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Criminal Division

Discuss #6

Washington, D.C. 20530

MEMORANDUM

TO: John Harris, Director
Office of International Affairs

FROM: Russell Bikoff, Deputy Director
Deborah Gaynus, Trial Attorney

DATE: July 1, 1999

RE: Options for Prosecuting or Extraditing Foreign Offenders for Crimes Committed Abroad, in the Absence of Bilateral Extradition Treaties

I. Introduction

Among the Criminal Division's successes of the past quarter century is the creation of two regimes of international legal cooperation, extradition and mutual legal assistance. The U.S. and many foreign countries have bound themselves together by a series of bilateral treaties (as of 1999: 105 extradition treaties in force and 17 pending; 20 MLATS in force and 20 pending) and international conventions. The extradition treaties— many of which are entirely new or have been updated since the mid-1970's— have permitted the U.S. and its partner countries to return literally thousands of fugitives from justice to the countries where they committed crimes to face prosecution. The MLATS have allowed the U.S. and its treaty partners to share and exchange evidence, so that countries undertaking prosecutions have available the strongest and best evidence for use in their courts. Yet, there are many fugitives today who leave the U.S. after committing crimes or who enter the U.S. as their safe haven after committing crimes abroad for whom these successful legal regimes do not work. These fugitives are able to avoid prosecution, often retain the fruits of their crimes, and can, in some cases, reside openly and freely in their country of refuge without fear that they will be prosecuted.

One explanation for this serious gap in the effectiveness of international legal cooperation is the absence of bilateral extradition treaties between the U.S. and many nations [note: if and when the pending treaties enter into force, the U.S. will lack extradition treaties with about 65 countries], including such major nations as China[1] and Russia. A second explanation is that, even when the U.S. has an

[1]As noted in a memo by OIA Director John Harris, dated June ,1999, "without a U.S.-China

extradition treaty, some nations are unable under the treaty (or, where they have discretion, unwilling) to return their nationals to the U.S. to face criminal charges. In some cases, countries have begun to successfully conduct prosecutions in their systems for crimes committed by their nationals in the U.S. We refer to this as "domestic prosecution." The creation of a new regime of international legal cooperation to allow the U.S. and more and more foreign countries to successfully conduct domestic prosecutions is the next great international challenge facing the Criminal Division.

II. Summary of Legislative Strategy and Initiatives

This memorandum proposes a legislative strategy to guide the Division and Department in making changes in U.S. law that will enable this country to become the leader and trend setter for international legal cooperation matters in the first decades of the 21st century. Our strategy is guided by three simple principles:

> The U.S. should not be a safe haven for criminals, and we will either extradite or prosecute anyone found within our territory who has committed a serious crime in a foreign country;
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> The U.S. will lead by example to persuade other countries that anyone who has committed a serious crime in the U.S. and flees to a foreign country will be returned to the U.S. for prosecution or prosecuted abroad;
>
> The U.S. will work closely with investigators, prosecutors, judges, and officials in other countries so that, no matter in which country it is held, all essential evidence is provided in a usable form to assure the highest degree of success for a domestic prosecution of a foreign crime.

The legislative strategy and changes proposed here will give the Department and Division the ability to extradite or prosecute anyone who is found in the U.S. after having committed a serious crime in a foreign country. Finally, we intend for these new legislative provisions to enable prosecutors to bring the criminal statutes of Title 18 of the U.S. Code to bear against serious crimes, which we view as crimes of violence or significant white collar crimes (including bank fraud, embezzlement, and corruption). We should not downplay, however, the serious legal and practical problems that will confront U.S. prosecutors who find themselves relying upon foreign witnesses and evidence (see, e.g.,

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extradition treaty (and the State Department is adamantly opposed to negotiating one), the best responses the U.S. has to Chinese requests for assistance in such matters involve: (1) possible deportation of the suspect, assuming of course that INS can identify grounds for deportation; (2) possible efforts to locate, seize, and repatriate the criminally obtained funds, under our money laundering or asset forfeiture laws, and (3) possible prosecution of the suspect in the U.S. on U.S. criminal charges (e.g., money laundering, or interstate transportation of stolen property), as well as (4) use of our mutual assistance law to obtain evidence to locate the offender and trace the allegedly illegally obtained funds."

