture of the legal system tends to confer interlocking advantages on overlapping groups whom we have called the 'haves.'").

118 Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 730 (6th Cir. 2013) ("If an ordinary criminal law contains an uncertainty, every court would agree that it must resolve the uncertainty in the defendant's favor. No judge would think of deferring to the Department of Justice." (quoting *Crandon*, 494 U.S. at 178 (Scalia, J., concurring))).

119 *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659–63 (2000) (describing ways that courts defer to the executive branch on foreign relations questions); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1238 (2007).

120 Jinks & Katyal, *supra* note 119, at 1236–37.

121 *Id.* at 1237.

122 *Id.*

tional facts."[123] In cases implicating national security, courts may apply foreign affairs deference to questions of statutory and treaty interpretation.[124] Justifications for such deference include "expertise, speed, secrecy, flexibility, error costs, and the nature of the subject matter."[125]

In other words, from a judicial deference perspective, criminal cases and foreign affairs cases could not be any further apart. Scholars such as Bill Eskridge and Lauren Baer have located criminal and foreign affairs cases on opposite extremes of the "continuum of deference" in statutory interpretation, revealing the contrast between judicial "anti-deference" in criminal cases and super-strong deference in foreign relations cases.[126] On one end they place criminal cases, characterized by "anti-deference"—in which the Court "invokes a presumption against the agency interpretation," such as the rule of lenity—and having an agency win rate of 36.2%.[127] On the other end, *Curtiss-Wright* foreign affairs deference has an agency win rate of 100%.[128] In treaty interpretation cases, furthermore, the judiciary con-

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[123] *Id.* at 1238. Scholarship on foreign affairs deference is vast and this Article does not intervene directly into broader debates about the contours of such deference. *See, e.g.*, Bradley, *supra* note 119, at 659–63 (advancing a typology of foreign affairs deference as constituting political question deference, executive branch lawmaking deference, international facts deference, persuasiveness deference, and *Chevron* deference). Rather, the emphasis here is on broad foreign affairs deference compared to criminal law "anti-deference." *See infra* note 133.

[124] Pearlstein, *supra* note 21, at 792–93 ("In statutory interpretation, the Court has broadly construed legislative delegations of power to the President. . . . [I]n treaty interpretation . . . the President's record of prevailing in the Supreme Court is lengthy and . . . the President's power to 'make treaties' may give the Court formal reasons to accede to the President's interpretive wishes.").

[125] Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1935 (2015). Scott Sullivan has also suggested that the executive exhibits greater flexibility, accountability, and specialization in foreign affairs, whereas the judiciary enjoys a greater long-term perspective, diversity, and promotion of uniformity. Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 795–97 (2008).

[126] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098 (2008).

[127] *Id.* at 1099.

[128] *Id.* Intermediate deference includes consultative, *Chevron*, *Beth Israel*, *Seminole Rock*, and *Skidmore* deference, which ranges from agency win rates of 73.5 to 90.9%. *Id.*; *see also* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984); Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945); Skidmore v. Swift & Co., 323 U.S. 134 (1944). As many scholars have recognized, the characterization of executive power in *Curtiss-Wright* is problematic as a matter of history, constitutional methodology, and political theory. *See generally* Robert D. Sloane, *Responses to the Ten Questions: 4. Is* Curtiss-Wright*'s Characterization of Executive Power Correct? The Puzzling Persistence of* Curtiss-Wright*-Based Theories of Executive Power*, 37 WM. MITCHELL L. REV. 5072, 5074–86 (2011). Nonetheless, "it continues to exert an influence out of proportion to its legal merits." *Id.* at 5073.

fers "great weight" on the executive's interpretation.[129] David Bederman demonstrated that the Warren, Burger, and Rehnquist Courts deferred to executive branch treaty interpretations 83% of the time,[130] whereas Robert Chesney has shown this number to be 79% in a sample from 1984 to 2005, drawing on both the Supreme Court and lower federal courts.[131] And Harlan Cohen has shown more recently that the circuit courts defer to executive interpretations 88% of the time.[132] Indeed, "the single best predictor of interpretive outcomes in American treaty cases" is judicial deference to the executive branch.[133]

So what happens when these two conflicting deference regimes overlap in a foreign affairs prosecution? Existing scholarship has touched only lightly on this tension.[134] As part of a broader revival of

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129 David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1016 (1994); *see also* Joshua Weiss, Essay, *Defining Executive Deference in Treaty Interpretation Cases*, 79 GEO. WASH. L. REV. 1592, 1594–95 (2011) ("The 'great weight' standard has . . . arisen in a number of treaty interpretation cases and has become a canon the Court frequently consults when grappling with treaty interpretations."). U.S. courts are somewhat unusual globally in their deference to the executive branch in treaty interpretation. *See* Michael P. Van Alstine, *The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 555, 592–93 (David Sloss ed., 2009) [hereinafter THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT].

130 *See* Bederman, *supra* note 129, at 1015–16, 1015 n.422 (noting that the Court deferred to the executive in nine out of ten treaty interpretation cases under Rehnquist, in five out of seven cases under Warren, and in five out of six cases under Burger). Bederman reviewed Rehnquist Court decisions through 1993. *See id.* at 975 n.108 (listing significant treaty interpretation cases through 1993).

131 *See* Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1754–55 (2007) (noting that federal courts deferred to the executive in fifty-three out of sixty-seven treaty interpretation cases).

132 Harlan Grant Cohen, *The Death of Deference and the Domestication of Treaty Law*, 2015 BYU L. REV. 1467, 1488–89. The Supreme Court also applied a zero-deference standard in the late eighteenth and early nineteenth centuries. *See* David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 505–22 (2007); *see also* David Sloss, *United States*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT, *supra* note 129, at 504, 525 (noting Supreme Court use of a pre-World War II canon of liberal interpretation in favor of private rights rather than deferring to the executive's interpretation).

133 Bederman, *supra* note 129, at 1015. As at least one scholar has noted, "[T]he precise nature [of the 'great weight' standard], its triggering conditions, and the obligations it imposes on judges are far from clear." Chesney, *supra* note 131, at 1733. U.S. courts exhibit a "schizophrenic attitude" toward treaty cases, at times ruling in a manner that promotes "executive control over foreign affairs" and at other times promoting "treaty compliance and . . . protection of private rights." Sloss, *United States*, *supra* note 132, at 553.

134 Michael Kagan has recently explored a similar question in immigration law, arguing for a "liberty exception" to *Chevron* deference. *See* Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 495 (2019) ("*Chevron* deference is inappropriate when courts review the legality of a government intrusion on physical liberty."). He notes that Chief Justice

foreign affairs deference scholarship in the wake of 9/11,[135] some foreign relations scholars are recognizing that such deference is arising outside of the national security context.[136] For example, in response to a proposal that courts should give *Chevron* deference to the executive branch's interpretation of statutes with foreign relations implications, Derek Jinks and Neal Katyal argued that this would lead to executive expansionism given the rise in foreign relations cases.[137] In illustrating the point that foreign elements—such as foreign parties, questions of foreign or international law, or some foreign conduct relevant to the litigation—are increasingly common in U.S. litigation, they referenced criminal cases.[138]

In some respects, judicial decisionmaking in foreign affairs prosecutions resembles that in classical criminal cases. Courts are conscious of defendant rights, invoking many of the fundamental concerns about liberty interests that arise in classical criminal cases. For example, the rule of lenity may be invoked to construe an ambiguous statute in favor of the defendant in cases where the statute arguably encompasses extraterritorial conduct.[139] Courts are also identifying constitutional constraints, including the extraterritorial reach of the Constitution and its role in protecting individual rights and deterring law enforcement, as well as the constitutional authority of Congress to legislate in this criminal space.[140] For example, courts are increasingly focusing on whether Congress may rely on the Offenses Clause and Foreign Commerce Clause to criminalize certain extraterritorial crim-

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Roberts and Justice Gorsuch may share in Justice Breyer's "context-specific" approach to deference. *Id.* at 505–07.

135 *See, e.g.*, Pearlstein, *supra* note 21, at 785–87 (noting the discussion amongst scholars regarding deference in foreign relations law following certain post-9/11 Supreme Court decisions); Posner & Sunstein, *supra* note 21, at 1204–07 (advancing a proposal for *Chevron* deference in foreign relations cases); Jinks & Katyal, *supra* note 119, at 1233 (arguing against the Posner/Sunstein proposal and highlighting deference's importance in the wake of 9/11); *see also* Abebe, *supra* note 21, at 125–27 (suggesting that American unipolar hegemony may be contributing to lower levels of judicial deference to the executive).

136 *See, e.g.*, Jinks & Katyal, *supra* note 119, at 1258 (discussing recent developments that have increased the number of cases to which foreign affairs deference applies).

137 *See id.* at 1258–60.

138 *See id.* at 1258 ("One problem is that deference triggered by foreign relations 'effects' arguably applies to any *case* containing a foreign relations component . . . . An ordinary criminal prosecution . . . may affect foreign relations . . . and the executive might well advance a broad interpretation of the statute. . . . .").

139 *See* O'Sullivan, *supra* note 14, at 1091 ("Where there is ambiguity regarding [extraterritoriality], the rule of lenity requires that it be resolved in the defendant's favor—that is, the statute should not be applied extraterritorially.").

140 *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (considering application of the Fourth Amendment to extraterritorial searches).

inal conduct.[141] Courts may also weigh congressional intent, especially in regard to the policy rationales that have encouraged Congress to amend and enact certain statutes. For example, the Comprehensive Crime Control Act of 1984, which introduced the above-referenced option of tolling the statute of limitations in cases of mutual legal assistance, represents an instance of Congress deviating from customary criminal process in order to facilitate transnational law enforcement realities.[142] Finally, courts may consider doctrinal distinctiveness—resolving cases because of material differences between criminal law and civil law doctrine—and, from a realist perspective, perpetrator punishment—persuading courts through the perceived equities of ensuring accountability to punish individuals who have perpetrated horrific crimes against the public interest.[143]

Crucially, however, foreign affairs prosecutions are unique in one central aspect: The issue of engagement with other nations arises frequently. In such instances, courts look to the executive's unique role as a branch of the federal government that is "dual-hatted"—both initiating criminal proceedings and conducting foreign affairs. In contrast to private plaintiffs, who are easier to dismiss when they are perceived as "foreigners" using U.S. federal courts to resolve foreign disputes,[144] the executive branch enjoys the perception of inherent legitimacy in federal prosecution.[145] In foreign affairs prosecutions, a secondary authority bolsters its influence: The executive can argue that it has already considered the foreign affairs implications of a particular pros-

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141 *See, e.g.*, United States v. Baston, 818 F.3d 651, 668 (11th Cir. 2016) (considering congressional power under the Foreign Commerce Clause); United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1251 (11th Cir. 2012) (equating "law of nations" under the Offenses Clause with "customary international law"); United States v. Clark, 435 F.3d 1100, 1114–17 (9th Cir. 2006) (considering congressional power under the Foreign Commerce Clause).

142 *See* 18 U.S.C. § 3292 (2012).

143 *See, e.g.*, United States v. Leija-Sanchez, 820 F.3d 899, 901 (7th Cir. 2016) (distinguishing the application of the presumption against extraterritorial application to civil statutes from its application to criminal cases); *see also* United States v. Alvarez-Machain, 504 U.S. 655, 686 (1992) (Stevens, J., dissenting) (recognizing that the executive is interested in punishing the respondent due to the brutal nature of the murder committed). However, in Justice Stevens's view, the executive's desire to punish the criminal perpetrator "provides no justification for disregarding the Rule of Law that this Court has a duty to uphold." *Id.* at 686.

144 Justice Stevens has referred to such cases as "foreign-cubed": when foreign plaintiffs sue foreign defendants over conduct occurring in foreign countries in U.S. courts for alleged violations of U.S. law. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 283 n.11 (2010) (Stevens, J., concurring in the judgment).

