# The New Financial Extraterritoriality

*Pierre-Hugues Verdier**

## Abstract

*In a series of recent cases, the Supreme Court has vigorously applied the presumption against extraterritoriality to curtail the territorial reach of federal statutes. During the same period, however, federal prosecutors have brought an unprecedented wave of criminal cases against foreign banks for activities centered abroad, including benchmark manipulation, tax and sanctions evasion, and money laundering. These cases have led to some of the largest criminal fines ever levied and imposed costly compliance reforms affecting the defendants' worldwide activities. This Article argues that, from a doctrinal standpoint, these two trends are on a collision course. Indeed, some lower courts have already questioned the compatibility of expansive extraterritorial application of federal criminal law in corporate criminal cases with the Supreme Court's case law.*

*The Article then examines whether financial criminal extraterritoriality should be curtailed. It first shows that, because they are initiated and controlled by actors within the executive branch, foreign bank prosecutions do not engage the separation-of-powers rationale that motivates the presumption against extraterritoriality. Although managing foreign bank prosecutions raises unique challenges for the executive due to their implications for foreign relations and financial stability, the experience so far suggests that these implications can be successfully managed without compromising prosecutorial autonomy. From a broader policy standpoint, the Article argues that in a world that lacks a robust system of international financial regulation, extraterritorial criminal prosecutions are an important tool for protecting U.S. interests.*

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* Professor of Law, University of Virginia. The author thanks Ashley Deeks, Brandon Garrett, Michael Gilbert, Jack Goldsmith, Howell Jackson, Dotan Oliar, Sai Prakash, Hal Scott, Paul Stephan, Matt Stephenson, and participants in workshops at Harvard Law School and the University of Virginia School of Law for their comments on previous versions of this Article.

## Introduction

From a doctrinal standpoint, extraterritorial application of U.S. law appears to be at a nadir. In a series of recent cases—*Morrison v. National Australia Bank*,[1] *Kiobel v. Royal Dutch Petroleum Co.*,[2] and *RJR Nabisco, Inc. v. European Community*[3]—the Supreme Court vigorously applied the presumption against extraterritoriality to curtail the reach of federal statutes, including some that had been widely assumed to apply beyond the borders of the United States. The Court's message was consistent and simple: unless it clearly states otherwise, Congress is concerned with domestic conditions, not with what happens abroad,[4] and the separation of powers dictates caution by courts in extending the reach of U.S. law.[5] The presumption, omitted from the *Restatement (Third) of Foreign Relations Law*, makes a trium-

1 561 U.S. 247 (2010).

2 569 U.S. 108 (2013).

3 136 S. Ct. 2090 (2016).

4 *See, e.g.*, *RJR Nabisco*, 136 S. Ct. at 2100 ("[The presumption] reflects the more prosaic 'commonsense notion that Congress generally legislates with domestic concerns in mind.'" (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993))); *Kiobel*, 569 U.S. at 115 ("That canon . . . reflects the 'presumption that United States law governs domestically but does not rule the world.'" (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007))); *Morrison*, 561 U.S. at 255 (noting that the presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters").

5 *See, e.g.*, *RJR Nabisco*, 136 S. Ct. at 2100 ("[The presumption] [m]ost notably . . . serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries."); *Kiobel*, 569 U.S. at 115–16 ("This presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord' [and] . . . helps ensure that the Judiciary does not erroneously adopt an interpretation of [U.S.] law that carries foreign policy consequences not clearly intended by the political branches." (quoting EEOC v. Arabian Am. Oil Co. ("*Aramco*"), 499 U.S. 244, 248 (1991))).

phant return in the *Restatement (Fourth)*.[6] Alongside its lionization of the presumption against extraterritoriality, the Court also curtailed personal jurisdiction over foreign companies, further complicating the application of U.S. law to foreign activities and persons.[7] These cases seem to confirm the passing of a postwar era of expansive extraterritorial application of U.S. law.

This conclusion, however, would come as a surprise to an international banker or, for that matter, to a casual reader of the financial press. From their perspective, the post–financial crisis era seems a new golden age of U.S. extraterritoriality. Since 2008, U.S. prosecutors have brought numerous criminal actions against large foreign banks for alleged violations of U.S. law that occurred primarily outside U.S. territory. UBS, Switzerland's largest bank, paid $780 million to the United States in February 2009 for assisting tax evasion by U.S. customers. In June 2012, British bank Barclays paid $360 million for manipulating the London Interbank Offered Rate ("LIBOR"), a widely used interest rate benchmark, and another $1.9 billion in May 2015 for rigging foreign exchange rates. In December 2012, HSBC paid $1.9 billion for helping clients evade sanctions on Cuba, Iran, and Libya, and for anti–money laundering ("AML") failures in its Mexican operations.[8]

These well-publicized actions constitute only the most visible examples of an extensive enforcement campaign that took place from 2008 to 2016. U.S. prosecutors initiated dozens of cases against global banks for tax evasion, benchmark manipulation, money laundering, and sanctions violations. They released emails, text messages, and chat logs in which traders conspired to rig rates for bottles of champagne and boasted of their criminal activities. In the end, all of these cases were resolved by non-prosecution agreements ("NPAs"), deferred prosecution agreements ("DPAs"), or plea agreements, and none went to trial. Nevertheless, banks agreed to unprecedented fines and penalties: nearly $32 billion from 2008 to 2016 solely from the largest foreign banks in connection with the matters mentioned above.[9]

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6 *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporters' n.1 (AM. LAW INST. 2018) [hereinafter RESTATEMENT (FOURTH)].

7 *See* Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

8 These numbers include both the criminal fines and other penalties imposed by federal prosecutors and the penalties imposed by other U.S. regulatory agencies and state authorities.