Wang v. Reno, 81 F.3d 808 (9th Cir. 1996)). Nor should we ignore the burden on OIA and the Criminal Division, which will need to work closely with foreign prosecutors and judicial systems— which may be in countries with which the U.S. lacks a record of mutual legal cooperation— to ensure that the witnesses and evidence are provided to U.S. prosecutors in a manner that optimizes the chances of success in U.S. trials.

Once the U.S. puts in place such a strategy for fugitives found in our country, we will use the power of our example, plus our negotiating skills and diplomatic muscle, to encourage our major international law enforcement partners, as well as other countries, to make similar changes to their legal systems.[2] This will ensure that anyone committing a crime in the U.S. and fleeing to a foreign country will face extradition to the U.S. or domestic prosecution in the foreign country, regardless of his nationality, and with the full cooperation of U.S. and foreign authorities.

Because the statutory schemes in Title 18 with respect to extradition and (for purposes of domestic prosecution) jurisdiction are so complex, there is no single change that we can recommend to implement the strategy described above. Rather, we recommend a series of targeted statutory changes that will allow us to accomplish the goal of making any fugitive found in the U.S. subject to extradition or U.S. domestic prosecution. These are:

Enabling the U.S. to Extradite in the Absence of a Bilateral Treaty

1. Amend 18 U.S.C. §3181 (b) (which allows the extradition of foreign nationals for crimes of violence committed abroad against U.S. nationals, regardless of the existence of a bilateral treaty) to permit the extradition of persons other than citizens, nationals, and permanent residents of the U.S. for any "serious crime" committed against U.S. nationals abroad, regardless of the existence of a bilateral treaty. This represents a minor change in existing law and should be non-controversial, since it merely broadens the scope to cover other types of serious crimes (such as fraud and other white collar crimes) in addition to crimes of violence. **Alternatively or additionally,** section 3181 (b) should be broadened to permit extradition regardless of the nationality of the victim of the crime.

2. Further amend 18 U.S.C. §3181 (b) to permit the extradition of U.S. nationals and permanent residents for any serious crime, regardless of the nationality of the victim, regardless of the existence of a bilateral treaty. Since this change would permit extradition of U.S. citizens, even to countries where a bilateral treaty is lacking, Congress may be reluctant to make this change.

3. Enact a new statute to follow 18 U.S.C. §3184 (the basic U.S. extradition statute) that will specify procedures, such as a standard of proof and time limits, that would apply to extraditions pursued under a multilateral convention that does not itself contain specific procedures. Such a statute will enable the U.S. to extradite both U.S. and foreign nationals for crimes committed abroad, even if there is no

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[2] One other tactic that the U.S. authorities can use to return fugitives to foreign courts to be prosecuted is "lures." In cooperation with foreign law enforcement agencies, the U.S. can help remove fugitives from U.S. territorial jurisdiction to places where foreign agencies can make arrests and return suspects to face charges in foreign courts.

bilateral extradition treaty, as long as both the U.S. and the receiving state are parties to an international criminal convention with an extradition provision.

Furthering U.S. Domestic Prosecution

4. Enact a new jurisdictional statute (entitled 18 U.S.C. §25) to create jurisdiction in the federal courts for crimes committed in foreign countries by U.S. nationals or against U.S. nationals. The statute would specifically reference serious violent and white collar crimes that are defined in Title 18. This will permit the U.S. to prosecute, where federal law defines an applicable offense, crimes committed abroad in two significant categories of cases: those committed by U.S. nationals and those committed against U.S. nationals.[3]

5. Enact a new statute making it an offense to enter the U.S. with the intent of fleeing foreign criminal prosecution or punishment. This statute will enable the U.S. to avoid becoming a safe haven for fugitives from foreign criminal activity by allowing the U.S. to prosecute people who enter the U.S. illegally or legally under our immigration laws but have committed offenses in foreign countries.

6. Enact a new jurisdictional statute, referencing serious crimes in Title 18, to permit the U.S. to prosecute for any offense committed abroad, regardless of the nationality of perpetrator or victim, or of any effects or connection to the U.S. (Should this be possible under the U.S. Constitution and international law, this statute would give the U.S. extensive extraterritorial reach to prosecute foreign crimes where the offender is later found in the U.S.)

7. Consider amendments to statutes such as 18 U.S.C. §1956 and §1957 (reaching proceeds of crimes of violence in foreign countries that are brought to U.S.; money laundering) to permit prosecution, on a broader basis, of people who commit underlying offenses in foreign jurisdictions and then transfer or send the financial proceeds of those offenses to the U.S.