145 *See* Sklansky, *Prosecutorial Power*, *supra* note 12, at 498–510 (discussing factors contributing to prosecutorial discretion and legitimacy).

ecution[146] given it is in the best position to weigh international comity[147] and has more mechanisms at its disposal to reduce foreign conflicts in criminal cases.[148] This claim that deference is owed to the dual-hatted executive—deriving from the limits of the judiciary's competence regarding international affairs—resembles foreign affairs deference. And such deference may be given to the government at various stages throughout a criminal case, meaning the foreign affairs considerations cumulatively begin to overwhelm customary criminal process.[149]

To some degree such prosecutorial authority is unsurprising. David Sklansky has recently advanced a conception of prosecutors as "mediating" figures who bridge organizational and theoretical divides

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146 The concern regarding over-involvement in foreign affairs has less purchase in cases implicating federal law, given that the federal government has power over foreign affairs. *See* Farbiarz, *supra* note 16, at 526. Federal *criminal* law only underscores this distinction, given that the executive branch—as opposed to private litigants—is the one initiating criminal prosecutions. *Id.* at 526–27. Even in state prosecutions, the federal executive branch increasingly cooperates with state executive branch actors to facilitate their prosecutions with transnational aspects. *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-15.210, https://www.justice.gov/jm/jm-9-15000-international-extradition-and-related-matters#9-15.210 (last updated Apr. 2018) ("The Criminal Division's Office of International Affairs (OIA) provides information and advice to [f]ederal and [s]tate prosecutors about the procedure for requesting extradition from abroad."). In practice, OIA functions as a clearing house for transnational criminal questions outside of the extradition context.

147 Clopton, Bowman *Lives*, *supra* note 14, at 192.

148 These available mechanisms include bilateral and multilateral treaties that provide for the exchange of indictees and incarcerated convicts. *See, e.g.*, Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 35 U.S.T. 2867 (creating rules that govern the relationship between the sentencing State and the administering State to facilitate cooperation in the transfer of sentenced persons).

149 A recent example of this, albeit in the civil context, is *Animal Science Products v. Hebei Welcome Pharmaceutical Co*., 138 S. Ct. 1865 (2018). Faced with the question of the degree of deference a court is required to give to foreign governments' amicus submissions in U.S. courts, the Supreme Court rejected the various standards the courts of appeals had applied in previous cases, instead adopting the "respectful consideration" standard which the United States had proposed in its amicus brief. *See id.* at 1869; Brief for the United States as Amicus Curiae Supporting Petitioners at 17–21, *Animal Science Products*, 138 S. Ct. 1865 (No. 16-1220), 2018 WL 1181858. By doing so, the Court articulated a standard far less deferential than those the courts of appeals had adopted. *See, e.g.*, Andreas L. Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT'L L. 783, 804 (2004) (describing the respectful consideration standard as an "exercise in inconsequential politeness"); *see also* Daniel Fahrenthold, Note, *Navigating "Respectful Consideration": Foreign Sovereign Amici in U.S. Courts*, 119 COLUM. L. REV. (forthcoming 2019) (on file with New York University Law Review). But even as it eliminated deference to foreign governments, the Court emphasized the almost conclusive deference the federal government is owed when it participates directly in the process of obtaining a foreign government's position on the litigation, effectively reallocating any international comity inquiry from the courts back to the federal government. *Animal Science Products*, 138 S. Ct. at 1874–75 (citing United States v. Pink, 315 U.S. 203, 218 (1942)).

in criminal justice.[150] In Sklansky's view, prosecutors stand in a "boundary-blurring" space between adversarial and inquisitorial justice, between the police and the courts, and between law and discretion.[151] In foreign affairs prosecutions, prosecutors are increasingly playing another mediating function: between the United States and foreign sovereigns. They are frequently called upon to act as representatives of foreign interests within the U.S. criminal justice system. They are also expected to work with foreign counterparts in order to advance joint investigations. And finally, they are expected to make such developments intelligible to Congress when advocating for relevant statutory reforms.

Three points bear emphasis. First, this is an emerging deference trend in foreign affairs prosecutions; thus, the rest of Section II.B shows illustrative cases that represent this trend and foreshadow the potential risk to individual rights that such cases represent. Second, the cases below are by no means a comprehensive review of all instances in which this deference arises; a wide variety of doctrinal areas manifest the challenges the judiciary has faced in this regard. And third, whereas deference regimes like *Chevron* are invoked explicitly through citation to the case itself, "it remains a rarity for the Court to announce super-strong deference" of the kind seen in foreign affairs cases.[152] It is similarly rare for courts to announce such deference in foreign affairs prosecutions. Yet this heightened judicial deference is visible through several windows, considered in the rest of Section II.B: (1) differences between foreign affairs prosecutions and analogous classical criminal prosecutions; (2) dissenting opinions critiquing the reasoning of the majority on this ground; (3) circuit court splits; and (4) academic critiques of courts' rulings.

1. Treaty Interpretation

In foreign affairs prosecutions, the "great weight"[153] that the judiciary confers on executive interpretations of treaties may undermine defendant interests. As will be seen below, in such cases a defendant's position may resemble that of a third-party beneficiary, asserting rights under a criminal treaty that exists between the United States and another sovereign. Often, however, the U.S. prosecutor will invoke the legal position of that sovereign as additional authority when arguing for a contrary interpretation of the treaty. The judiciary

150 Sklansky, *Prosecutorial Power*, *supra* note 12, at 477.

151 *Id.*

152 Eskridge & Baer, *supra* note 126, at 1101 (emphasis omitted).

153 *See supra* note 129 and accompanying text.

will then confer heightened deference on the executive branch's interpretation.

Let us return in greater depth to *United States v. Alvarez-Machain*,[154] a foreign affairs prosecution involving extraterritorial criminal conduct and—crucially for this particular case—foreign apprehension.[155] Siding with the government's interpretation of the extradition treaty,[156] the majority held that the respondent's abduction was not a violation of the U.S.-Mexico extradition treaty, and thus the long-standing *Ker-Frisbie* doctrine applied.[157] Under *Ker-Frisbie*, a defendant's abduction does not prohibit his trial in U.S. court for violations of U.S. criminal law.[158] The majority acknowledged that the "shocking" abduction might be considered a violation of general international law principles and further noted Mexico's explicit and active diplomatic protests.[159] But it ultimately avoided the question by stating that the prospective return of Alvarez-Machain to Mexico was "as a matter outside of the Treaty" and thus for the executive branch to decide.[160]

The majority was wrong in its reasoning; the very nature of a bilateral extradition treaty, with precise procedures and criteria for moving fugitives across borders, demands a contrary interpretation. The canon of good faith in treaty interpretation—which emphasizes consistency of interpretation with treaty partners—dictates this result.[161] Not only the dissent but also legal scholars and governments worldwide have underscored this point.[162]

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154 504 U.S. 655 (1992).

155 *Id.* at 657. DEA agents were found to have been responsible for the abduction, though were not personally involved. *Id.* The Respondent was flown to Texas whereupon he was arrested by DEA in connection with the kidnap and murder of a DEA agent in Mexico. *Id.*

156 Brief for the United States at 21–23, *Alvarez-Machain*, 504 U.S. 655 (No. 91-712) (arguing that the extradition treaty did not prohibit extraterritorial apprehension).

157 *Alvarez-Machain*, 504 U.S. at 669–70.

158 *Id.* at 670.

159 *Id.* at 669.

160 *Id.*

161 As Michael Van Alstine has noted, the Court no longer explicitly applies the canon of good faith, which has led to a "rudderless drift in treaty interpretation" and confusion in the lower courts. Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1887 (2005). However, courts may still implicitly apply the canon. Sloss, *United States*, *supra* note 132, at 523. In this case such application would have led to proper interpretation of the U.S.-Mexico extradition treaty.

162 Reasoning from the extradition treaty's structure, purpose, and provisions, Justice Stevens—joined by Justices Blackmun and O'Connor—concluded that the treaty was a "comprehensive document" and one that should protect defendants from prosecution in cases of forcible abduction circumventing the extradition process. *Alvarez-Machain*, 504 U.S. at 671–75 (Stevens, J., dissenting). The dissent also considered the U.S. government's involvement in Alvarez-Machain's kidnapping to be a "flagrant violation of international

Why such a mistake? While some scholars have identified doctrinal reasons, such as the structure of the treaty or the nature of customary international law,[163] both the dissent and subsequent scholarship have pointed to undue judicial deference to the executive's interpretation of the treaty.[164] Here, the executive branch argued for what it perceived to be the meaning of the treaty and thus, implicitly, the U.S. government's belief about the shared intent of the two state parties. Or, put another way, the executive branch effectively stood as a proxy for Mexico in the U.S. courts, thus advocating with greater persuasive authority and minimizing Alvarez-Machain's ability to assert rights under the treaty.[165] This opened the door to prosecutorial interests obscuring good faith treaty interpretation: As the dissent reasoned, the majority reached its outcome by deferring to "the Executive's intense interest in punishing respondent in our courts" for the brutal murder of a U.S. law enforcement agent.[166]

Another example of this dynamic is *Sanchez-Llamas v. Oregon*,[167] a foreign affairs prosecution involving Mexican and Honduran defendants and both countries' consular officials. Under the Vienna Convention on Consular Relations (VCCR) Article 36, individuals detained in a foreign country have a right to have their consulate notified of their detainment; further, the article requires that arresting "authorities shall inform the person concerned without delay of his rights."[168] In *Sanchez-Llamas*, neither defendant was informed of his Article 36 rights upon arrest; subsequently, one made incriminating statements to the police and was convicted of attempted

law" and breach of treaty obligations. *Id.* at 682. For their part, commentators and national governments worldwide condemned the decision. *See supra* note 2.

163 *See, e.g.*, Glennon, *supra* note 2, at 747.

164 After analyzing the treaty and international law norms more generally, the dissent focused on the majority's wholesale acceptance of the executive's one-sided treaty interpretation, stating "[t]hat the Executive['s] . . . wish to reinterpret the Treaty to allow for an action that the Treaty in no way authorizes should not influence [sic] this Court's interpretation."*Alvarez-Machain*, 504 U.S. at 686–87 (Stevens, J., dissenting). Eskridge and Baer have noted that the Court instead implicitly accorded foreign affairs deference to the executive, part of a larger trend of cases where the Court "goes along with legally weak executive department arguments in cases involving foreign affairs or national security." Eskridge & Baer, *supra* note 126, at 1102.

165 In fact, the executive branch's representation regarding the intent of the two parties differed from that of the government of Mexico, which protested the abduction and interpretation of the treaty that the executive branch espoused. *Alvarez-Machain*, 504 U.S. at 669.

166 *Id.* at 686 (Stevens, J., dissenting). In the dissent's view, the executive's desire to punish the criminal perpetrator "provide[d] no justification for disregarding the Rule of Law that this Court has a duty to uphold." *Id.*

167 548 U.S. 331 (2006).

168 Vienna Convention on Consular Relations, *supra* note 35, art. 36(1)(b).

murder while the other was convicted of first-degree murder.[169] One of the issues before the Court was whether VCCR Article 36 "create[s] rights that defendants may invoke against the detaining authorities in a criminal trial or in a post-conviction proceeding," and, if so, what remedy was appropriate to redress violations of such rights.[170]

Sanchez-Llamas represents another example of the Court deferring to executive invocation of foreign interests in foreign affairs prosecutions. In arguing against the enforceability of Article 36 rights, the government as amicus curiae argued that "political and diplomatic channels, rather than . . . the courts" were the presumptive forums for treaty enforcement.[171] The Court found it unnecessary to resolve that question, however, concluding that neither defendant was entitled to relief on their claims.[172] In dissent, Justice Breyer—joined by Justices Stevens and Souter, as well as Justice Ginsburg in relevant part[173]—disagreed, reasoning that Article 36 created individually-enforceable rights because the language, nature of the right, and the interpretation of an international court "so strongly point to an intent to confer" such rights.[174] Justice Breyer emphasized that, while "the Executive Branch's interpretation of treaty provisions is entitled to 'great weight,'" such determinations were "not conclusive," and "the simple fact of the Executive Branch's contrary view" was insufficient reason to adopt the government's interpretation of Article 36.[175]

As in *Alvarez-Machain*, the plain language, object, and purpose of the treaty were clear: to ensure criminal defendants' access to consular officials. And this surely creates individually enforceable rights; as Justice Breyer correctly noted, if a pre-*Miranda* federal statute had provided that law enforcement "shall inform a detained person

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169 *Sanchez-Llamas*, 548 U.S. at 340–41.