9 This amount is based on a database of publicly available NPAs, DPAs, pleas, and regulatory settlements collected by the author and described in Section I.A, *infra*. The $32 billion

In many cases, prosecutors and regulators also required banks to implement extensive reforms in the United States and overseas. UBS agreed to terminate its business with U.S. customers in Switzerland and turn over many of their names, leading to a broader program under which dozens of Swiss banks settled with U.S. authorities.[10] Barclays and several other banks agreed to reform their internal compliance procedures for benchmark-setting and foreign exchange trading.[11] HSBC agreed to replace its senior management team, implement a global compliance program against money laundering and sanctions evasion, hire hundreds of new employees at a cost of hundreds of millions of dollars, exit several risky countries and business segments, and screen all of its clients worldwide against U.S. sanctions lists.[12]

Part I describes this new wave of global bank prosecutions and what distinguishes it from previous instances of U.S. extraterritoriality. Part II argues that, from a doctrinal standpoint, global bank prosecutions are on a potential collision course with the Supreme Court's recent case law on extraterritoriality. Many of the cases initiated by U.S. prosecutors rely, explicitly or implicitly, on aggressive extraterritorial application of U.S. criminal statutes such as mail fraud, wire fraud, and conspiracy, as well as of criminal remedies such as probation. Older case law sometimes supports expansive territorial readings of the relevant statutes, and corporate defendants have so far refrained from challenging them in light of the Court's recent cases. Nevertheless, these decisions provide ample grounds to question DOJ's broad jurisdictional claims. Extraterritorial financial prosecutions rest on vulnerable doctrinal foundations. In the coming years, courts will likely face the question, "Should global bank prosecutions be curtailed?" To answer it, one must look beyond doctrine to the policies that motivate the presumption against extraterritoriality, as well as to broader questions, such as the desirability of extraterritorial prosecutions as a tool to protect U.S. interests in a world that lacks comprehensive international financial regulation.

This Article undertakes such an investigation and proposes a qualified defense of the new financial extraterritoriality. Part III examines extraterritorial bank prosecutions in light of the separation-of-

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figure does not include fines and penalties on U.S.-based global banks; including them increases the total to more than $40 billion.

10 *See infra* notes 117–18 and accompanying text.

11 *See infra* note 120 and accompanying text.

12 *See infra* notes 102–15 and accompanying text.

powers rationale for the presumption, namely to "ensure that the Judiciary does not erroneously adopt an interpretation of [U.S.] law that carries foreign policy consequences not clearly intended by the political branches."[13] It first shows that extraterritorial bank prosecutions indeed risk creating tensions with foreign governments, as illustrated by foreign complaints, some of them at the highest political levels. Nevertheless, Part III argues that criminal prosecutions do not engage the separation-of-powers concerns that underlie the presumption. Unlike the civil causes of action curtailed by the Court in *Morrison*, *Kiobel*, and *RJR Nabisco*, they are initiated by the executive branch, which possesses the primary responsibility for managing the nation's foreign relations. More generally, the executive branch is best situated to balance the benefits of applying U.S. law extraterritorially against competing policy concerns such as diplomatic relations, national security, and financial stability.

Although this notion is uncontroversial in theory, Part III undertakes a closer examination of extraterritorial bank prosecutions to determine whether and how the executive branch can effectively fulfill its responsibility in practice. These prosecutions touch upon multiple areas of federal concern, including criminal justice, financial regulation, and foreign relations, each under the responsibility of different officials whose priorities often conflict. At the same time, important norms that prohibit presidential intervention in criminal prosecutions curtail the President's normal role as arbiter of conflicts within the executive branch. Although specialized regulatory agencies possess unique expertise, giving them a gatekeeping role in financial prosecutions is undesirable because their institutional incentives and embeddedness with the industry discourage them from robust enforcement. In response to these constraints, the executive branch has developed informal mechanisms through which Department of Justice ("DOJ") prosecutors consult with their counterparts in other departments and agencies, while avoiding direct presidential involvement and retaining final decisionmaking authority.[14] Thus, competing policy objectives are incorporated into the decisionmaking process without compromising prosecutorial autonomy. This informal system has been successful at avoiding major clashes with foreign nations or serious threats to financial stability.

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13 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013); *see also* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016).

14 *See infra* Section III.B.

Part IV looks beyond separation-of-powers concerns to the broader case for extraterritorial financial prosecutions as a tool of U.S. policy. Drawing on scholarship on corporate criminal prosecutions, it argues that criminal cases against global banks offer a combination of features—strong penalties, investigative capacity, and prosecutorial initiative—that complement civil and administrative enforcement by specialized agencies. Although unilateral U.S. action may risk international frictions, it is sometimes necessary to address situations where foreign governments fail to regulate practices whose harms materialize outside their borders. International cooperation could address such cross-border spillovers, but weaknesses in the current system of international financial regulation—which rests on voluntary cooperation by national regulators, nonbinding standards, and limited monitoring and enforcement—leave many gaps that can be ameliorated by unilateral action. In fact, U.S. prosecutions have spurred foreign reforms, including tax information sharing by Switzerland and more robust benchmark regulation by the United Kingdom and the European Union.

Part IV also argues that although the current decisionmaking process for extraterritorial financial prosecutions has been largely successful, it should be articulated more formally. It recommends that DOJ adopt policies that require central approval of such prosecutions, set forth a limited list of competing policies that can appropriately inform decisions, and establish a process by which prosecutors would consult other government actors with relevant expertise. More specifically, consultations should be limited to financial stability and national security and be directed to an interagency panel with predetermined membership. This approach would ensure that the expert agencies are systematically consulted while avoiding injecting too many actors and considerations in prosecutorial decisions. It would also—to some degree—address criticism of DOJ (such as the political storm following Attorney General Holder's "Too Big to Jail" comments) and protect the President and other senior officials from foreign and industry pressure to interfere with prosecutions.

This Article contributes to the debate on extraterritorial application of U.S. law by demonstrating the increasingly fragile legal foundations of longstanding assumptions regarding the reach of U.S. criminal law. It contributes to scholarship on foreign relations and the separation of powers by analyzing how the executive branch's role as arbiter of national policy comes under strain when confronted with the complex, multifaceted policy considerations involved in foreign

bank prosecutions. It proposes a framework to improve decisionmaking without compromising prosecutorial autonomy. Finally, it contributes to the debate on international financial governance by arguing that in a world of weak international financial regulation, unilateral action is often necessary to protect legitimate state interests and break deadlocks in international cooperation.