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[3] We also recommend passage of another new jurisdictional statute to permit the U.S. to prosecute U.S. military personnel and their dependents stationed at U.S. bases overseas for crimes committed either on those bases or within the foreign host countries against persons of any nationality. This amendment would close a gap in U.S. law that removed the authority to prosecute such cases from the military system (UCMJ) but never gave authority to the Department of Justice. Several years ago we proposed a statute allowing U.S. prosecution of dependents of servicemen who commit crimes overseas. That proposal did not pass. We can and should resurrect that proposal, which was approved by OMB.

III. Discussion

Goal 1: Amend 18 U.S.C. §3181 (b)

Traditionally, most countries including the United States will not extradite fugitives in the absence of a bilateral or multilateral treaty. Since 1848, United States law has required the existence of a treaty between the United States and another country before a fugitive could be extradited. In 1996, Congress amended the law to authorize extradition in the absence of a treaty under very specific circumstances. Currently, 18 U.S.C. §3181(b) permits, in the exercise of comity, the statutory extradition of non-U.S. citizens, nationals and permanent resident aliens who commit violent crimes against U.S. nationals in foreign countries. This type of extradition is permitted regardless of the existence of a treaty if two prerequisites are met: (1) the Attorney General certifies that the evidence submitted by the foreign government demonstrates that the offense, had it been committed in the U.S., would have constituted a violent crime under 18 U.S.C. §16; and (2) the foreign offense is not of a political nature. This 1996 Congressional amendment was made as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, §443(a)(2), 110 Stat. 1214, 1280 (1996). A second statute allows extradition to the United Nations' ad hoc tribunals for Rwanda and the former Yugoslavia; the United States entered into executive agreements, which were not submitted to the Senate for its advice and consent, whereby we undertook the obligation to surrender persons to those tribunals.

The legality of extradition in the absence of a treaty approved by a supermajority of the Senate is, in our view, beyond reasonable question. That said, at least one judge has disagreed. A magistrate judge in the Southern District of Texas refused extradition on the ground that extradition based on a statute without a treaty is unconstitutional. Surrender of Ntakirutimana, 988 F. Supp. 1038 (S.D. Tex. 1997).[4] Following that decision, however, the government refiled the extraditon request and the second extradition judge found extradition pursuant to the statute to be constitutional. In In the Matter of The Surrender of Elizaphan Ntakirutimana, 1998 WL 655708 (S.D. Tex.), the judge held that there was no constitutional prohibition on surrenders made pursuant to a statute rather than a treaty. In Ntakirutimana, the Rwandan International Tribunal sought Ntakirutimana's extradition from Texas for his participation in the slaughter of Tutsis during the 1994 civil war in Rwanda. He unequivocally stated that it is within the power of the Executive and Congress to surrender fugitives such as Ntakirutimana under an executive agreement with congressional assent via implementing legislation. 1998 WL 655708 at 9. In reaching his decision the judge determined that, inter alia,: (1) there are no provisions in the U.S. Constitution that specifically refer either to extradition or the necessity of a treaty to extradite; (2) the Supreme Court has repeatedly stated that extradition may be effected either by treaty or by statute; and (3) there is precedent for extraditing fugitives pursuant to statutes that filled the gap left by the treaty provisions. 1988 WL 655708 at 9.

With Ntakirutimana as a backdrop (although it is currently on appeal to the 5th Circuit) we propose amending 18 U.S.C. §3181(b) to permit the extradition of non-U.S. citizens, nationals and permanent resident aliens for any serious crime committed against a U.S. national overseas, regardless of the existence

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[4]Magistrate Judge Notzon held that the Court could not act in the absence of a treaty and that Congress's attempt to effectuate the Agreement [with the Tribunal] in the absence of a treaty is an unconstitutional exercise of power. Surrender of Ntakirutimana, 988 F. Supp. at 1042.

of a bilateral extradition treaty. This represents a minor change in existing law and should be non-controversial since it merely broadens the scope of the statute to cover other types of serious crimes, such as fraud and other white-collar crimes, in addition to crimes of violence. 18 U.S.C. §3181(b) could be amended even more broadly to permit the extradition of fugitives from foreign justice regardless of the nationality of the victim of the crime. Since the rationale behind 18 U.S.C. §3181(b) is to prevent illegal aliens from entering and/or remaining in the U.S. following the commission of some heinous violent crime elsewhere, we believe that these minor modifications may be the most palatable to Congress and the Courts.