170 *Id.* at 337. The other issues were whether it was permissible for a state to treat a defendant's claim as defaulted for failure to raise at trial and whether suppression of evidence is a proper remedy for a violation of Article 36. *Id.* The Court concluded that, simply on the basis of non-notification, suppression is not appropriate, and ordinary rules of procedural default apply. *Id.*

171 *Id.* at 343 (quoting Brief for the United States as Amicus Curiae Supporting Respondents at 11, *Sanchez-Llamas*, 548 U.S. 331 (No. 05-51, 04-10566)).

172 *Id.* ("Because we conclude that Sanchez-Llamas and Bustillo are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights."). Justice Breyer, writing in dissent, would have affirmatively decided the question. *Id.* at 371, 378 (Breyer, J., dissenting).

173 While Justice Ginsburg concurred in the judgment, she agreed that Article 36 grants rights that defendants may invoke in a judicial proceeding. *Id.* at 360 (Ginsburg, J., concurring).

174 *Id.* at 378 (Breyer, J., dissenting).

175 *Id.* (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982)).

without delay of his right to counsel," courts would surely affirm that this statute created rights that criminal defendants could invoke at trial.[176] And yet, again, the judiciary conferred implicit deference on the executive's interpretation and undermined defendant interests by asserting that such matters should be resolved through diplomatic channels.

As a final example, rule-of-specialty cases demonstrate how divergent judicial conceptions of defendant rights under treaties lead to circuit splits in the lower courts. Such divergence turns on which party—the prosecutor or the defendant—the court perceives to be the proxy for foreign interests. The recurring issue in these cases is whether an extradited defendant has standing to raise violations of the rule of specialty under a bilateral extradition treaty. The rule of specialty is a widely accepted principle of international extradition law whereby the requesting state must limit its prosecution of an extradited individual to the offense(s) specified in the extradition agreement.[177] Many U.S. bilateral extradition treaties include explicit specialty provisions,[178] and the principle has been reflected in statutory form since the mid-nineteenth century.[179]

The question of whether a criminal defendant has standing to raise a violation of specialty has divided the circuits, with some reasoning that defendants may stand in the place of another sovereign to assert rule-of-specialty arguments.[180] Among those circuits that have definitively addressed standing, the Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have all held that a defendant has standing to

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176 *Id.* at 374.

177 BASSIOUNI, *supra* note 45, at 538; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477(1)(a) (AM. LAW INST. 1987) ("A person who has been extradited to another state will not, unless the requested state consents, be tried by the requesting state for an offense other than one for which he was extradited."). The surrendering state may also place limitations on the penalties to be imposed for those crimes, which must be adhered to by the requesting state. BASSIOUNI, *supra* note 45, at 538.

178 *See, e.g.*, Extradition Treaty Between the United States of America and the Republic of Korea, S. Kor.-U.S., art. 15, June 9, 1998, T.I.A.S. No. 12,962.

179 *See* 18 U.S.C. § 3186 (2012) (based on 18 U.S.C. § 653 (1940)) (authorizing the Secretary of State to order certain fugitives remitted to foreign governments pursuant to treaty); *id.* § 3192 (based on 18 U.S.C. § 659 (1940)) (empowering the President to protect persons extradited to the United States, though not touching on the jurisdiction of courts); United States v. Rauscher, 119 U.S. 407, 423–24 (1886) (interpreting U.S. treaties of extradition to include the rule of specialty, in light of two U.S. statutes).

180 In all circuits, defendant standing is derivative of another nation's specialty claims; a defendant's standing is contingent on the country not waiving or otherwise disclaiming the rule. *See, e.g.*, United States v. Puentes, 50 F.3d 1567, 1574 (11th Cir. 1995) ("The extradited individual's rights . . . need not be cast in stone; rather, the individual may enjoy these protections only at the sufferance of the requested nation. The individual's rights are derivative of the rights of the requested nation.").

raise a violation of the rule of specialty to the extent the surrendering country could have objected.[181] For example, in *United States v. Thirion*,[182] the Eighth Circuit permitted the defendant to "raise whatever objections to his prosecution that Monaco might have," given that Monaco had not consented to his extradition on a conspiracy count not enumerated as an offense under the U.S.-Monaco extradition treaty.[183] Similarly, in *United States v. Cuevas*, the Ninth Circuit affirmed that "[a] person extradited may raise whatever objections the extraditing country would have been entitled to raise."[184]

In contrast, the Second and Seventh Circuits have relied on prosecutors as the proxies for a foreign nation in rule of specialty disputes, finding that defendants lack standing to challenge violations of specialty unless there is an affirmative protest from the surrendering country.[185] In such cases, an executive-executive relationship again "supercharges" the persuasive power of U.S. prosecutors, thus influencing courts at the expense of defendant interests. Take for example the 2017 case *United States v. Barinas*, where the defendant sought to raise a specialty challenge to the court's finding of a supervised release violation when he was extradited for offenses committed while he was subject to a release condition not to commit any further federal or state crimes for five years.[186] Reasoning that treaties are "primarily a compact between independent nations," the court held that the defendant lacked standing given that the Dominican Republic had not objected, nor was there indication in the treaty of an intent to make its

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[181] United States v. Fontana, 869 F.3d 464, 469 (6th Cir. 2017) ("We . . . hold that an individual extradited pursuant to an extradition treaty has standing under the doctrine of specialty to raise any objections which the requested nation might have asserted."); United States v. Lomeli, 596 F.3d 496, 500 (8th Cir. 2010) (noting that extradited defendants may allege treaty violations that the rendering country would have raised); *Puentes*, 50 F.3d at 1572 (holding that the defendant had standing to allege treaty violations that the rendering country would have alleged); United States v. Riviere, 924 F.2d 1289, 1297 (3d Cir. 1991) (finding that Dominica's waiver of objection to the defendant's trial eliminated the defendant's rights under the treaty); United States v. Levy, 905 F.2d 326, 328 n.1 (10th Cir. 1990) (rejecting the government's challenge to the defendant's standing); United States v. Cuevas, 847 F.2d 1417, 1426 (9th Cir. 1988) (determining the scope of permissible objections for the defendant to raise by examining the Swiss court's restrictions on the extradition order).

[182] 813 F.2d 146 (8th Cir. 1987).

[183] *Id.* at 151 (citing *Rauscher*, 119 U.S. at 419); *see also Lomeli*, 596 F.3d at 500 ("This circuit has held that extradited individuals such as Lomeli have standing to raise any objection that the surrendering country might have raised to their prosecution.").

[184] *Cuevas*, 847 F.2d at 1426.

[185] *See, e.g.*, United States v. Barinas, 865 F.3d 99, 105 (2d Cir. 2017) (rejecting defendant's standing because the Dominican Republic did not object to the proceedings brought against the defendant).

[186] *Id.* at 100–01.

provisions enforceable by individual defendants.[187] Likewise, precedent from the Seventh Circuit indicates that defendants lack standing to raise specialty absent sovereign protest. The general principle arose in *Matta-Ballesteros v. Henman*, which concerned a habeas petition by a defendant who had been arrested in Honduras by U.S. agents and the Honduran military and flown to the United States.[188] The defendant argued "that his arrest violate[d] international law, namely . . . two extradition treaties to which the United States and Honduras were parties."[189] However, the court found that—in light of the fact that treaties are designed to protect nations' sovereign interests—Matta-Ballesteros lacked standing to allege a treaty violation absent Honduran protest.[190]

In sum, foreign affairs prosecutions often involve defendants in a position of third-party beneficiary, asserting rights under a treaty that the United States and one or more other nations have ratified. In such cases, foreign affairs authority bolsters the executive branch, which stands in for the interests of the other sovereign. Given this fortified executive role, the judiciary often defers to the executive branch, typically in a manner adverse to defendant interests.

2. Statutory Interpretation

When interpreting federal statutes in foreign affairs prosecutions, courts may also defer to the executive in a manner that pressures defendant interests. Although no treaty is at issue, the dual-hatted executive may still represent foreign interests to the court, triggering heightened judicial deference adverse to defendants. Crucially, this dynamic may play out in foreign affairs prosecutions regardless of whether a court classifies the underlying criminal statute as "extraterritorial" or "territorial."

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187 *Id.* at 104–05 (quoting Mora v. New York, 524 F.3d 183, 200 (2d Cir. 2008)).

188 896 F.2d 255, 256 (7th Cir. 1990).

189 *Id.* at 259.

190 *Id.* Notably, Matta-Ballesteros did not raise a specialty challenge, nor did the court discuss *Rauscher*. *See id.* In *United States v. Munoz-Solarte*, the court cited *Matta-Ballesteros* for its conclusion that the defendant lacked standing to challenge specialty, and that it could not conclude the surrendering state objected absent an official protest. United States v. Munoz-Solarte, Nos. 93-2723 & 93-3811, 1994 U.S. App. LEXIS 18128, at *5–6 (7th Cir. July 18, 1994). The court addressed specialty in a similarly abbreviated fashion in *United States v. Burke*, in which the defendant argued that his prosecution for perjury (which had occurred after his extradition) violated the rule of specialty. 425 F.3d 400, 407 (7th Cir. 2005). Citing *Matta-Ballesteros* and the United Kingdom's lack of protest, in addition to the fact that the crime occurred after the extradition, the court emphasized the role of treaties in regulating relations between sovereigns when denying standing. *Burke*, 425 F.3d at 408.

Take, for example, cases construing criminal statutes' extraterritoriality. When a case involves a potential extraterritorial application of a U.S. statute, courts now apply the two-step framework first articulated in *Morrison v. National Australia Bank, Ltd*.[191] This new test, raising the bar for overcoming the presumption against extraterritoriality, has been reaffirmed and applied recently in *Kiobel v. Royal Dutch Petroleum*[192] and *RJR Nabisco, Inc. v. European Community*.[193]

One might think that criminal cases would have the same or even higher extraterritorial threshold: Criminal law turns on specificity and congressional direction much more than civil law.[194] And yet many courts are still upholding convictions that would likely be overturned under the *Morrison* test by applying *United States v. Bowman*,[195] a

[191] 561 U.S. 247 (2010). Under this new two-step framework, the Court looks first to see whether the statute contains a "clear, affirmative indication" that rebuts the presumption against extraterritoriality. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016). Second, if the statute is not extraterritorial, the Court will consider the statute's "focus": If the conduct relevant to the statute's focus occurred within U.S. territory, then domestic application is permissible in the case, regardless of whether other conduct occurred abroad; but if the conduct relevant to the focus occurred outside of U.S. territory, extraterritorial application is impermissible, even if other conduct occurred domestically. *Id*. If, alternatively, the statute is extraterritorial, then the Court will consider congressional limits on the statute's foreign application, not the statute's focus. *Id.*

[192] 569 U.S. 108, 116, 124 (2013) (applying the two-step framework and determining that the Alien Tort Statute does not rebut the presumption against extraterritoriality).

[193] 136 S. Ct. at 2101 (applying the two-step framework to the Racketeer Influenced and Corrupt Organizations Act and finding the presumption against extraterritoriality rebutted in certain applications).

[194] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. f (AM. LAW INST. 1987) ("[L]egislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication."). Separation-of-power and legality principles are stronger in criminal than in civil cases. *See* O'Sullivan, *supra* note 14, at 1089.