## I. What Is the New Financial Extraterritoriality?

### *A. Definition and Three Cases*

"Extraterritoriality" is an ambiguous term, one often laden with pejorative connotations.[15] While some scholars define extraterritorial jurisdiction broadly "to include any exercise of prescriptive jurisdiction that touches another state," others consider virtually any connection with the prescribing state sufficient to make an exercise of jurisdiction "territorial."[16] As will be seen, the Supreme Court's approach to the problem requires determining what specific connections with the United States make an exercise of jurisdiction permissibly territorial, based on the focus of the relevant statute.[17] Extraterritoriality, by this standard, means applying a statute to any situation that does not involve these particular connections to the United States; conversely, where the relevant connections are present, jurisdiction is territorial. This does not provide a universal definition of extraterritoriality, however, because other observers—including a foreign state affected by the U.S. assertion of jurisdiction—might nevertheless consider the exercise of jurisdiction impermissibly "extraterritorial."

Because this Article is concerned with exercises of U.S. jurisdiction over global banks that may raise objections by foreign governments, I define "extraterritoriality" as the application of U.S. law to activities conducted primarily outside U.S. territory by non-U.S. individuals or corporations. As the adverb "primarily" suggests, this is not a bright-line definition: virtually all activities targeted by the cases discussed in this Article have connections with the United States, usually because some conduct (usually peripheral) occurred here or because they distorted U.S. financial markets. Nevertheless, in virtually all cases, most of the relevant conduct occurred outside the United States

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15 *See* Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 Recueil des Cours 9, 43–44 (1994) ("The search for a satisfactory definition of extraterritorial jurisdiction . . . is doomed to failure: 'extraterritorial jurisdiction', like 'bureaucratic', is a term that could never be rescued from its unattractive reputation.").

16 Restatement (Fourth), *supra* note 6, § 402 reporters' n.1.

17 *See infra* notes 149–54 and accompanying text.

and non-U.S. employees played a predominant role, thus providing plausible grounds for foreign objections to U.S. jurisdiction.[18] This definition excludes cases targeting U.S. banks, as the jurisdiction of the United States to regulate its corporate entities' actions abroad is well established.[19] It also excludes cases against foreign banks for their U.S.-based activities, such as defective mortgage lending and securitization practices prior to the financial crisis.[20]

This Article focuses on criminal cases brought by U.S. prosecutors against global banks between 2008 and 2016. For this Article's purposes, "global banks" includes all non-U.S. banks that are or have been on the Financial Stability Board's list of Global Systemically Important Banks ("G-SIBs") between its first publication in 2010 and 2016.[21] The period coincides with both the post–financial crisis era and the Obama Administration, two potentially important drivers of the unprecedented volume of prosecutions and penalties. The prosecutions related primarily to three areas: tax evasion, benchmark manipulation, and violations of AML and sanctions laws. In these areas, prosecutors resolved cases against 14 of these banks (some repeatedly), imposing financial penalties exceeding $32 billion.[22] To illustrate and explicate this trend, the Article will draw on three salient cases.

*Facilitating Tax Evasion.* In February 2009, UBS, the largest bank in Switzerland, entered into a deferred prosecution agreement ("DPA") under which it agreed to pay $780 million in penalties for assisting U.S. clients in evading U.S. taxes.[23] According to the criminal

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18 *See* Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] AC 547 (HL) 631 (UK) (criticizing U.S. assertions of jurisdiction "over foreigners in respect of acts done outside the jurisdiction of that country").

19 *See, e.g.*, RESTATEMENT (FOURTH), *supra* note 6, § 410.

20 Global banks (including several foreign ones) have paid more than $300 billion in connection with such claims. However, because they are essentially territorial, civil rather than criminal, and include both public and private suits, they are not the focus of this Article.

21 The list includes those banks "whose disorderly failure, because of their size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity." FIN. STABILITY BD., REDUCING THE MORAL HAZARD POSED BY SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS 1 (2010). For the designation methodology, see BASEL COMM. ON BANKING SUPERVISION, GLOBAL SYSTEMICALLY IMPORTANT BANKS: UPDATED ASSESSMENT METHODOLOGY AND THE HIGHER LOSS ABSORBENCY REQUIREMENT (2013). In total, 34 banks are or have been on the list between 2008 and 2016 (26 if U.S. banks are excluded). A related book project will present a comprehensive dataset of publicly available enforcement actions by U.S. authorities against these banks.

22 The totals by category are $4.4 billion (tax evasion), $11 billion (benchmark manipulation), and $16.8 billion (AML/sanctions) (not including U.S. banks).

23 The penalties were $380 million in disgorgement and $400 million in backup federal withholding tax and restitution of U.S. taxes due by UBS's undeclared U.S. clients. Deferred Prosecution Agreement at 3, United States v. UBS AG, No. 09-60033-CR-COHN (S.D. Fla. Feb.

information filed by DOJ, UBS bankers actively marketed their services to U.S. customers. They boasted that "Swiss bank secrecy was impenetrable," and helped U.S. customers hide their identities and accounts by forming nominee structures in Panama, Hong Kong, the British Virgin Islands, and other offshore jurisdictions.[24] Between 2001 and 2007, UBS had approximately 20,000 U.S. clients with total assets of $20 billion, of which 17,000 concealed their accounts from the IRS.[25] This cross-border U.S. business generated approximately $120 to $140 million in annual revenues.[26]

UBS's business with undeclared U.S. clients was based outside the United States. A team of approximately sixty private bankers serviced them from the bank's offices in Geneva, Zurich, and Lugano.[27] U.S. clients visited these offices in person, or communicated with their bankers via telephone, fax, or email.[28] UBS bankers also travelled to the United States to deliver bank statements, money, and debit cards to their U.S. customers—which they concealed by falsifying internal reports.[29]

After UBS's DPA, U.S. prosecutors and the IRS continued their campaign against Swiss bank secrecy. In May 2014, Credit Suisse, the second-largest Swiss bank, pleaded guilty to U.S. charges based on very similar facts and agreed to pay $2.6 billion in fines and restitution.[30] As will be seen below, U.S. authorities have also charged several individual U.S. clients and foreign bankers, as well as smaller Swiss banks, in connection with similar schemes.[31]

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18, 2009) [hereinafter UBS DPA]. DOJ filed a criminal information against UBS on one count of conspiracy to defraud the United States, 18 U.S.C. § 371 (2012). Information para. 11, United States v. UBS AG, No. 09-60033-CR-COHN (S.D. Fla. Feb. 18, 2009) [hereinafter UBS Information].