Goal 2: Secondly, and a bit more problematic, would be amending 18 U.S.C. §3181 (b) to permit the extradition of U.S. nationals and permanent residents for any serious crime, regardless of the nationality of the victim or the existence of a bilateral treaty. Congress may be reluctant to make this change since it will permit the extradition of U.S. citizens, even to countries where a bilateral treaty is lacking. We anticipate that there may be resistence from Congress and the State Department to extraditing U.S. nationals to countries whose punishments or judicial systems do not meet the standards of the U.S., i.e. Saudi Arabia, China, and any other country with a religion-based judicial system or a history of human rights abuses. We need only to remember the outrage from many U.S. legislators a few years ago when a U.S. national was convicted of vandalism in Singapore -- a country with whom we have a treaty -- and sentenced to caning" which was the requisite punishment in that society for that particular criminal infraction.

Goal 3: Finally, we propose the enactment of a new statute to follow 18 U.S.C. §3184 that will establish procedures for use in those instances where extradition is based upon a multilateral convention, that does not itself contain procedures, to countries with which we have no independent extradition treaty. In addition, the new procedural statute will apply in those instances, such as 18 U.S.C. §3181(b), where extradition is based upon a statutory grant and not on a treaty. 18 U.S.C. §3184 specifically permits the extradition to foreign countries when both the requesting and the requested state are parties to a convention or treaty or under §3181(b). With this statute the U.S. will have procedures in place to extradite both U.S. and foreign nationals for crimes committed abroad, even if there is no bilateral extradition treaty, as long as both the U.S. and the receiving state are parties to an international convention with an extradition provision.

Goal 4: Enact a new jurisdictional statute (entitled 18 U.S.C. 25) to create jurisdiction in the federal courts for crimes committed in foreign countries by U.S. nationals or against U.S. nationals.[5]

Present law: None

Proposed law: Add to Title 18 U.S.C. a new section 25, as follows:

(a) Whoever, being a citizen, national, or permanent resident of the United States, engages in conduct within the jurisdiction of any nation, which, if such conduct had been committed within the territory of the U.S. or within its special maritime and territorial jurisdiction, would be punishable by any Act of Congress by a term of imprisonment of one year or more, shall be subject to prosecution and

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[5]See discussion in related paper by Sara Criscitelli, pp 8-10.

punishment according to the laws of the United States.

(b) Whoever engages in conduct against any citizen, national, or permanent resident of the United States within the jurisdiction of any nation, which, if such conduct had been committed within the territory of the U.S. or within its special maritime and territorial jurisdiction, would be punishable by any Act of Congress by a term of imprisonment of one year or more, shall be subject to prosecution and punishment according to the laws of the United States.

Explanation: Subsection (a) makes it possible to prosecute and punish in the courts of the United States any criminal conduct committed by a U.S. citizen, national, or permanent resident in a foreign country, provided there is a federal offense that criminalizes such conduct and that federal law carries a punishment of imprisonment of one year or more. Subsection (b) makes it possible to prosecute and punish criminal conduct committed by anyone in a foreign country, including the citizens and nationals of the country in question, as well as those of third countries if the conduct is directed against a U.S. citizen, national, or permanent resident. Also, there must be a federal offense that criminalizes the conduct and the punishment must be imprisonment of one year or more.

Legal Authority: Articles I and III of the Constitution grant Congress the authority to define the subject matter jurisdiction of the U.S. courts. Therefore, Congress has the power to apply domestic criminal law extraterritorially. United States v. Yunis, 924 F.2d. 1086, 1091 (D.C. Cir. 1991); Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-a- Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980) (U.S. courts are "obligated to give effect to an unambiguous exercise by Congress of its jurisdiction to prescribe even if such an exercise would exceed the limitations imposed by international law"); United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991) ("generally there is no constitutional bar to the extraterritorial application of United States penal law").

If Congress wishes to create extraterritorial jurisdiction for crimes committed by nationals and non-nationals of the United States, it must evince a clear intent. Courts interpret statutes that purport to extend jurisdiction extraterritorially in accordance with dictates of "reasonableness" and international law is often used to gauge congressional intent. The court in United States v. Yunis examined Congress' intent in implementing the Hostage Taking Act and ratifying the International Convention Against the Taking of Hostages. There, the court stated:

> [T]he statute in question reflects an unmistakable congressional intent, consistent with treaty obligations of the United States, to authorize prosecution of those who take Americans hostage abroad no matter where the offense occurs or where the offender is found. Our inquiry can go no further.