[195] *See, e.g.*, United States v. Weingarten, 632 F.3d 60, 66–67 (2d Cir. 2011) (finding that the presumption against extraterritoriality does not apply because, under the *Bowman* test, "it is reasonable to conclude that Congress intended to proscribe . . . [the crimes of traveling in foreign commerce to engage in illicit sexual relations with minors and conspiracy to do so] when hatched abroad, lest the effectiveness of the statute be threatened"); United States v. Belfast, 611 F.3d 783, 813 (11th Cir. 2010) ("We have interpreted *Bowman* to hold that extraterritorial application may be inferred from the nature of the offense and Congress's other legislative efforts to eliminate the type of crime involved." (quoting United States v. Frank, 599 F.3d 1221, 1230 (11th Cir. 2010))); United States v. Harder, 168 F. Supp. 3d 732, 744 (E.D. Pa. 2016) (rejecting the defendant's argument that *Morrison* and *Kiobel* apply to the Travel Act); United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 7416975, at *6 (C.D. Cal. Sept. 20, 2011) ("Even if an extraterritorial analysis is implicated here, the Travel Act counts are proper under *Bowman* . . . ."); United States v. Campbell, 798 F. Supp. 2d 293, 304 (D.D.C. July 27, 2011) ("[T]he purpose of § 666 [solicitation of a bribe by an agent of an organization receiving more than $10,000 in federal funds] parallels that of the statute considered by the Supreme Court in *Bowman* and falls squarely within *Bowman*'s holding."); *see also* United States v.

1922 Supreme Court case holding that extraterritoriality may be read into a criminal statute if a strictly territorial reading would "greatly . . . curtail the scope and usefulness of the statute."[196] The executive's assertion of foreign interests also marks these cases, triggering greater judicial deference to the executive's competence in managing international friction. For example, the Seventh Circuit has twice held that 18 U.S.C. § 1959 (violent crimes in aid of racketeering activity) applies extraterritorially because, *inter alia*, crimes such as murder inherently present fewer foreign law conflicts than civil laws do.[197] It also reasoned that "[a]ny international repercussions of the decision to prosecute Leija-Sanchez are for the political branches to resolve with their counterparts in Mexico" and that in the present case the Mexican government's extradition of the defendant to the United States suggested its consent to the U.S. prosecution for murder.[198] In reaffirming its holding post-*Morrison*, the court emphasized that *Bowman*'s "holding that criminal and civil laws differ with respect to extraterritorial application . . . is not affected by yet another decision [(*Morrison*)] showing how things work on the civil side."[199]

Bowman, 260 U.S. 94 (1922); Clopton, Bowman *Lives*, *supra* note 14, at 138–39 (noting that the presumption against extraterritoriality articulated by the Supreme Court in civil cases has not been extended to the criminal context, where courts rely on *Bowman* to uphold the extraterritorial application of criminal laws); *cf.* United States v. Sidorenko, 102 F. Supp. 3d 1124, 1129, 1132 (N.D. Cal. 2015) (recognizing that *Bowman* may be good law post-*Morrison* but declining to find extraterritorial application of federal wire fraud and bribery statutes).

196 *Bowman*, 260 U.S. at 98.

197 *See* United States v. Leija-Sanchez, 820 F.3d 899, 901 (7th Cir. 2016) ("*Morrison* does not undermine our 2010 decision. It does not mention either *Bowman* or § 1959. A decision such as *Bowman*, holding that criminal and civil laws differ with respect to extraterritorial application, is not affected by yet another decision showing how things work on the civil side."); United States v. Leija-Sanchez, 602 F.3d 797, 799 (7th Cir. 2010) (Easterbrook, C.J.) ("Nations differ in the way they treat the role of religion in employment [(as in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991))]; they do not differ to the same extent in the way they treat murder."); *see also* Clopton, Bowman *Lives*, *supra* note 14, at 192 ("[A]t least one court was persuaded by the intuitive position that U.S. criminal law presents fewer or less significant conflicts with foreign laws than U.S. civil law presents.").

198 *Leija-Sanchez*, 602 F.3d at 801 ("That diplomacy has occurred already. Three of Leija-Sanchez's co-defendants were apprehended in Mexico, which agreed to extradite them to the United States to face all of the indictment's substantive charges, including arranging for Montes's murder.").

199 *Leija-Sanchez*, 820 F.3d at 901. Julie O'Sullivan has recently noted that "[d]espite the modern Supreme Court's strong presumption against extraterritoriality, it is relatively rare for courts of appeals to find that a federal criminal statute does not have extraterritorial purchase." O'Sullivan, *supra* note 14, at 1027; *see also* Verdier, *supra* note 18, at 24 (asking whether *Bowman* remains viable precedent and noting that lower courts have gone beyond its reasoning to give federal criminal statutes extraterritorial effect).

Even in foreign affairs prosecutions where cases are labeled "territorial"—i.e., that the Court classifies as not involving criminal conduct outside of U.S. territory, thus obviating the need for application of the presumption against extraterritoriality—courts may still display heightened judicial deference to the executive, leading to erroneous results. This dynamic played out in two Supreme Court cases—*Small v. United States*[200] and *Pasquantino v. United States*[201]—issued on the same day but reaching divergent conclusions due to distinct judicial treatment of the dual-hatted executive.[202]

The issue in both cases was whether a federal criminal statute under which the defendant was convicted encompassed foreign activity. In these cases, the Court construed one statute to exclude a foreign court but the other to include harm to a foreign government. In *Small*, the petitioner had been convicted under 18 U.S.C. § 922(g)(1), which makes it unlawful for a person "convicted in *any court*" of a crime punishable by imprisonment exceeding one year to possess a firearm, based on a prior Japanese conviction for attempted arms smuggling.[203] Both the majority and dissent agreed that the firearm possession was domestic; however, in construing the phrase "convicted in any court," the majority limited the statute's application to prior domestic convictions only.[204] In so doing, the majority characterized the case as territorial but also reasoned that, as in extraterritorial cases, it should assume that Congress legislates with domestic considerations in mind.[205] In *Pasquantino*, however, the Court ruled in the opposite way, finding that the federal wire fraud statute[206] encompasses criminal schemes defrauding a foreign government, in this case Canada.[207] The majority held that the common law "revenue

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200 544 U.S. 385 (2005).

201 544 U.S. 349 (2005).

202 *Cf.* O'Sullivan, *supra* note 14, at 1075 ("*Pasquantino* is best understood as a case in which the Court determined that because all the elements of the crime occurred in the United States, the prosecution was domestic—not extraterritorial—in nature.").

203 *Small*, 544 U.S. at 387 (emphasis added) (quoting 18 U.S.C. § 922(g)(1) (2000)).

204 *Id.* at 394.

205 *Id.* at 390–91.

206 18 U.S.C. § 1343.

207 *Pasquantino*, 544 U.S. at 354–55. The statute prohibits the use of interstate wires "to effect any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." *Id.* at 355 (quoting 18 U.S.C. § 1343). "Petitioners used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States . . . . This domestic element of petitioners' conduct is what the Government is punishing." *Id.* at 371 (citations omitted); *see also* Pamela Karten Bookman, Note, *Solving the Extraterritoriality Problem: Lessons from the Honest Services Statute*, 92 VA. L. REV. 749, 752 (2006) (noting the irony that "[b]ecause statutes that explicitly apply only to domestic conduct do not trigger the presumption against extraterritorial application, they may be

rule"—which generally bars courts from enforcing the tax laws of foreign sovereigns—was inapplicable, in part because the executive branch could be presumed to have assessed a prosecution's impact with another country.[208] The "greater danger," the Court reasoned, would be to bar the prosecution based on foreign policy concerns underlying the common law revenue rule—concerns that the Court has "neither aptitude, facilities nor responsibility to evaluate."[209] In dissent, Justice Ginsburg accused the majority of ignoring the lack of congressional intent that the statute have extraterritorial effect[210] and, furthermore, of construing the statute extraterritorially to enforce foreign tax laws.[211] Notably, she also invoked the rule of lenity given the interpretative question was a close one.[212]

While the divergent approaches of the Court—construing one statute to exclude a foreign court and the other to include harm to a foreign government—have been criticized for their inconsistency,[213] a focus on the dual-hatted executive clarifies why the Court reached incongruous holdings. In *Small* and *Pasquantino*, foreign affairs implications and executive deference are what principally differentiated the two cases. *Small* lacks any language suggesting deference to the executive branch's foreign affairs authority. Indeed, the *Small* majority put exclusive emphasis on its own statutory reading, grounded in "an ordinary assumption about the reach of domestically oriented statutes" to determine congressional intent.[214] This was likely rooted in the fact that the case's foreign affairs implications were minimal: Small had already served his sentence in Japan, so the Japanese government would be unlikely to protest his subsequent conviction for gun possession in the United States.[215] By contrast, the Canadian interest in

more likely to reach conduct that has significant foreign elements or effects than statutes that do not specify the location of the conduct to which they apply").

208 *Pasquantino*, 544 U.S. at 369; Farbiarz, *Extraterritorial Criminal Jurisdiction*, *supra* note 16, at 527.

209 *Pasquantino*, 544 U.S. at 369.

210 *Id.* at 378 (Ginsburg, J., dissenting). Only Justices Ginsburg and Breyer joined Part I of the dissenting opinion, in which this position on extraterritoriality was put forth. *Id.* at 372.

211 *Id.* at 377.

212 *Id.* at 383.

213 *Cf.* Brogan v. United States, 522 U.S. 398 (1998) (strictly interpreting 18 U.S.C. § 1001 to lack any "exculpatory no" exception); *see also* DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, DEFINING FEDERAL CRIMES (unpublished manuscript) (manuscript ch. 3, at 13) ("The argument in *Brogan* is played out again and again, with curiously inconsistent results."); Bookman, *supra* note 207, at 754 (describing *Pasquantino* and *Small* as contradictory).

214 Small v. United States, 544 U.S. 385, 390 (2005).

215 *See id.* at 387; Bookman, *supra* note 207, at 782–83 (suggesting that by restricting the interpretation of the phrase "convicted in any court" in the gun possession statute to

Pasquantino was more pronounced, given that the U.S. government was prosecuting individuals who had defrauded Canada and thus were also subject to Canadian criminal jurisdiction.[216] In considering the foreign affairs ramifications of interpreting the revenue rule as a bar to prosecution for defrauding foreign governments, the *Pasquantino* majority relied in part on the fact that the U.S. government had brought the prosecution, using it to nullify concerns about international friction.[217] In other words, the executive branch's prosecutorial authority—which implicitly also included its foreign affairs authority and the implied consent of the Canadian government—contributed to the Court's ruling in favor of the executive branch's interpretation over that of the defendant.[218]

C. Assessing the Risk to Defendants

The doctrinal examples above demonstrate that the greatest concern about foreign affairs prosecutions is their potential risk of executive aggrandizement, often at the expense of defendant rights to present a defense, demand notice and specificity in criminal statutes,

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domestic convictions, the Court "effectively checks the Executive's power to bring criminal charges by interpreting the scope of a legislative enactment to be purely domestic"). She continues to state that *Small* does not "require courts to address the extent to which the Executive can carry out its foreign relations powers through criminal prosecutions because it finds that Congress never granted the Executive the power to prosecute such a crime in the first place," in furtherance of her point that the presumption against extraterritoriality "has always been a presumption about congressional intent." *Id.* at 783–84. Clearly this is so. However it is questionable whether, given *Small* is considered a territorial case, the methodology employed by the *Small* majority would be entirely effective in a case where there were more substantial concerns about a prosecution's effect on international friction or comity.

216 In fact, Canada did indict the petitioners on several charges, although it did not request their extradition. *Pasquantino*, 544 U.S. at 375 n.3 (Ginsburg, J., dissenting).