24 UBS Information, *supra* note 23, para. 18; Statement of Facts para. 11, Exhibit C to Deferred Prosecution Agreement, United States v. UBS AG, No. 09-60033-CR-COHN (S.D. Fla. Feb. 18, 2009) [hereinafter UBS Statement of Facts].

25 UBS Information, *supra* note 23, para. 4; *see also* UBS Statement of Facts, *supra* note 24, para. 8 (noting that approximately 11,000 to 14,000 U.S.-domiciled U.S. private clients did not provide Form W-9 or an equivalent).

26 UBS Statement of Facts, *supra* note 24, para. 8.

27 *Id*. para. 6.

28 *Id.*

29 *See* UBS Information, *supra* note 23, paras. 17, 19; UBS Statement of Facts, *supra* note 24, paras. 6–7; *cf.* BRADLEY C. BIRKENFELD, LUCIFER'S BANKER (2016).

30 Plea Agreement at 4–5, United States v. Credit Suisse AG, No. 1:14-CR-188 (E.D. Va. May 19, 2014) [hereinafter Credit Suisse Plea Agreement]. The plea was for conspiracy, 18 U.S.C. § 371 (2012), to aid, assist, procure, counsel, or advise in the preparation or presentation of false income tax returns to the IRS, 26 U.S.C. § 7206(2) (2012). Credit Suisse Plea Agreement, *supra*, at 1.

31 Deutsche Bank also entered into an NPA with the U.S. Attorney for the Southern Dis-

*Benchmark Manipulation*. In June 2012, Barclays, a storied British bank that traces its origins to the seventeenth century, agreed to pay $160 million in penalties under a NPA with DOJ for manipulating the LIBOR, plus $200 million to the Commodity Futures Trading Commission ("CFTC") in a related regulatory settlement.[32] Barclays was one of the 16 banks who submitted daily estimates of their U.S. dollar borrowing costs in London to the British Bankers' Association ("BBA"), which compiled them to generate daily LIBOR rates.[33] These rates were broadly disseminated through financial-data services and the press and used as benchmarks for financial contracts around the world, including debt securities, loans, derivatives, and even U.S. consumer mortgages.[34]

Although Barclays's LIBOR submissions were supposed to be independent from the bank's trading positions, DOJ filings described in detail, based on internal emails and calls, how Barclays's derivatives traders manipulated them.[35] Traders did this not only to benefit their own positions, but also as a favor to traders at other banks.[36] After a Barclays trader agreed to pass along a request for lower LIBOR to the bank's money-market desk, an external trader famously replied: "Dude I owe you big time! Come over one day after work and I'm opening a bottle of Bollinger! Thanks for the libor."[37] DOJ, CFTC, and FCA documents contain numerous other incriminating quotes, which were widely publicized at the time.[38] The bank also underre-

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trict of New York, agreeing to pay $553.6 million for marketing illegal tax shelters to U.S. clients. Letter from Preet Bharara, U.S. Attorney, S.D.N.Y., to Mark F. Pomerantz, Paul, Weiss, Rifkind, Wharton & Garrison LLP 3 (Dec. 21, 2010).

32 Letter from Denis McInerney, Chief, Criminal Division, Fraud Section, U.S. Dep't of Justice, to Steven R. Peikin et al., Sullivan & Cromwell LLP (June 26, 2012) [hereinafter Barclays NPA]. Barclays also agreed to pay £59,500,000 to the U.K. Financial Services Authority, bringing the total to approximately $453,000,000 at contemporary exchange rates. U.K. Financial Services Authority, Final Notice to Barclays Bank PLC para. 1 (June 27, 2012). The Barclays NPA did not cite specific criminal statutes, and no information or indictment was issued. Resolutions with other global banks for LIBOR and foreign exchange manipulation refer to wire fraud, conspiracy to commit wire fraud, Sherman Act violations, CEA violations, and New York regulatory violations.

33 Statement of Facts para. 2–7, Exhibit A to Barclays NPA, *supra* note 32 [hereinafter Barclays Statement of Facts].

34 Barclays Statement of Facts, *supra* note 33, para. 1.

35 *Id.* paras. 11–22.

36 *Id.* paras. 23–29.

37 *Id.* para. 26; U.K. Financial Services Authority, Final Notice to Barclays Bank PLC, para. 83 (June 27, 2012).

38 *See, e.g.*, Janet Paskin, *"Who's Going to Put My Low Fixings in?"—Highlights from the Barclays Emails*, WALL ST. J. (June 27, 2012, 1:29 PM), https://blogs.wsj.com/deals/2012/06/27/

ported its borrowing costs during the financial crisis to give the appearance of financial strength.[39]

The Barclays traders and submitters involved in manipulating LIBOR were based outside the United States, as were their co-conspirators and the BBA officials to whom the submissions were sent. The filings do not allege that Barclays's counterparties were located in the United States, although some may have been.[40] From an economic standpoint, the principal connection between the fraud and the United States was that it targeted a benchmark rate widely used for U.S. transactions.[41] In the following years, several other global banks settled U.S. charges of manipulating LIBOR and other benchmarks. In total, between 2012 and 2016, Barclays, Lloyds, UBS, Royal Bank of Scotland, Deutsche Bank, and HSBC paid fines and penalties of more than $11 billion. Several individuals were charged, most saliently former UBS and Citigroup trader Tom Hayes, who was sentenced to 14 years in prison by a British court in 2015.[42]

*Money Laundering and Sanctions Evasion*. In December 2012, HSBC, the largest U.K.-based bank, entered into a DPA under which it agreed to pay $1.25 billion in penalties for numerous violations of U.S. sanctions and AML laws.[43] The DPA and a prior congressional

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whos-going-to-put-my-low-fixings-in-highlights-from-the-barclays-emails/ [https://perma.cc/6K8N-9EUB].