924 F. 2d at 1091.

See also, Louis Henkin, International Law as Law in the United States, 82 Mich. L.Rev. 1555, 1569 (1984) (courts should "give effect to the developments in international law to which the U.S. is a party, unless Congress is moved to reject them as domestic law in the United States.").

Congress may legislate the extension of U.S. criminal statutes to conduct outside the U.S., when either the perpetrator or victim is a national of the U.S. This would not run afoul of international law, under

recognized applications of the "nationality" and the "passive personality" principles:

> the *nationality principle* grants criminal jurisdiction over nationals wherever they are located. See, e.g., MDLEA, 46 App. U.S.C. § 1903(a);
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> the *passive personality principle* grants jurisdiction over those who commit crimes against nationals wherever they are located. United States v. Ali Rezaq, 134 F. 3d 1121 (D.C. Cir. 1998) (extraterritorial killing of U.S. citizens by Arab terrorist invokes this principle).

Due Process

There may be due process problems according to the conflicting standards which different U.S. appeals courts have used to find subject matter jurisdiction in cases of extraterritorial criminal jurisdiction. Different circuits around the United States have used different standards. The Ninth Circuit has adhered to a "nexus" standard whereby the government must show a connection between the extraterritorial conduct and the United States. United States v. Davis, 905 F. 2d 245 (9th Cir. 1990). In United States v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994), the court held that a United States nexus was established when the defendants traveled to Mexico to assist the murderer of a DEA agent to flee Mexico and to further their positions in a drug trafficking enterprise based in Guadalajara. The Court held that:

> ...because drug trafficking by its nature involves foreign countries and because DEA agents often work overseas, the murder of a DEA agent in retaliation for drug enforcement activities is a crime against the United States regardless of where it occurs.

15 F.3d 833 at 840. The connection was the effects on U.S. interests of the criminal enterprise. See also United States v. Felix-Gutierrez, 940 F. 2d 1200, (9th Cir. 1991) (inferring congressional intent for crimes that are not dependent on the locality in which they were committed but are enacted to allow the government to defend itself against destruction, or fraud wherever perpetrated).

However, the Ninth Circuit has also held that the application of the Maritime Drug Law Enforcement Act does not require the Government to demonstrate a "nexus" between the crime and the United States where the prosecution is of a United States citizen and a resident alien on board a stateless vessel. United States v. Juda, 46 F. 3d 961 (9th Cir. 1995). The jurisdictional link there was the U.S. nationality of one defendant and constructive U.S. nationality of the vessel, under long-standing rules that apply to "stateless" ships at sea.

Other circuit courts have taken a different approach. See United States v. Pinto-Mejia, 720 F. 2d 248, 259 2nd Cir. 1983); Leasco Data v. Maxwell, 468 F. 2d 1326, 1334 (2d Cir. 1972); United States v. Howard-Arias, 679 F. 2d 363, 371 (4th Cir. 1982); United States v. Martinez-Hiddalgo, 993 F. 2d 1052 (3d Cir. 1993). It is therefore clear that while extraterritorial criminal jurisdiction is permissible, the appropriate standard to be used will depend on the reasoning in the circuit where the case is heard. For U.S. nationals who are defendants, the connection to the U.S. is their nationality; while for foreign national defendants, the connection is the U.S. status of their victim.

Goal 5: Domestic Prosecution of Offenders for Fleeing to the United States to Avoid Foreign Prosecution or Punishment (from Sarah Criscitelli's paper)

Federal law currently criminalizes unlawful flight to avoid prosecution (UFAP). 18 U.S.C. 1073 punishes whoever moves in interstate or foreign commerce to avoid prosecution or custody or confinement for a crime or attempt to commit a crime punishable by death or more than one year's imprisonment. A violation of Section 1073 is punishable by not more than five year's imprisonment. Prosecution is situated in the district where the original crime occurred or where the person was confined. Prosecution requires formal approval, in writing, by the Assistant Attorney General (or higher).