217 *Id.* at 369 (majority opinion). As Bookman notes, "by looking to executive intent, [*Pasquantino*] seems capable of generating an exception . . . for potentially all criminal cases." Bookman, *supra* note 207, at 778. In "grey zone" cases, then, there is some danger that unless the analysis is tied to congressional intent, the Court will abdicate responsibility for evaluating the comity concerns that typically accompany the presumption of extraterritoriality to the executive. By contrast, it is also possible that such an untethered analysis could go the other direction, leading to judicial infringement on the executive's foreign affairs power. Indeed, the Court assumed "that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction." *Pasquantino*, 544 U.S. at 369.

218 The Court noted that the "prosecution create[d] little risk of causing international friction" and that the "action was brought by the Executive to enforce a statute passed by Congress." *Pasquantino*, 544 U.S. at 369 (citing the president's foreign affairs prerogative); *see* Bookman, *supra* note 207, at 777–78 (suggesting that the Court in *Pasquantino* looked to executive intent, rather than congressional intent, in determining the territorial limits of the application of the wire fraud statute).

and enjoy consular access. Let us drive this point home with a hypothetical. Imagine you are a U.S. national living in Toronto. One night, FBI agents kidnap you, transport you across the U.S.-Canada border, and bring you before a New York federal judge. The judge denies your claim that the kidnapping violated the U.S.-Canada extradition treaty and affirms the court's personal jurisdiction over you. You then learn you were indicted almost eight years after you allegedly received bribes while working abroad—much longer than the five-year statute of limitations—because the prosecution was waiting to receive key evidence from Canada. Such evidence is admitted into the record even though it was obtained without a warrant. The court also rules that the federal bribery statute criminalizes your conduct abroad, even though the statutory language does not so provide. When you object to the totality of this Kafkaesque scenario, the court rejects all your claims on the grounds that the U.S. government deserves deference.

As should now be clear, all such actions are lawful. FBI agents may kidnap a person under *Alvarez-Machain* and a judge will affirm personal jurisdiction under *Ker-Frisbie*.[219] The statute of limitations may be tolled up to eight years pursuant to 18 U.S.C. § 3292,[220] and evidence obtained without a warrant from a foreign jurisdiction may be admitted pursuant to a mutual legal assistance treaty.[221] Furthermore, under *Bowman*, 18 U.S.C. § 666 (theft or bribery concerning programs receiving federal funds), which is silent on extraterritoriality,[222] may be used to prosecute despite a lack of congressional intent to that effect.

Foreign affairs prosecutions may also undermine defendant rights when certain rules suited to transnational criminal cases impact classical criminal law norms. The *Alvarez-Machain* line of cases are instructive here. Indeed, the facts of the case in *Ker*—a kidnapping from Peru, leading to prosecution in the United States[223]—provided a foundation for the Court to rule similarly in the 1952 domestic *Frisbie* case, and then ultimately to extend the doctrine again in *Alvarez-Machain*.[224] Or as another example, 18 U.S.C. § 3505, which was

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219 *See supra* notes 154–60 and accompanying text.

220 *See supra* notes 105–07 and accompanying text.

221 *See* United States v. Verdugo-Urquidez, 449 U.S. 259 (1990).

222 18 U.S.C. § 666 (2012).

223 Ker v. Illinois, 119 U.S. 436, 438 (1886).

224 *See* Frisbie v. Collins, 342 U.S. 519, 522 (1952) ("This Court has never departed from the rule announced in *Ker v. Illinois* . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" (citing *Ker*, 119 U.S. 436)); United States v. Alvarez-Machain, 504 U.S. 655, 669–70 (1992) ("We conclude . . . that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and

enacted in 1984, lowered the threshold for admission in criminal cases of foreign records of regularly-conducted business activity by eliminating the need for a custodian to testify in court.[225] Such records could thus no longer be excluded as hearsay and are self-authenticating given certain certifications are met.[226] Subsequently, in 2000, the Federal Rules of Evidence were similarly amended for records of domestic regularly-conducted activity, lowering the standards for admission and authentication.[227]

The sum total of all of these changes to criminal prosecutions suggests a further shifting of power toward the government and away from defendants. While each individual change to criminal procedure or substantive law may be, in many instances, appropriate, the cumulative effect may equate to a loss of defendant voice. This in turn may undermine fundamental assumptions about our criminal justice system, including the rights to present a defense, challenge admission of evidence, confront witnesses, and have notice and specificity in criminal statutes.

III
Splintering U.S. Foreign Policy

Foreign affairs prosecutions may also adversely impact U.S. foreign policy. As is well known domestically, criminal justice is highly decentralized: Prosecutorial power is divided into ninety-three autonomous U.S. Attorneys Offices (USAOs), certain prosecuting offices within Main Justice itself, and fifty states, each with diverse prosecutorial structures. Additionally, the U.S. criminal justice system is strongly autonomous: DOJ policy dictates a strong separation from White House oversight regarding criminal investigations.[228]

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therefore the rule of *Ker v. Illinois* is fully applicable to this case." (citing *Ker*, 119 U.S. 436)).

225 *See* 18 U.S.C. § 3505.

226 *Id.* Such records include "a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country." *Id.* § 3505(c)(1). This can also impact civil cases. *See* Fed. R. Evid. 902(12) (Evidence That Is Self-Authenticating—Certified Foreign Records of a Regularly Conducted Activity, enacted in 2000).

227 *See* Fed. R. Evid. 803(6) (Exceptions to the Rule Against Hearsay—Records of a Regularly Conducted Activity); Fed. R. Evid. 902(11) (Evidence That Is Self-Authenticating—Certified Domestic Records of a Regularly Conducted Activity).

228 *See* Memorandum from the Office of the Attorney Gen. to Heads of Dep't Components & All U.S. Att'ys (May 11, 2009), https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download [hereinafter Memorandum] ("[T]he Justice Department will advise the White House concerning pending or contemplated criminal or civil investigations or cases when—but only when—it is important for the performance of the President's duties and appropriate from a law enforcement perspective.").

This decentralization and autonomy can easily generate dissonance within the foreign policy decisionmaking mechanisms of the executive branch.[229] First, decentralization means an individual USAO anywhere in the country could make an independent decision to investigate and prosecute—doing so without any clearance by the DOJ's Office of International Affairs or other office higher up within the executive branch—in a manner that is undesirable for U.S. foreign relations. For example, in 2013, the USAO in the Southern District of New York charged and arrested Indian Deputy Consul General Devyani Khobragade on charges of visa fraud relating to an Indian national she brought to the United States as a housekeeper and allegedly paid less than the minimum wage.[230] After the arrest, the Indian government responded with counter-measures threatening security at the U.S. embassy in Delhi.[231] And even if a USAO clears its investigatory or prosecutorial steps "up the chain" of the DOJ, autonomy means that DOJ would not normally inform the other executive agencies of its actions.[232] This means that prosecutors are, in essence, making independent decisions domestically on cases that are viewed internationally as an extension of U.S. foreign policy.

To some degree, foreign policy blowback from domestic law enforcement inevitably results from the United States properly exercising its prosecutorial function. So, for example, the December 2018

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[229] Such dissonance is not unique to the executive branch. The doctrinal mantra that the United States speaks with "one voice" belies the impact of all three branches of government and state governments on U.S. foreign relations. *See* Sarah H. Cleveland, Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 984–1001 (2001) (reviewing the role of the three federal government branches and state governments in the constitutional text, U.S. history, and practice).

[230] Press Release, U.S. Dep't of Justice & U.S. Attorney's Office, S. Dist. of N.Y., Manhattan U.S. Attorney Announces Arrest of Indian Consular Officer for Visa Fraud and False Statements in Connection with Household Employee's Visa Application (Dec. 12, 2013), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-arrest-indian-consular-officer-visa-fraud-and-false.

[231] *See* Jeremy Carl, *Did India Overreact to Diplomat's Arrest?*, CNN (Jan. 14, 2014), https://www.cnn.com/2013/12/20/opinion/carl-india-dispute-privilege/index.html ("In the wake of the arrest, India announced a number of steps against U.S. diplomats, including revoking government-issued IDs for U.S. diplomats in India, stopping the U.S. Embassy from importing most goods, and most provocatively removing a concrete security barricade at the U.S. Embassy in Delhi."); Karen DeYoung & Sari Horwitz, *In Dispute over Indian Diplomat, an Internal U.S. Rift and Many Unanswered Questions*, WASH. POST (Dec. 19, 2013), https://www.washingtonpost.com/world/national-security/in-dispute-over-indian-diplomat-an-internal-us-rift-and-many-unanswered-questions/2013/12/19/0a84f21c-68dd-11e3-ae56-22de072140a2_story.html?utm_term=.cdc110aa1209 (noting that Main Justice was unaware of the arrest).

[232] *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 1-7.100, https://www.justice.gov/jm/jm-1-7000-media-relations (last updated Apr. 2018) (General Need for Confidentiality); Memorandum, *supra* note 228.

arrest of Huawei executive Meng Wanzhou potentially complicates the U.S. relationship with China—including the trade relationship—but does so due to what appear to be legitimate charges of Huawei's violation of export controls and U.S. sanctions relating to Iran and other countries.[233] And, sometimes, law enforcement and foreign policy objectives can interact synergistically to achieve a positive outcome. For example, some foreign observers hailed the May 2015 arrest and unsealing of E.D.N.Y. indictments against FIFA officials in Switzerland as "[t]he best American foreign policy action" of the year.[234] This made some sense, given that nearly all soccer-loving countries around the world had long despised FIFA as corrupt.[235] And yet something potentially pernicious lurks in this statement: Foreign media regarded it as part of the United States' broader diplomatic agenda and thus implicitly as part of its system of foreign policy checks—as opposed to a decision largely driven by federal law enforcement exigencies, separate from direct White House oversight.[236]

This conflation of U.S. law enforcement and foreign policy is more salient when foreign governments and media criticize the United States for its "long arm" into foreign countries.[237] For example, both

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[233] *See* Steven Arrigg Koh, *The Huawei Arrest: How It Likely Happened and What Comes Next*, JUST SECURITY (Dec. 10, 2018), https://www.justsecurity.org/61799/huawei-arrest-happened.

[234] Daniel W. Drezner, *The Best American Foreign Policy Action Taken in 2015*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/the-best-american-foreign-policy-action-taken-in-2015/?utm_term=.d94af2372a82.

[235] *United States Welcomed as Liberators by Soccer Fans Around the World*, GLOBALPOST (May 27, 2015), https://www.pri.org/stories/2015-05-27/united-states-welcomed-liberators-soccer-fans-around-world.

[236] *See, e.g.*, Jon Sopel, *Fifa Scandal: Is the Long Arm of US Law Now Overreaching?*, BBC NEWS (June 4, 2015), https://www.bbc.com/news/world-us-canada-33011847 ("Barack Obama's presidency has been marked by his determination to pull US troops out of foreign conflicts, to admit past mistakes and to say it is not for us to pick and choose which world leaders we like. But is America creating a new legal imperialism?").

[237] *See, e.g.*, *The Anti-Bribery Business*, ECONOMIST (May 9, 2015), https://www.economist.com/news/business/21650557-enforcement-laws-against-corporate-bribery-increases-there-are-risks-it-may-go (stating in subtitle that "[a]s the enforcement of laws against corporate bribery increases, there are risks that it may go too far"); Sopel, *supra* note 236 ("Some of the charges relate to alleged crimes in the US, but there are massive implications to . . . ETJ—Extraterritorial Jurisdiction. . . . [I]t seems to me to be the right of the US to poke its nose into anyone's affairs anywhere in the world."). This "long arm" raises the concern of ever-expanding U.S. jurisdiction over crimes with a foreign nexus, further underscoring the risk to defendants enumerated in Section II.C. *supra*; *see also* United States v. Hoskins, 902 F.3d 69, 96 (2d Cir. 2018) ("[T]he FCPA does not impose liability on a foreign national who is not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern—*unless* that person commits a crime within the territory of the United States."). As noted above, such questions arise, for example, when courts consider whether Congress may enact certain federal statutes that

the DOJ and SEC take an expansive view of the Foreign Corrupt Practices Act, giving the United States jurisdiction over a wide variety of transactions,[238] including those occurring abroad between foreign actors that are merely denominated in U.S. dollars.[239] Pushback from foreign countries like France has extended not just into the law enforcement cooperation space, but also into broader bilateral relations.[240] And *Alvarez-Machain* triggered diplomatic protest from Mexico, leading to a temporary cessation of all DEA activity there.[241] Thus, foreign affairs prosecutions may sometimes constitute an undesirable parallel "second arm" of U.S. foreign policy, unfolding outside of traditional foreign policy checks but then generating diplomatic controversy. This long arm may be inevitable, given U.S. investigators and prosecutors enjoy relative freedom compared to their civil law country counterparts.[242] But certain law enforcement policy decisions in this space reflect the negative consequences of the broad executive authority described above.