39 Barclays Statement of Facts, *supra* note 33, paras. 35–36.

40 Barclays Statement of Facts, *supra* note 33, does not identify the name or location of the counterparties to the trades. In at least one other LIBOR case, against UBS and Citigroup trader Tom Hayes, prosecutors specifically alleged that a U.S. counterparty—a fund management firm in Purchase, New York—was defrauded. Complaint para. 3, United States v. Hayes, No. 12-MAG-3229 (S.D.N.Y. Dec. 12, 2012).

41 Other connections may have existed for some of the cases, although public documents provide scant details. For example, some communications relating to the fraud may have transited through the United States, and the fraud may have affected transactions entered into with U.S. counterparties.

42 On the Hayes trial, see generally David Enrich, The Spider Network (2017); Liam Vaughan & Gavin Finch, The Fix (2017). In addition to the case against UBS traders Hayes and Roger Darin, U.S. criminal cases relating to interest rate and foreign exchange manipulation have been brought against individual traders and brokers at Rabobank, Deutsche Bank, ICAP, Société Générale, HSBC, Barclays, Citigroup, and JPMorgan Chase. *See, e.g.*, Press Release, U.S. Dep't of Justice Office of Pub. Affairs, Two Former Rabobank Traders Sentenced to Prison for Manipulating U.S. Dollar and Japanese Yen LIBOR Interest Rates (Mar. 10, 2016), https://www.justice.gov/opa/pr/two-former-rabobank-traders-sentenced-prison-manipulating-us-dollar-and-japanese-yen-libor [https://perma.cc/ES6N-8LMD]. As of December 2017, 11 individuals had been convicted or pleaded guilty in connection with these cases.

43 Deferred Prosecution Agreement para. 7, United States v. HSBC Bank USA, N.A., No. 12-763 (E.D.N.Y. Dec. 11, 2012) [hereinafter HSBC DPA]. The criminal information charged that HSBC had "knowingly, intentionally and willfully facilitated prohibited transactions for sanctioned entities in Iran, Libya, Sudan and Burma" in violation of the International Emer-

investigation detailed how foreign affiliates of HSBC routed prohibited U.S. dollar payments for entities in Iran, Libya, Sudan, Burma, and Cuba through HSBC's U.S. subsidiary, HSBC Bank USA.[44] In order to avoid detection by HSBC Bank USA's compliance systems, HSBC employees outside the United States scrubbed wire-transfer messages of references to sanctioned countries and entities, used an alternative message format under which customers were not identified, and—in at least one case—instructed a sanctioned entity on how to format its wire-transfer requests to avoid detection.[45]

Thus, "HSBC Group's conduct, which occurred outside the United States, caused HSBC Bank USA and other financial institutions located in the United States to process payments that otherwise should have been held for investigation, rejected, or blocked pursuant to U.S. sanctions."[46] HSBC's DPA was only one of many settlements entered into between DOJ and large foreign banks for similar conduct: from 2009 to 2016, Lloyd's, Credit Suisse, Barclays, ING, Standard Chartered, Royal Bank of Scotland, Commerzbank, Crédit Agricole, and Deutsche Bank were sanctioned by DOJ and U.S. regulators. The U.S. enforcement campaign culminated in June 2014, when BNP Paribas, France's largest bank, pleaded guilty and paid nearly $9 billion to U.S. authorities for evading U.S. sanctions on Sudan, Iran, Cuba, and several other designated entities.[47] The HSBC case also involved massive AML-compliance failures, as a result of which HSBC processed billions of dollars for Mexican drug cartels and other criminal organizations.[48] In total, non-U.S. G-SIBs paid more than $16 billion in fines and penalties for sanctions evasion and AML deficiencies.

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gency Economic Powers Act, 50 U.S.C. §§ 1702, 1705 (2012), and "knowingly, intentionally and willfully facilitated transactions for sanctioned entities in Cuba" in violation of the Trading with the Enemy Act, 50 U.S.C. App. §§ 3, 5, 16. Information paras. 25, 27, *HSBC Bank USA, N.A.*, No. 12-763. HSBC's U.S. subsidiary was also charged with violating the Bank Secrecy Act by failing to maintain effective anti–money laundering policies and to conduct due diligence on correspondent bank accounts. *Id.* paras. 22–23.

44 Statement of Facts para. 52, Attachment A to Deferred Prosecution Agreement, *HSBC Bank USA, N.A.*, No. 12-763 [hereinafter HSBC Statement of Facts].

45 *Id.* para. 53; *see also* U.S. SENATE, COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, PERMANENT SUBCOMM. ON INVESTIGATIONS, U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS, AND TERRORIST FINANCING: HSBC CASE HISTORY (July 17, 2012) [hereinafter HSBC PSI REPORT].

46 HSBC Statement of Facts, *supra* note 44, para. 54.

47 Letter from Preet Bharara, U.S. Attorney, S.D.N.Y., to Karen Patton Seymour, Sullivan & Cromwell LLP (June 27, 2014) [hereinafter BNP Plea Agreement].