We propose a statute, patterned on the UFAP statute, that would make it a crime for a person to enter the United States to avoid foreign prosecution or punishment. This has potential complications, though we start with a very simple text along the following lines:

18 U.S.C. 1075. **Flight to the United States to avoid prosecution or punishment.**

(a) It shall be unlawful for any person knowingly and intentionally to move or travel to the United States from a point outside the United States with intent to avoid prosecution or custody or confinement after conviction, under the laws of another country, for a crime, or an attempt to commit a crime, that if committed in the United States would be punishable by a term exceeding five years' imprisonment under the laws of the United States. Violations of this statute shall be prosecuted in the federal district in which the person has been found, and only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

(b) Alternative One: Any person who violates this section shall be sentenced to the same fine and term of imprisonment that the person would receive had the crime been committed within the territory of the United States, except that the sentence shall not exceed the maximum penalty authorized in the country whose laws the person violated.
Alternative Two: Any person who violates this section shall be fined under this title or imprisoned not more than five years, or both.

Assuming we adopt this notion, we might want to consider whether we should propose additional elements or defenses. For example, if we allow imprisonment for the term the defendant would receive for the substantive crime under U.S. and/or foreign law, should we add a requirement that the government prove beyond a reasonable doubt that the defendant actually committed the foreign crime? If so, we raise the same concerns about the reliability of foreign evidence (and the other problems that can arise when we have to rely on foreign evidence) that will arise when we attempt to prove foreign offenses or adopt foreign prosecutions. If the person has fled after conviction, can he raise as an affirmative defense a challenge to the validity of the conviction? Even if we apply the more moderate penalty of five years' imprisonment, can the defendant raise an affirmative defense that his prosecution or conviction was impermissibly politically motivated? If the prosecution incorporates the underlying foreign crime, will that protect the person from extradition under a future treaty or even for prosecution in the country where the crime occurred under that country's double jeopardy law?

Despite the issues to be resolved if we adopt this approach, there is no doubt about the constitutionality

of such a statute. It does not create extraterritorial jurisdiction over a foreign crime; the crux of the crime here is flight to the U.S. to avoid prosecution, not the foreign crime itself, and the U.S. plainly has an interest in not being a world refuge for unextraditable criminals.

Goal 6: Enact a new jurisdictional statute, referencing serious crimes in Title 18, to permit the U.S. to prosecute for any offense committed abroad, regardless of the nationality of perpetrator or victim, or of any effects or connection to the U.S.

Present law: None

Proposed law: Add to Title 18 U.S.C. a new section 26, as follows:

(a). Whenever any person engages in conduct within the jurisdiction of any nation, and:

— (1) such person is found within the territory of the United States; and

— (2) any foreign government has filed criminal charges, or has opened a criminal investigation, against such person based upon such conduct and the charges or investigation may lead to a sentence of imprisonment of one year or more; and

— (3) if such conduct had been committed within the territory of the U.S. or within its special maritime and territorial jurisdiction it would be punishable by any Act of Congress by a term of imprisonment of one year or more;

such person shall be subject to prosecution and punishment according to the laws of the United States.

(b). In any prosecution brought under paragraph (a), venue may be laid in the district where the defendant was taken into custody or where he committed any criminal conduct within the United States.

(c). The Assistant Attorney General for the Criminal Division may prescribe rules for the Department of Justice, including United States Attorneys, to govern the institution of all prosecutions brought under this section. Such rules may consider, inter alia, the existence of claims or assertions of jurisdiction by any foreign government(s) and the effects of such claims or assertions on the potential prosecution of a case by the United States; the likelihood of receiving cooperation by foreign governments in both the providing of evidence and access to witnesses located outside the United States; and the interests of justice in preventing persons from avoiding criminal liability by seeking safe haven in the United States for criminal conduct committed in foreign countries.

Legal Authority: Article 1, Sec. 2 grants Congress the right to "make all laws ... necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States ...". Article 2, Section 8 of the Constitution authorizes Congress to "define and punish ... felonies ... and offenses against the Law of Nations."

Articles I and III of the Constitution grant Congress the authority to define the subject matter jurisdiction of the U.S. courts. Therefore, Congress has the power to apply domestic criminal law extraterritorially. United States v. Yunis, 924 F.2d. 1086, 1091 (D.C. Cir. 1991); Federal Trade Commission v. Compagnie

de Saint-Gobain-Pont-a- Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980) (U.S. courts "obligated to give effect to an unambiguous exercise by Congress of its jurisdiction to prescribe even if such an exercise would exceed the limitations imposed by international law"); United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991) ("generally there is no constitutional bar to the extraterritorial application of United States penal law").