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enable foreign affairs prosecutions. *See id.* at 103. Future scholarship must consider what the proper limits of such reach should be—as a matter of both law and criminal law enforcement policy—and its intersection with U.S. foreign policy.

238 *See* U.S. DEP'T OF JUSTICE, CRIMINAL DIV. & U.S. SEC. & EXCH. COMM'N, ENF'T DIV., FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf ("Thus, placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system . . . ."); *see also Hoskins*, 902 F.3d at 96.

239 *See Supreme Court Questions Whether Dollar-Denominated Transactions or Other Financial Transactions in the U.S. Are Sufficient to Assert Jurisdiction over Foreign Corporations*, FCPA PROFESSOR (May 8, 2018), http://fcpaprofessor.com/supreme-court-questions-whether-dollar-denominated-transactions-financial-transactions-u-s-sufficient-assert-jurisdiction-foreign-corporations (describing how several FCPA enforcement actions have alleged jurisdiction because the transactions were denominated in U.S. dollars).

240 *See* Frederick T. Davis, *Where Are We Today in the International Fight Against Overseas Corruption: An Historical Perspective, and Two Problems Going Forward*, 23 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 337, 340–42 (2017). The same has occurred with foreign affairs prosecutions against foreign banks. Verdier, *supra* note 18, at 36–37 (noting that foreign governments complain about U.S. prosecutors unfairly treating foreign banks and the financial implications of U.S. criminal sanctions).

241 *See U.S. Tries to Calm Mexico over Court's Kidnap Ruling*, CHI. TRIB. (June 17, 1992), http://articles.chicagotribune.com/1992-06-17/news/9202230639_1_rene-martin-verdugo-urquidez-dr-humberto-alvarez-machain-mexico-city ("The Bush administration, eager to calm an outraged Mexican government Tuesday, pledged not to kidnap any more criminal suspects in its southern neighbor's territory if Mexico vows to prosecute them promptly.").

242 As a general rule, the judiciary has more checks over civil law country investigators earlier in the criminal investigatory process. Davis, *supra* note 240, at 340 ("Simply put, U.S. prosecutors have powers that most of their European counterparts can only dream of . . . .").

Finally, the foreign policy consequences of foreign affairs prosecutions also cut the other way: Countries extending their criminal legal reach into the United States may also complicate U.S. foreign policy. For example, after the failed Turkish coup attempt in 2016, President Recep Tayyip Erdogan demanded the extradition of cleric Fetullah Gulen, who is located in the United States and is alleged to have been behind the attack.[243] While the United States is obligated to extradite under the U.S.-Turkey extradition treaty, it has not initiated extradition proceedings on the ground that the extradition request is deficient in showing evidence of Gulen's participation in the attempted coup.[244] This impasse has strained bilateral relations. By late 2017, both countries had suspended non-immigrant visas, and Turkey had both indicted Turkish nationals working in the U.S. embassy and a dozen U.S. nationals accused of ties to Gulen.[245] To make matters worse, U.S. failure to extradite Gulen has led to "widespread speculation" amongst the Turkish population that the United States orchestrated the coup attempt in Turkey.[246] And in August 2018, President Erdogan wrote in a *New York Times* op-ed to the American people that the Gulen case represented one of the issues putting the U.S.-Turkish relationship in jeopardy.[247]

The Gulen case thus provides a rich example of the role that foreign affairs prosecutions play in U.S. foreign policy. The blame for lack of extradition actually falls to Turkey: The Turkish government has failed to provide sufficient evidence in its extradition request to meet U.S. domestic standards for extradition.[248] And yet the broader

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243 Karen DeYoung, *Turkish Evidence for Gulen Extradition Pre-Dates Coup Attempt*, WASH. POST (Aug. 19, 2016), https://www.washingtonpost.com/world/national-security/turkish-evidence-for-gulen-extradition-pre-dates-coup-attempt/2016/08/19/390cb0ec-6656-11e6-be4e-23fc4d4d12b4_story.html?utm_term=.b281ff42b83b.

244 *Id.*

245 Umar Farooq, *Relations Between U.S. and Turkey Grow Tense, with Both Countries Suspending Routine Visas*, L.A. TIMES (Oct. 8, 2017), http://www.latimes.com/world/middleeast/la-fg-turkey-us-visas-20171008-story.html.

246 *Id.*

247 Recep Tayyip Erdogan, Opinion, *Erdogan: How Turkey Sees the Crisis with the U.S.*, N.Y. TIMES (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/opinion/turkey-erdogan-trump-crisis-sanctions.html ("The Turkish people expected the United States to unequivocally condemn the attack and express solidarity with Turkey's elected leadership. It did not. . . . To make matters worse, there has been no progress regarding Turkey's request for the extradition of Fethullah Gulen under a bilateral treaty."). Other cases, such as the temporary detention of American pastor Andrew Brunson, have also revealed possible tensions between the United States and Turkey. *See* Carlotta Gall, *Turkey Frees Pastor Andrew Brunson, Easing Tensions With U.S.*, N.Y. TIMES (Oct. 12, 2018), https://www.nytimes.com/2018/10/12/world/europe/turkey-us-pastor-andrew-brunson.html.

248 DeYoung, *supra* note 243 ("'At this point, Turkish authorities have not put forward a formal extradition request based on evidence that he was involved in the coup' attempt.").

tension between two NATO allies obscures this explanation,[249] leading to a foreign country's popular inference that the United States orchestrated a coup against it. Looking ahead, what would happen if some of the doctrinal examples above were to begin playing out in this case? We might imagine a case of Turkish law enforcement agents kidnapping Gulen in Pennsylvania and bringing him to Turkey for prosecution under their equivalent of the *Ker-Frisbie-Alvarez-Machain* doctrine. And why not?[250] Turkey obviously has a greater national interest in the arrest and prosecution of the alleged leader of a coup attempt than the United States did in a Mexican doctor allegedly involved in the torture and killing of one DEA agent, as in *Alvarez-Machain*. This is not merely hypothetical: Former Trump Administration National Security Adviser Michael Flynn reportedly discussed with the Turkish government the possibility of having Gulen kidnapped and sent to Turkey in exchange for $15 million.[251]

The Gulen case also exemplifies future trends as all countries expand their capacities for foreign affairs prosecutions. As another example, China has recently garnered attention for sending its agents into other countries to surveil, intimidate, and even attempt to kidnap Chinese fugitives there.[252] This means that more individuals worldwide will be brought before a judiciary that does not even conceive of itself as independent.[253] Foreign affairs prosecutions thus trigger concerns of criminal justice dynamics overlaid onto the thousands of bilateral relations among countries worldwide, in some cases strengthening—but also potentially hindering—such relationships.

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[249] *See* Erin Cunningham & Kareem Fahim, *U.S. and Turkey Announce Tit-For-Tat Travel Restrictions, a Sign of Deteriorating Alliance*, WASH. POST (Oct. 8, 2017), https://www.washingtonpost.com/world/us-halts-some-visa-services-in-turkey-citing-security-concerns/2017/10/08/02bdc01a-ac52-11e7-9b93-b97043e57a22_story.html?tid=a_inl&utm_term=.23f2fcc0febd.

[250] This is not a predictive claim regarding the likelihood of unilateral Turkish law enforcement action; extra-legal foreign policy considerations may prevent this from occurring. Nonetheless, this example underscores that the Turkish government could—and likely does—assert abduction as a legally available option.

[251] Julian Borger, *Ex-Trump Aide Flynn Investigated over Plot to Kidnap Turkish Dissident–Report*, GUARDIAN (Nov. 10, 2017), https://www.theguardian.com/us-news/2017/nov/10/michael-flynn-trump-turkish-dissident-cleric-plot.

[252] *China's Law-Enforcers Are Going Global*, ECONOMIST (Mar. 31, 2018), https://www.economist.com/china/2018/03/31/chinas-law-enforcers-are-going-global (noting that China has resorted to such tactics in part because only thirty-six countries have ratified bilateral extradition treaties with it).

[253] Michael Forsythe, *China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince*, N.Y. TIMES (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html.

IV
Striking a Better Balance in Criminal Law and Foreign Affairs

How can foreign affairs prosecutions better deliver on their promise of criminal accountability, while also mitigating risk to foreign policy and defendant interests? The answer is not straightforward: Foreign affairs prosecutions are wide-ranging, with implications for treaties, statutes, and procedure, as well as obligations for all three branches of government. And the cases raise a variety of rich and weighty questions, given that both crimes and foreign policy represent critical areas of law and public policy. For example, might the United States be "criminalizing" foreign policy, finding ways to use foreign affairs prosecutions as part of its broader diplomatic agenda? How might foreign affairs prosecutions complicate other bilateral issues, such as our trade relationships?[254] What are the implications for federalism given that many otherwise-local cases are suddenly in the hands of the federal government, which wields the foreign affairs power? And how will these cases impact the development of international law, namely the development of treaties, customary international law, and both global and regional legal institutions? Given these questions, the following represents an initial—but by no means exclusive—set of suggestions to strengthen foreign affairs prosecutions.

As a preliminary matter, ideally the executive branch should alter its internal working procedures to promote intra-executive coordination and obviate undesirable foreign policy consequences. DOJ, for example, could become more amenable to a policy of limited disclosure of investigations and indictments to other relevant executive agencies engaged in foreign policy, particularly the State Department. Such executive branch coordination already exists *ad hoc*: The Legal Adviser's office and relevant State Department regional bureaus advise on certain foreign and international issues arising from criminal cases at home and abroad; the National Security Council convenes and oversees issues of national security throughout the executive branch; and the various executive agencies meet in a variety of formal and informal ways in order to advance specific agenda items.[255] And domestically, federal and state prosecutors should and do consult with

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[254] *See* Adam Muchmore, *International Activity and Domestic Law*, 1 Penn State J. Int'l Aff. 363, 363–64 (2012) ("Broadly speaking, two types of law are relevant to international affairs. The first is international law, consisting of norms embodied in treaties, custom, general principles, and judicial decisions . . . . The second is domestic law, the positive law of individual states . . . .").

[255] *See, e.g.*, 50 U.S.C. § 3021(a) (2012) (describing the role of the National Security Council); U.S. Dep't of State, Practicing Law in the Office of the Legal Adviser,

the DOJ's Office of International Affairs regarding the broader effects of a given prosecution.[256]

At the same time, however, executive branch agencies are unlikely to reform internally unless certain statutory, doctrinal, or institutional incentives demand that they do so. As other scholars have noted, every agency has some degree of "tunnel vision" as it pursues its statutory mandate, and intra-agency reform is unlikely unless structural changes force all to internalize costs.[257] This is inevitable and not necessarily undesirable. In foreign affairs prosecutions, DOJ will doggedly pursue its federal law enforcement mission—which will tend toward more expansive readings of treaties, federal statutes, and doctrine—with an eye toward preserving cooperative law enforcement relationships with foreign national counterparts, but likely lacking comprehensive awareness of and sensitivity to diplomatic considerations. The State Department, likewise, will have its own incentives for cultivating diplomatic relations, sometimes at the expense of criminal accountability in specific cases.[258] Furthermore, there is a strong norm against DOJ disclosure of investigations and—as tested recently in today's political climate—political influence on decisions

https://www.state.gov/documents/organization/244958.pdf (last visited Feb. 16, 2019) (reviewing the functions of the Office of Law Enforcement and Intelligence).