48 HSBC PSI REPORT, *supra* note 45, at 35–36.

Extraterritorial application and enforcement of U.S. law to financial activities is hardly a new phenomenon. In the 1980s, the United States and its European allies clashed over application of U.S. sanctions laws to Libyan accounts held at foreign branches of U.S. banks.[49] Europeans vocally denounced the 1996 Helms-Burton Act, which threatened secondary sanctions on foreign firms doing business with Cuba.[50] They also resisted extraterritorial application of U.S. antitrust and securities laws, sometimes adopting blocking statutes against U.S. enforcement.[51] These clashes later abated as Europe and other major jurisdictions recognized extraterritorial antitrust jurisdiction, coordination arrangements emerged, and convergence of substantive rules diminished the potential for conflicts.[52] The U.S. government also suspended the Helms-Burton provisions most objectionable to Europe.[53]

What, then, is "new" about the new financial extraterritoriality? First, prosecutors now play a central role in applying and enforcing U.S. law against large foreign banks, and they rely on criminal law—which brings into play robust investigative tools, wide and largely unreviewable discretion regarding charging decisions, and the potential for harsher sanctions and adverse publicity. Second, instead of discrete interventions to punish and deter criminal activities, these cases involve "structural reform prosecution,"[54] in which criminal disputes are resolved through agreements by which banks agree to extensive internal reforms to ensure future compliance with U.S. law.[55] The following two Sections explain these features.

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49 *See, e.g.*, Libyan Arab Foreign Bank v. Bankers Trust Co. [1989] 1 QB 728, 732–33, 748 (UK) (determining that the "rights and obligations of the parties" with respect to a Libyan bank account held in a U.S. bank subsidiary in London were governed by English law, despite a U.S. Executive Order applying U.S. sanctions to property and interests of the Libyan government held in "overseas branches of U.S. persons").

50 *See* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 923–25 (2d ed. 2008).

51 *See* Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 204 (2005) (discussing European resistance to application of the U.S. "effects test" for territoriality in competition law). *See generally* A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981) (discussing the enactment of the British Protection of Trading Interests Act as an attempt to defend the United Kingdom against unilateral enforcement of economic and commercial policies by other countries); Note, *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, 50 L. & CONTEMP. PROBS. 197, 198–204 (1987) (describing legislation in England, France, Canada, and Australia blocking international application of U.S. antitrust law).

52 *See* Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 152–53 (2009).

53 *See* LOWENFELD, *supra* note 50, at 925.

54 Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007).

55 *See infra* Section I.C.

### *B. The Global Bank as Corporate Criminal*

The latest round of extraterritorial prosecutions takes global banks well outside their usual habitat of oversight and enforcement by specialized regulatory agencies, into harsher and less familiar terrain. Unlike the detailed regulations and guidance issued by agencies, federal criminal law is extraordinarily broad, allowing prosecutors to charge a wide range of behavior they consider dishonest.[56] The mail and wire fraud statutes[57]—the latter of which was the basis for LIBOR prosecutions—"are among the most flexible weapons in the federal prosecutorial arsenal."[58] They cover a wide range of fraudulent schemes, well beyond common-law definitions of fraud, and apply whether the schemes are successful or not.[59] They apply whenever mail or interstate wires are used in the course of the fraud, even if such communications are peripheral to the scheme and do not involve the defendant.[60]

Likewise, the federal conspiracy statute, used against UBS's business with undeclared U.S. clients, applies wherever "two or more persons conspire . . . to commit any offense against the United States."[61] Thus, any conspiracy to commit a federal crime—in UBS's case, filing a false tax return—is itself an offense, and if the crime would be a felony, the conspiracy is punishable by five years' imprisonment.[62] The conspiracy statute is a workhorse of federal criminal law: it requires only that the conspirators agree to commit an offense and commit an overt act in furtherance thereof.[63] In addition to being a crime in its own right, conspiracy is also a mode of liability, making all conspirators liable for the underlying offense.[64] The statute does not require that the underlying offense be completed, and the overt act need not

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56 Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. Rev. 757, 760–67 (1999).

57 18 U.S.C. §§ 1341, 1343 (2012).

58 Daniel C. Richman, Kate Stith & William J. Stuntz, Defining Federal Crimes 179 (2014).

59 *See* Pasquantino v. United States, 544 U.S. 349, 371 (2005) ("[T]he wire fraud statute punishes the scheme, not its success." (quoting United States v. Pierce, 224 F.3d 158, 166 (2d Cir. 2000))).

60 *See, e.g.*, United States v. Kim, 246 F.3d 186, 190 (2d Cir. 2001).

61 18 U.S.C. § 371 (2012).

62 *Id.*; Richman, Stith & Stuntz, *supra* note 58, at 476.

63 Richman, Stith & Stuntz, *supra* note 58, at 481 ("Conspiracy is usually defined to include two conduct elements. One element is the criminal agreement, and the other is an overt act in furtherance of the agreement."). The elements of the criminal agreement are a common goal, interdependence, and overlapping participants. *Id.* at 493.

64 *See* Pinkerton v. United States, 328 U.S. 640, 641, 646–47 (1946); Richman, Stith & Stuntz, *supra* note 58, at 476–77.

itself be illegal.[65] These are only a few of the criminal statutes deployed by U.S. prosecutors against global banks.[66]

Although the underlying misconduct is committed by employees, often without their superiors' approval or knowledge, this matters little to a bank's criminal liability. Under U.S. criminal law's strict *respondeat superior* doctrine, "a corporation is liable for the criminal acts of its employees and agents done within the scope of their employment with the intent to benefit the corporation."[67] An employee's scope of employment includes "all those acts falling within the employee's or agent's general line of work, when they are motivated—at least in part—by an intent to benefit the corporate employer."[68] As a result, corporate criminal liability in the United States is "spectacularly expansive,"[69] and corporations can be held liable for the act of a single employee. Limits on criminal prosecution of banks for misconduct within their ranks do not arise from substantive criminal law or corporate-liability doctrines, but from how prosecutors choose to exercise their discretion.

Moreover, U.S. law grants federal prosecutors wide discretion as to virtually all aspects of a criminal case: "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."[70] Although prosecutorial discretion is subject to ethical constraints, disciplinary rules "typically forbid only prosecuting without probable cause and concealing exculpatory evidence."[71] Until the 1990s, there were very few federal corporate prosecutions, which focused on situations where the individuals responsible could not be prosecuted.[72] In 1999, the DOJ issued the Holder Memorandum, the

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65 *See* United States v. Endicott, 803 F.2d 506, 514 (9th Cir. 1986).