As noted earlier, if Congress wishes to create extraterritorial jurisdiction for crimes committed by nationals and non-nationals of the United States, it must evince a clear intent. That would especially be the case if Congress wishes to extend U.S. jurisdiction to conduct abroad where there are no effects on the United States, no victim or perpetrator with U.S. nationality, and no crimes involved that carry universal jurisdiction. Courts interpret statutes that purport to extend jurisdiction extraterritorially in accordance with dictates of "reasonableness" and international law is often used to gauge congressional intent. See United States v. Yunis, supra, 924 F. 2d at 1091.

Congress could legislate U.S. extraterritorial jurisdiction over certain offenses outside the U.S.— with neither the offender nor the victim a U.S. national— where the offender is found in the U.S., as it has done with some statutes punishing crimes of a universal nature (see list of statutes in Appendix II).[6] In all of those cases, however, Congress was implementing an international convention to which the U.S. had become a party. It would be a case of first impression if Congress legislated in the absence of a treaty or convention. Some Court of Appeals cases have held that as long as Congress has expressly stated an intent to reach conduct outside the United States, "a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment." United States v. Pinto-Mejia, 720 F. 2d 248, 259 (2d Cir. 1983) (emphasis added). Even the expansive Yunis opinion by Judge Abner Mikva, however, tied the clear expression of Congressional intent to its "consisten[cy] with treaty obligations of the United States." Yunis, *supra*, at 1091.

The Restatement of the Foreign Relations Law of the U.S., 3d., Sec. 404, moreover, recognizes that States may punish offenses having no jurisdictional connection to the State, other than that the "community of nations" has condemned these offenses and has a general interest in cooperating to suppress them (as reflected in widely accepted international agreements and resolutions of international organizations) (at 254). There is an expanding class of offenses subject to universal jurisdiction, because of new international agreements, even if those agreements have not become customary law and do not bind non-State parties (at 255). International agreements have provided for extraterritorial jurisdiction for newly-created offenses, and the agreements obligate the parties to punish or extradite, even when the offense was not committed within their territory or by a national. The U.S. is a party to many of these agreements, such as the Hostage-Taking Convention (see list of statutes and conventions in Appendix I; Restatement at 256-57). Another recent international agreement extending jurisdiction is the Convention on the Safety of UN and

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[6]All of the Conventions listed in Appendix I contain provisions in which States undertake to punish or extradite the offender, even when the offense was not committed within their territory or by a national. The United States is a party to each of these Conventions. More importantly, the implementing legislation for each of these Conventions provides for the United States to exercise jurisdiction over the offender if he is found in the United States regardless of where the offense was committed.

Associated Personnel (Dec. 9, 1994), 34 I.L.M 482. (U.S. signed but not yet ratified). Articles 10 (4), 13, and 14 of this Convention provide for prosecution of offenders in the state where they are found, without regard to any other connection that state has to the defendant, the crime, or the victims.

Due Process

One of the challenges sure to be raised by defense counsel and others to extending U.S. law to overseas conduct by non-U.S. nationals is whether such law violates due process. Courts have determined that such applications of extraterritorial jurisdiction do not violate due process if they are neither arbitrary nor fundamentally unfair. United States v. Davis, 905 F.2d 245 (9th Cir. 1990), cert. denied, 498 U.S. 1047 (1991) (application of the Maritime Drug Law Enforcement Act did not violate the due process clause because there was a sufficient nexus between the defendant and the United States); United States v. Medjuck, 156 F.3d 916 (9th Cir. 1996), United States v. Martinez-Hidalgo, 993 F.2d 1052 (3d Cir. 1993) (it was not fundamentally unfair for Congress to provide for punishment of persons apprehended with narcotics on high seas); United States v. Juda, 46 F.3d 961 (9th Cir. 1995) (it was not unreasonable, arbitrary, or fundamentally unfair for the United States to apply United States law to defendants). Even for courts that may wish to apply a "nexus" test to determine whether acts committed abroad can be punished by U.S. law, holding defendants to account in U.S. courts for crimes committed in foreign countries can be reasonable, non-arbitrary, and fair. See United States v. Felix-Gutierrez, 940 F. 2d 1200 (9th Cir. 1991). The alternative very often is that they will not face trial and punishment anywhere for crimes of which they are accused, unless they can be prosecuted when they are found in the U.S.

Goal 7: Expansion of existing money laundering statutes to cover a broader range of extraterritorial specified unlawful activity.