256 Paul B. Stephan, *Private Litigation as a Foreign Relations Problem*, 110 AM. J. INT'L L. UNBOUND 40, 42 (2016).

257 *See* Eskridge & Baer, *supra* note 126, at 1174–75 ("[A]gencies . . . pursue their statutory mission with varying degrees of diligence, but often without sufficient regard to a larger normative framework such as the Constitution."). Dan Kahan has argued that *Chevron* could moderate aggressive readings of criminal statutes by shifting lawmaking responsibility from individual USAOs to Main Justice. Kahan, *supra* note 12, at 497, 519. In his contention, Main Justice is much more likely to internalize the costs of such readings because, in part, it must justify its broad interpretations in public and through the President, who is directly accountable to the electorate. *Id.* Such reforms could include, *inter alia*, central DOJ approval for initiating cases and development of DOJ guidelines for cooperation between DOJ and other regulators. Verdier, *supra* note 18, at 58.

258 An intriguing example of this tension occurred during the negotiation of the 2016 Colombian peace deal. U.S. indictments and extradition requests in place for certain Revolutionary Armed Forces of Columbia (FARC) leaders posed a source of debate in the negotiations, which involved U.S. diplomats. Nick Miroff, *Colombian Peace Deal Could Mark Rare Victory for U.S. Diplomacy*, WASH. POST (Aug. 27, 2016), https://www.washingtonpost.com/world/the_americas/colombian-peace-deal-marks-rare-victory-for-us-diplomacy/2016/08/27/0d0ac8aa-6ad7-11e6-91cb-ecb5418830e9_story.html. From DOJ's perspective, it was unlikely that individual USAOs would withdraw their indictments or extradition requests for such individuals. *See id.*; *Colombia: President Santos Wants Rebels off Terror List*, NBC NEWS (Jan. 29, 2016), https://www.nbcnews.com/news/latino/colombia-president-santos-wants-rebels-terror-list-n506801. In the end, the U.S. government ultimately agreed not to press the Colombian government to act on the extradition requests. Miroff, *supra*. Such a balance tracks broader "peace vs. justice" debates in international criminal legal literature. *See, e.g.*, Richard J. Goldstone, *Peace Versus Justice*, 6 NEV. L.J. 421, 423 (2005) (describing the balance between post-conflict peace and criminal accountability in the former Yugoslavia, South Africa, and Iraq).

to investigate or prosecute.[259] Thus, while some adaptation of this protocol—in a space already characterized by adapted criminal procedure—could mitigate certain foreign policy risks, such changes are unlikely without judicial and legislative reforms.

This executive institutional reality thus puts greater emphasis on the courts and Congress to mitigate the risks to defendant rights and foreign policy. This is largely rooted in the customary roles of each branch in classical criminal cases, namely, that Congress provides the necessary legislative direction regarding substantive criminal law and criminal procedure, while courts—operating within this framework—use a variety of judicial tools to ensure that executive power does not exceed this legislative mandate. Indeed, an initial prescriptive temptation might be to argue that all foreign affairs prosecutions should be treated like classical criminal cases, and yet that would overlook the subtleties at play in treaty interpretation, not to mention the broader foreign policy ramifications of a given case. Alternatively, one might argue that such cases should be treated squarely as foreign affairs matters; as has already been seen, however, this creates undesirable consequences for individual rights. Neither extreme is desirable. A better approach should balance the necessities of both criminal and foreign affairs law through greater congressional engagement and judicial oversight.

Turning, then, to the judiciary, an initial tension between normative concerns is obvious. On one hand, a more interventionist role for the judiciary may protect individual rights pressured in such cases. But in doing so, the judiciary could risk undermining the executive's foreign affairs authority. In other words, any shift in the judicial-executive balance ostensibly bolsters one of two opposing values. And yet a better way forward is possible, rooted in the separation-of-power rationales animating judicial decisionmaking in criminal and foreign relations law. The goal is to narrow, but not eliminate, the current degree of deference to ensure greater accountability and protection for individual rights.

In criminal law, it is well settled that all prosecutions must have clear statutory authority, i.e., authority that the political branches

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259 *See, e.g.*, Michael D. Shear & Katie Benner, News Analysis, *Trump's War on the Justice System Threatens to Erode Trust in the Law*, N.Y. TIMES (Aug. 25, 2018), https://www.nytimes.com/2018/08/25/us/politics/trump-justice-legal-system.html ("The president's public judgments about the country's top law enforcement agencies revolve largely around how their actions affect him personally—a vision that would recast the traditionally independent justice system as a guardian of the president and an attack dog against his adversaries.").

define pursuant to statute.[260] The judiciary, for its part, recognizes this legislative primacy and uses traditional tools of statutory and constitutional interpretation to resolve questions of law in this space, without giving preferential treatment to the state's expertise in this regard.[261] Canons of construction such as the rule of lenity ensure this legislative primacy, check government power, and help to safeguard individual rights.

To some degree, such criminal legal reasoning has broken down in foreign affairs prosecutions because of the confusion about criminal cases in this transnational space. In a transnational setting, the quest for punishment may steer perilously close to double punishment or jeopardy for a single crime, which would plainly offend the principle of *non bis in idem*.[262] And although one rationale for foreign affairs deference is that the executive branch "has the better opportunity of knowing the conditions which prevail in foreign countries,"[263] the strong executive interest in conviction in criminal cases weakens the rationale for overreliance on executive interpretation of treaties and statutes. Indeed, such deference can risk undermining the judicial practice of interpreting treaties as the "shared expectations of the contracting parties" when the executive branch instead advocates for an interpretation that it has been incentivized to make for purposes of domestic political gain.[264] This is especially true in foreign affairs prosecutions, where DOJ has a strong interest in conviction. Giving the executive branch too much say in interpretation of criminal statutes thus risks prioritizing DOJ over other U.S. government agencies, particularly the State Department.[265] *Alvarez-Machain* exemplified this problem. As noted above, the case had undesirable foreign policy con-

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[260] *See* United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution."). *But see* DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, DEFINING FEDERAL CRIMES (unpublished manuscript) (manuscript ch. 3, at 6) (on file with New York University Law Review) ("Federal courts wound up exercising more power than if the field had been a part of the common law from the beginning . . . . [P]resent-day federal courts are quicker to rely on the common law when construing criminal statutes . . . .").

[261] *See, e.g.*, *supra* note 116 and accompanying text (citing cases affirming lack of deference to the prosecution's interpretation of criminal law).

[262] Another conception of foreign affairs prosecutions is that the executive branch is being "double counted," first as a prosecutor and then as a diplomat by the judiciary.

[263] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[264] Evan Criddle, Commentary, Chevron *Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1930 (2003) (quoting Air Fr. v. Saks, 470 U.S. 392, 399 (1985)). For this reason, perhaps, most other nations' judiciaries do not defer to their executive branch's treaty interpretations. Van Alstine, *supra* note 129, at 592–93.

[265] Bookman, *supra* note 207, at 778 ("By assuming . . . that the government thoroughly considers international comity and foreign relations concerns before bringing any prosecution, the Court imputes coordination and unanimity between the Justice

sequences, triggering condemnation from a wide array of governments; the dissent recognized that the State Department Legal Adviser had previously questioned the wisdom of forcible abductions.[266]

The better judicial approach should continue to balance foreign affairs and criminal interests, but do so in a manner that is tilted away from foreign affairs deference and toward criminal legal reasoning. Courts could deploy "consultative deference," another point on the Eskridge-Baer continuum, which is not an explicit deference regime but instead "relies on some input from the agency (e.g., amicus briefs, interpretive rules or guidance, or manuals) and uses that input to guide its reasoning and decisionmaking process."[267] As an example, the plurality in *Hamdan v. Rumsfeld*[268] engaged in this sort of consultative deference when ruling on whether procedures for military commissions violated the Uniform Code of Military Justice.[269] The Court considered the President's judgments on statutory "practicability" but at no point embraced Justice Thomas's view that the Court's "duty [was] to defer to the President's understanding" under *Curtiss-Wright*.[270] From this vantage point, the judiciary may use traditional tools of statutory and constitutional interpretation—upholding the principle of legality under the rule of lenity and due process vagueness doctrines, for example—to resolve questions of law in this space, with executive consultation on foreign affairs aspects.[271] This form of deference would provide a basis for accommodating foreign affairs while better safeguarding individual rights, and, in doing so, would recognize that such prosecutions are indeed different due to their foreign

Department and the State Department without any indication that the latter, which has its own interests, communicates its preferences to the former.").

266 *See* Bush, *supra* note 2, at 942; *supra* Section II.B.2; United States v. Alvarez-Machain, 504 U.S. 655, 679 n.21 (1992) (Stevens, J., dissenting) ("When Abraham Sofaer, Legal Adviser of the State Department, was questioned at a congressional hearing, he resisted the notion that such seizures were acceptable: 'Can you imagine us going into Paris and seizing some person we regard as a terrorist . . . ?'" (quoting *Bill To Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing Before the Subcomm. on Sec. & Terrorism of the S. Comm. on the Judiciary*, 99th Cong., 1st Sess. 63 (1985) (statement of Abraham Sofaer, Legal Adviser, U.S. Dep't of State))).

267 Eskridge & Baer, *supra* note 126, at 1099.

268 548 U.S. 557 (2006).

269 Eskridge & Baer, *supra* note 126, at 1112 ("The Court stated that it would accord 'deference' to the President's judgment as to practicability, but found that the President had reached no public judgment as to the section 836(b) uniformity requirement." (quoting *Hamdan*, 548 U.S. at 622–23 & n.51)).

270 *Hamdan*, 548 U.S. at 718–19 (Thomas, J., dissenting); *id.* at 632 (majority opinion) (rejecting Justice Thomas's argument).

271 *See* O'Sullivan, *supra* note 14, at 1090–91.

policy aspects. The reduced deference will also decrease the chance of reliance on the DOJ to the detriment of other agencies.[272]

So, for example, the approach of the Supreme Court in *Small*—relying on the traditional tools of domestic statutory interpretation to ensure that an individual was not convicted of a federal crime due to a statutory ambiguity[273]—was the correct one. The Court engaged in a similar analysis in *Bond v. United States*, reasoning that Congress did not intend the Chemical Weapons Convention Implementation Act, which implemented the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, to allow for the prosecution of an isolated incident of one individual using toxic chemicals to poison her husband's lover.[274] The approach of *Pasquantino*, by contrast, was the wrong one because it delegated part of its interpretative task to the executive based on an assumption that the executive branch had already resolved any foreign conflict and, furthermore, disregarded the rule of lenity when construing an arguably ambiguous statute.[275] Justice Ginsburg, in dissent, was thus right in stating that "the Court ignore[d] the absence of anything signaling Congress's intent to give the statute such an extraordinary extraterritorial effect" and that "the

272 Eskridge & Baer, *supra* note 126, at 1112 ("The Justices understand that the Solicitor General is providing agency-based inputs that no one else is providing, while at the same time remaining free from the agency's sometimes blindered (or captured) point of view.").

273 Small v. United States, 544 U.S. 384, 394 (2005) ("In sum, we have no reason to believe that Congress considered the added enforcement advantages flowing from inclusion of foreign crimes . . . . The statute itself and its history offer only congressional silence.").