66 For example, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 (2012), which was applied in the HSBC and BNP Paribas cases, allows the government to prohibit virtually all transactions involving a U.S. person and a sanctioned country or entity, and criminalizes willful violations. 50 U.S.C. § 1705(c) (2012). Another protean provision is the Sherman Act's broad prohibition on "[e]very contract, combination, . . . or conspiracy, in restraint of trade," 15 U.S.C. § 1 (2012), used in the foreign exchange manipulation cases. The aiding and abetting doctrine and accessory doctrine further broaden the reach of substantive criminal statutes. *See* 18 U.S.C. §§ 2, 3 (2012).

67 Mylan Labs., Inc. v. Akzo, N.V., 2 F.3d 56, 63 (4th Cir. 1993).

68 United States v. Singh, 518 F.3d 236, 249 (4th Cir. 2008).

69 Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2109 (2009).

70 United States v. Nixon, 418 U.S. 683, 693 (1974).

71 Garrett, *supra* note 54, at 915.

72 *See* BRANDON L. GARRETT, TOO BIG TO JAIL 6 (2013); Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144, 147 (Alon Harel & Keith N. Hylton eds., 2012).

first of a series of internal documents providing formal guidelines for federal corporate prosecutions.[73] The memorandum opened the door to corporate prosecutions and instructed prosecutors to consider a firm's compliance, reporting, and cooperation efforts in deciding whether to indict it.[74] The current version states that "[v]igorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public."[75] A study by Professor Brandon Garrett identified 2,262 corporate prosecutions between 2001 and 2012.[76]

Federal prosecutors also have broad discretion as to how to resolve a criminal case. Although they may bring it to trial, this only occurs in a minuscule proportion of cases. In 2010, 88.9% of federal criminal defendants took a plea of guilty or *nolo contendere*, often pursuant to a plea agreement.[77] Aside from plea agreements, "[t]here is a long-standing practice of adopting programs to defer and ultimately withdraw individual prosecutions so long as the defendants comply with certain conditions."[78] Beginning in the 1990s, federal prosecutors extended this approach to corporate defendants, entering into numerous NPAs and DPAs under which they agreed to comply with extensive conditions.[79] This approach has been codified by successive DOJ internal documents, beginning with the 2003 Thompson Memorandum, which recommended "granting a corporation immunity or amnesty or pretrial diversion" when it "appears to be necessary to the public interest."[80] Garrett's study finds 255 corporate DPAs and NPAs between 2001 and 2012, compared to 14 between 1992 and 2000.[81]

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73 Garrett, *supra* note 54, at 881. These guidelines, as amended, are now part of the U.S. DOJ Justice Manual. *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-28.000 (2018), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/VA2B-NS4Z].

74 *See* Arlen, *supra* note 72, at 151.

75 U.S. DEP'T OF JUSTICE, *supra* note 73, § 9.28-200.

76 GARRETT, *supra* note 72, at 301.

77 *See* HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. OF ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: CRIMINAL DEFENDANTS DISPOSED OF IN U.S. DISTRICT COURTS (2010), https://www.albany.edu/sourcebook/pdf/t5222010.pdf [https://perma.cc/UBE6-TJB5].

78 Garrett, *supra* note 54, at 874.

79 GARRETT, *supra* note 72, at 54–56.

80 Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Department Components and U.S. Attorneys (Jan. 20, 2003) (citation omitted).

81 GARRETT, *supra* note 72, at 298; *see also* Arlen, *supra* note 72, at 152 (noting that "federal prosecutors entered into at least 163" NPAs and DPAs between 2003 and 2010). On the trend towards corporate DPAs and NPAs, see generally Cindy R. Alexander & Mark A. Cohen,

Finally, prosecutors can choose from a large menu of sanctions and remedies to advance their objectives. Although imprisonment is not available for corporations, upon conviction the court may impose fines, restitution, and other remedial measures, and probation subject to conditions.[82] These sanctions must "provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."[83] When the parties reach a plea agreement, it is subject to court review, but judges usually respect the agreement.[84] NPAs and DPAs are even more flexible than plea agreements. Because DPAs involve a criminal case whose prosecution is then deferred, they are in principle subject to court approval, but courts have held that such review is extremely limited.[85] NPAs need not be approved by the court at all, since no criminal case is initiated.

### *C. Commandeering the Global Bank*

This combination of broad substantive criminal statutes, extensive prosecutorial discretion, and a flexible regime to resolve criminal cases by agreement, allows prosecutors to impose—beyond large fines and other financial penalties—extensive conditions regarding the global operations of international banks. The effects of these resolutions are not limited to those banks directly targeted by U.S. prosecutions; because of the deterrent and standard-setting effects of agreements between banks and U.S. prosecutors, these agreements can reshape practices throughout the entire financial industry. The

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*The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015); Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295 (2013).

82 U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENTENCING COMM'N 2016).

83 *Id.*; *see* GARRETT, *supra* note 72, at 5 (showing that since the mid-1990s, corporate criminal fines have increased, with a large spike from the mid-2000s to 2012).

84 FED. R. CRIM. P. 11(c)(3). During its review, the court is instructed to "ensure that plea negotiation practices: (1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and (2) do not perpetuate unwarranted sentencing disparity." U.S. SENTENCING GUIDELINES MANUAL ch. 6, pt. B, introductory cmt. (U.S. SENTENCING COMM'N 2016).

85 *See* United States v. HSBC Bank USA, N.A., 863 F.3d 125, 137 (2d Cir. 2017). Court review is based on the Speedy Trial Act, 18 U.S.C. § 3161(h)(2) (2012), and the Second Circuit held that this provision merely authorizes the court to verify that the DPA "does not constitute a disguised effort to circumvent the speedy trial clock." *Id.* at 138. It rejected the trial court's assertion of broader (though still limited) supervisory powers.