OMB has already cleared a series of proposed statues to expand the money laundering statutes. The statute now criminalizes the laundering in the U.S. of money obtained through foreign crimes of violence. Section 8 of the proposed Money Laundering Act of 1999 would criminalize the movement in or through the United States of proceeds of fraud committed against foreign persons or governments, bribery, smuggling or export violations, or any offense that, under a multilateral treaty, the U.S. must prosecute or extradite. They would also enable the government to seize and forfeit these funds and to disallow a person to litigate the forfeiture if he refuses to subject himself to the jurisdiction of a U.S. court (statutorily imposing the equitable "fugitive disentitlement doctrine").

APPENDIX I

1. Maritime Drug Law Enforcement Act (MDLEA), 46 App. U.S.C. 1902: makes it a crime to intentionally possess, manufacture or distribute a controlled substance on board a vessel of the United States or a vessel "subject to U.S. jurisdiction" (i.e. one not registered to any State).

2. 18 U.S. C. § 2340A (implements Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 [1984], modified, 24 I.L.M. 535 [1985]) makes it a crime for anyone outside the United States to commit or attempt to commit torture. Jurisdiction over the proscribed activity is mandated if (1) the alleged offender is a U.S. national; or (2) the alleged offender is present in the U.S., irrespective of the nationality of the victim or the alleged offender.

3. 18 U.S.C. § 1091 (1988) (implements The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277), the Genocide Convention Implementation Act of 1987: makes it an offense, whether in peacetime or war, to destroy, in whole or substantial part, a national, ethnic, racial or religious group. The offense must be committed within the United States or the alleged offender is a national of the United States.

4. 18 U.S. C. § 37 (1994) (implements Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 U.S.T 565, T.I.A.S. No. 7570 [1973]) makes it an offense for any person to unlawfully and intentionally, using any device, substance, or weapon, to perform a violent act against a person at an airport serving international civil aviation that causes serious bodily injury or death. Jurisdiction over this offense is mandated if (1) the prohibited activity occurs in the United States; or (2)(a) the activity occurs outside the United States and the offender is later found in the U.S.; or (b) an offender or victim is a national of the U.S.

5. 18 U.S.C. § 1203 (1985) (implements the International Convention against the Taking of Hostages, Dec. 18, 1979 , T.I.A.S. No. 11,081) makes it a crime, whether inside or outside the United States, to seize or detain and threaten to kill, injure, or to continue to detain another person in order to compel a third person or a government organization to do or to abstain from doing any act as a condition for the release of the person detained. If the conduct occurred outside the United States, then it is an offense under this section if the offender is found in the United States.

6. 18 U.S.C. § 1116 - Murder or Manslaughter of foreign officials, official guests, or internationally protected persons: makes it a crime to kill or attempt to kill a foreign official, official guest or internationally protected person. If the victim of the offense is an internationally protected person outside the United States, the U.S. may exercise jurisdiction over the offense if ... (3) an offender is afterwards found in the United States.

7. 18 U.S.C. § 1201 - Kidnaping: makes it a crime to seize, confine, inveigle, decoy, kidnap, abduct or carry away and hold for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof. If the victim of an offense is an internationally protected person outside the United States, the U.S. may exercise jurisdiction over the offense if ... (3) the offender is afterwards found in the United States.

8. 18 U.S.C. § 112 - Protection of foreign officials, official guests, and internationally protected persons: makes it a crime to assault, strike, wound, imprison or offer violence to a foreign official, official guest, or internationally protected person or make an other violent attack upon such person. If the victim of an offense is an internationally protected person outside the United States, the U.S. may exercise jurisdiction over the offense if ... (3) an offender is afterwards found in the United States.

9. 49 U.S.C. § 46502 - Aircraft Piracy: makes it a crime to seize or exercise control of an aircraft in the special aircraft jurisdiction of the United States by force, violence or any form of intimidation. This statute also applies to an individual committing an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft) on an aircraft in flight *outside the special aircraft jurisdiction of the United States.* There is jurisdiction over the offense if the offender is afterwards found in the United States, or is a national of the United States.

Other Multilateral Conventions

Hague Convention for Suppression of Unlawful Seizure of Aircraft, 22 UST 1641, TIAS 7192 (1971): makes it an offense for any person on board an aircraft in flight to unlawfully, by force or threat thereof, to seize or exercise control of that aircraft.

Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 28 U.S.T 1975, TIAS 8532, 1035 UNTS 167 (1977): makes it an offense to murder, kidnap or commit any other attack upon the person or liberty of an internationally protected person likely to endanger his person or liberty.