274 Bond v. United States, 134 S. Ct. 2077, 2083 (2014). While the opinion of the Court and the concurring opinions agreed that the Convention, which aimed at controlling chemical weapons, was "a matter of great international concern," *id.* at 897 (Alito, J., concurring), they disagreed as to the scope of the treaty power itself, the authority of Congress to rely on the treaty power to implement subsequent legislation, and whether the statute applied to Bond's conduct in the particular case. *See id.* at 2094 (Scalia, J., concurring) ("As sweeping and unsettling as the Chemical Weapons Convention Implementation Act of 1998 may be, it is clear beyond doubt that it covers what Bond did; and we have no authority to amend it."); *id.* at 2103 (Thomas, J., concurring) ("[T]he Treaty Power is itself a limited federal power."); *id.* at 2111 (Alito, J., concurring) ("I believe that the treaty power is limited to agreements that address matters of legitimate international concern."). David Sloss shows that the judiciary misread the statute, which likely does criminalize Bond's conduct. David Sloss, Bond v. United States*: Choosing the Lesser of Two Evils*, 90 NOTRE DAME L. REV. 1583, 1589 (2015) ("The *Bond* majority concluded as a matter of statutory interpretation that the . . . Act did not reach defendant's conduct. That interpretation of the statute is untenable because it is based on the Court's failure to appreciate the crucial differences between the 1925 Geneva Protocol and the 1993 [Convention]."). Thus, while this case is an example of courts engaging in statutory interpretation without undue deference to the executive, it also highlights the concern that courts may err in such interpretations.

275 Pasquantino v. United States, 544 U.S. 349, 383 (2005) (Ginsburg, J., dissenting).

rule of lenity counsels against adopting the Court's interpretation of § 1343."[276]

The Supreme Court has already taken an analogous turn with the political question doctrine.[277] In *Baker v. Carr*, the Court narrowed the range of cases plausibly considered to be political, articulating its well-known six-part test.[278] More recently, *Zivotofsky v. Clinton* narrowed the test even further, reaffirming the political question doctrine as a "narrow exception" to the judicial responsibility to decide cases, and affirming that the doctrine should not apply in cases where a court is called upon to decide questions of statutory interpretation or statutory constitutionality.[279] In essence, the Court affirmed that in cases where plaintiffs seek to affirm a statutory right, judicial inquiry begins not with whether the issue is a political question, but whether the statute is constitutional and may be enforced against the executive.[280] Similarly, in foreign affairs prosecutions, judicial analysis must also start with conventional criminal law statutory interpretation, not with exceptional foreign affairs deference.[281]

This judicial reorientation could galvanize the political branches to enact new or amended legislation to clarify defendant interests in foreign affairs prosecutions. For example, Congress should provide

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[276] *Id.* at 378.

[277] To be clear, this analogy merely demonstrates that courts may affirm that certain categories of cases need not be viewed as exceptional and are amenable to judicial resolution using traditional interpretative tools. Political questions apply only to civil actions; if the government brings a criminal case, it must define any issues as legal questions and show that the defendant violated the law. *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1920 (2015) ("The traditional political question doctrine was not limited to civil disputes . . . but also applied in criminal prosecutions.").

[278] 369 U.S. 186, 217 (1962).

[279] 566 U.S. 189, 195 (2012).

[280] JARED P. COLE, CONG. RESEARCH SERV., R43834, THE POLITICAL QUESTION DOCTRINE: JUSTICIABILITY AND THE SEPARATION OF POWERS 23 (2014), https://fas.org/sgp/crs/misc/R43834.pdf; *see also* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("[T]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.").

[281] This turn in the political question doctrine parallels another analogous trend, what Sitaraman and Wuerth have coined the "normalization" of foreign relations law. Sitaraman & Wuerth, *supra* note 125. They have argued that the Supreme Court, in recent years, has laudably treated foreign relations law as unexceptional, applying more traditional tools of judicial review to such cases. *Id.* at 1901. *But see* Bradley, *supra* note 11, at 294 (noting the conceptual and methodological limitations of Sitaraman and Wuerth's article). Harlan Cohen has also noted this lack of deference in the Roberts Court, one that is counterbalanced by continuing high deference in the lower courts. Harlan G. Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 384, 440 (2015). Foreign affairs prosecutions would benefit from a similar normalization.

the extraterritorial statutory specificity to relevant criminal statutes, mindful of the transnational ambiguities increasingly arising in the absence of such direction.[282] It could also strip federal courts of jurisdiction when an individual has been abducted from abroad in contravention of a bilateral extradition treaty.

As is typical with federal criminal legislation, the executive branch may be the one instigating such changes.[283] For example, in the wake of the *Sanchez-Llamas* decision discussed above, DOJ lobbied for amendment of the Federal Rules of Criminal Procedure to ensure that magistrate judges apprise foreign nationals of their consular rights during the initial appearance.[284] As noted in the Committee Notes, the amendments to Rules 5 (initial appearance) and 58 (petty offenses and other misdemeanors) were necessary given that "many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for [its] violation."[285]

Recent passage of the Clarifying Lawful Overseas Use of Data Act (CLOUD Act) is another case in point.[286] The 2018 *United States v. Microsoft Corp.*[287] case was one in which Congress acted to resolve a dispute regarding the extraterritoriality of a statute, i.e., a challenge to a warrant issued under § 2703 of the Stored Communications Act (SCA) requiring Microsoft to disclose emails stored on one of its servers located in Ireland.[288] The Second Circuit had ruled that the SCA lacked extraterritorial effect,[289] and Judge Lynch, in concurrence, noted that the decision was "the application of a default rule of statutory interpretation to a statute that [did] not provide an explicit answer to the question,"[290] and thus Congress should revise and mod-

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[282] This could be a statute-by-statute revision or, alternatively, a general code instructing courts on the geographic scope of particular statutes. *See* O'Sullivan, *supra* note 14, at 1094–95.

[283] *See, e.g.*, Stuntz, *supra* note 77, at 544 ("[F]ederal criminal legislation often begins with the Justice Department and responds to pressure from that department and from U.S. Attorneys' offices.").

[284] FED. R. CRIM. P. 5(c)(4), (d)(1)(F) (governing initial appearances for persons extradited to the United States and consular rights under the Vienna Convention on Consular Relations); FED. R. CRIM. P. 26.1 (Foreign Law Determination); FED. R. CRIM. P. 58(b)(2)(H) (consular rights).

[285] FED. R. CRIM. P. 5 advisory committee's note to 2014 amendment; FED. R. CRIM. P. 58 advisory committee's note to 2014 amendment.

[286] *See* CLOUD Act, Pub. L. No. 115-141, 132 Stat. 1214 (2018).

[287] 138 S. Ct. 1186 (2018).

[288] Microsoft Corp. v. United States, 829 F.3d 197, 200 (2d Cir. 2016).

[289] *Id.* at 210.

[290] *Id.* at 232 (Lynch, J., concurring). Judge Lynch notes also that "the main reason that both the majority and I decide this case against the government is that there is no evidence

ernize the statute.[291] In their Supreme Court briefings, both parties referenced the *RJR Nabisco* test in formulating their positions. The government argued that the focus of the section was a provider's disclosure of information, which occurs in the United States and thus should be considered territorial.[292] By contrast, Microsoft focused on storage, asserting that because the information is stored in servers located in a foreign country, the government's warrant reaches abroad and thus is impermissibly extraterritorial regardless of Microsoft's ability to access that information in the United States.[293] In April 2018, however, the Supreme Court dismissed the case as moot after the parties advised that no live dispute existed in the wake of the March 2018 passage of the CLOUD Act.[294] The Act, which was passed into law after both the DOJ and private sector lobbied for statutory change,[295] amended the SCA by adding a provision stating that an internet service provider may be compelled under the SCA to produce electronic data stored outside of the United States.[296] In other words, in this situation and at the instigation of the executive branch, Congress laudably provided the necessary statutory clarity regarding the extraterritorial reach of a statute relevant to investigations in foreign affairs prosecutions, obviating the need for continued litigation under an uncertain test for criminal extraterritoriality.

Such congressional clarity would desirably uphold criminal legal values of statutory specificity and notice, decreasing ambiguity in this transnational space. Indeed, what characterizes criminal law most is the stakes: the gravity of the offenses; the resulting punishments, which include incarceration or even execution; and a concern for the liberty interests of the defendant because of such consequences. Given such stakes, statutory specificity, not to mention checks on gov-

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that Congress has *ever* weighed the costs and benefits of authorizing [such] court orders . . . ." *Id.* at 231.

[291] *Id.* at 233 ("[T]he statute should be revised, with a view to maintaining and strengthening the Act's privacy protections, rationalizing and modernizing the provisions . . . .").

[292] Brief for the United States at 20–21, United States v. Microsoft Corp., 138 S. Ct. 1186 (2018) (No. 17-2) (noting that the proper focus of an extraterritoriality analysis is the statutory provision at issue, not the statute as a whole).

[293] Brief in Opposition at 27, *Microsoft Corp.*, 138 S. Ct. 1186 (No. 17-2).

[294] *Microsoft Corp.,* 138 S. Ct. at 1188; *see also* CLOUD Act, Pub. L. No. 115-141, 132 Stat. 1214 (2018).

[295] U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S CYBER DIGITAL TASK FORCE 114 (2018), https://www.justice.gov/ag/page/file/1076696/download.

[296] CLOUD Act §§ 103(a)(1), 104(1)(A)(j) ("A [service provider] shall comply with the obligations of this chapter . . . regardless of whether such communication, record, or other information is located within or outside of the United States."). Subsequently, the government obtained a new warrant for the sought-after information pursuant to the amended SCA provision. *Microsoft Corp.*, 138 S. Ct. at 1188.

ernment power—including the doubled executive-executive power in such cases—are even more necessary. This means that the legislature must play a greater role in negotiating the emerging area of foreign affairs prosecutions, and the judiciary must then play its role in ensuring that such criminal laws do not violate constitutional and other norms.

Congressional action could also clarify inter-agency relationships, inuring to the benefit of foreign policy. So, for example, federal extradition law currently identifies the Secretary of State as the actor who surrenders a fugitive to another country at the end of the extradition process.[297] This requirement by definition gives the State Department visibility into the extradition process, albeit in one that it has limited control over given that the cases originate in the U.S. criminal justice system.[298] Congress could similarly take the lead in "hardwiring" a State Department role into other aspects of cross-border investigation and prosecution.

Let us turn back to our original hypothetical,[299] then, under this modified judicial posture and legislative structure. First, relying more readily on ordinary judicial interpretative tools, the New York federal court would find your transnational kidnapping unlawful under the U.S.-Canada extradition treaty. Alternatively, it could rule that it lacks personal jurisdiction over you pursuant to a novel statute stripping courts of personal jurisdiction over defendants abducted from abroad. Second, the court would either rule that the bribery statute encompassed extraterritorial conduct because Congress had given that explicit guidance, or would dismiss the charge because, under the rule of lenity, the lack of any indication of Congress's intent for extraterritorial application represents an ambiguity that should not be construed against the defendant. But the court would uphold the nearly three-year delay in indictment, finding that 18 U.S.C. § 3292 is sufficiently clear on its face and consistent with the legislative purpose of facilitating the logistical realities of cross-border criminal investigations.

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297 *See* 18 U.S.C. § 3184 (2012) (identifying procedures by which a federal judge certifies extradition to the Secretary of State); *id.* § 3186 (Secretary of State to surrender fugitive).

298 Mutual legal assistance, by contrast, is conducted solely by DOJ. *See* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 276, https://www.justice.gov/jm/criminal-resource-manual-276-treaty-requests (last visited Feb. 16, 2019) ("All treaties currently in force designate the Department of Justice as the 'central authority' assigned to make the request; because of those provisions, the request is signed in the Department rather than by a judge.").

299 *See supra* Section II.C.

Conclusion

Foreign affairs prosecutions represent a consequential shift in U.S. criminal law and promote accountability for cross-border, cyber, and international crime. But none of the three branches of government fully apprehend the hybrid nature of foreign affairs prosecutions, which engage the executive branch as both prosecutor and diplomat. This raises the specter of undermining criminal process at home and splintering foreign policy abroad. Congressional engagement and judicial oversight are important first steps in ensuring the promise—and avoiding the perils—of these critical cases.