U.S. corporate-prosecution framework is intended not merely to punish criminal violations, but also to incentivize defendants to adopt costly and pervasive compliance measures to detect, deter, and report U.S. law violations. As applied to international banks, this framework effectively transforms them into worldwide enforcers of U.S. law and policy, both in their own internal operations and against their foreign clients.

First, in order to benefit from more favorable treatment by U.S. prosecutors and courts, firms must establish effective internal compliance procedures and controls, investigate potential misconduct, and report it promptly to U.S. authorities. Under the Federal Sentencing Guidelines, "[t]he two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility."[86] The Guidelines provide extensive detail as to what constitutes an effective compliance program, which must include procedures to prevent and detect criminal conduct, effective oversight and training, internal audits, whistleblowing procedures, and effective responses to criminal conduct.[87] The Guidelines also provide for substantial mitigation where an organization reports an offense "prior to an imminent threat of disclosure or government investigation" and cooperates fully in the investigation.[88]

DOJ prosecutorial guidelines mirror this strong emphasis on compliance and reporting. The DOJ Principles—which apply when "conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements"—require consideration of "the existence and effectiveness of the corporation's pre-existing compliance program," its "timely and voluntary disclosure of wrongdoing," and its "willingness to cooperate in the investigation of its agents."[89] Although not as detailed as the Guidelines, the DOJ Principles make it clear that corporations must maintain a robust compliance program, one that is not a mere "paper program" and that

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86 U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENTENCING COMM'N 2016).

87 *See id.* § 8B2.1. The existence of such a compliance program is taken into account in determining the corporation's sentence (usually a fine) under the Guidelines' culpability score. *Id.* § 8C2.5. According to Garrett, *supra* note 54, at 889, "[t]he approach creates, in effect, a 'due diligence' defense for corporations."

88 U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1) (U.S. SENTENCING COMM'N 2016). The Guidelines also provide that compliance program mitigation will not apply "if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities." *Id.* § 8C2.5(f)(2).

89 U.S. DEP'T OF JUSTICE, *supra* note 73, § 9-28.300.

provides "independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations."[90] Beyond ensuring adequate supervision, the DOJ "encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities."[91]

The overall thrust of these policies is clear: they "offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct."[92] In practice, therefore, a bank potentially subject to U.S. jurisdiction must devote extensive resources to elaborate internal compliance programs with dedicated personnel, effective reporting lines, attention at the highest levels, and detailed policies and procedures.[93] Furthermore, the banks must act as the first line of both the prevention of lawbreaking and its detection and investigation—ideally bringing fully documented cases to the government and assisting prosecutors in charging individual employees where they deem it appropriate.[94]

Second, although a strong compliance program may help a bank avoid prosecution or mitigate punishment, U.S. prosecutors still bring criminal charges when serious violations occur. The agreements banks enter into to resolve these charges often impose detailed reforms to ensure future compliance.[95] U.S. prosecutors follow the approach developed over the past two decades in other corporate criminal cases,

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90 *Id.* § 9-28.800 cmt. It must also include internal audit functions and a reporting system "reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law." *Id.* It must be "designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business." *Id.* Among other factors, DOJ will consider the program's comprehensiveness, the "number and level of the corporate employees involved," and remedial actions, such as disciplinary action against past violators. *Id.* In 2017, DOJ's Fraud Section issued more detailed guidelines for "Evaluation of Corporate Compliance Programs." U.S. DEP'T OF JUSTICE, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (2017), https://www.justice.gov/criminal-fraud/page/file/937501/download [https://perma.cc/4SCA-NH33].

91 U.S. DEP'T OF JUSTICE, *supra* note 73, § 9-28.900.

92 U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENTENCING COMM'N 2016).

93 It is noteworthy that the relevant provisions of the Sentencing Guidelines were adopted after the Sentencing Commission conducted the review required by the Sarbanes-Oxley Act. *See id.* § 8B2.1 cmt. background.

94 *See* U.S. DEP'T OF JUSTICE, *supra* note 73, § 9.28-300 (listing cooperation, compliance, disclosure, and remedial action as mitigating factors). Likewise, the Manual explicitly "encourages . . . corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own." *Id*. § 9-28.800.

95 *See* Garrett, *supra* note 54, at 855.

which Professor Garrett has described as "structural reform prosecution."[96] In shaping remedies, prosecutors enjoy broad discretion. As noted above, NPAs and DPAs are subject only to minimal court review.[97] They need not be "closely tied to the already often broad and vague underlying substantive law" but "need only accomplish the general purposes of that underlying substantive law and the Sentencing Guidelines."[98]

HSBC's DPA reflects one of the most extensive sets of internal reforms imposed on a global bank to date. The agreement provides a long list of measures taken by HSBC to address the AML and sanctions violations identified by U.S. prosecutors.[99] Many of these measures related to HSBC's U.S. affiliate, through which most of the illegal transactions were processed.[100] HSBC USA installed a new senior leadership team, clawed back bonuses, and dramatically expanded its AML department.[101] Its AML budget increased nine-fold to $244 million, and staffing increased from 117 employees and consultants to 1,147.[102] HSBC USA implemented structural reforms, separating its legal and compliance departments and requiring the AML director to report directly to the Board of Directors and senior management.[103] It exited risky business segments, terminating 109 correspondent relationships and its U.S. bank notes collection and distribution operations, and implementing a new customer risk-rating system.[104]

HSBC's reforms were not limited to the bank's U.S. affiliate. The U.K. parent company, HSBC Holdings, replaced its CEO and Chair-

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96 *Id.* at 854; *see also* Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 327 (2017) (noting that DPAs/NPAs "transform prosecutors into firm-specific quasi regulators").

97 *See supra* Section I.B.

98 Garrett, *supra* note 54, at 934. Sentences imposed following a plea agreement can also include probation, and the U.S. SENTENCING GUIDELINES MANUAL § 8D1.4 introductory cmt. (U.S. SENTENCING COMM'N 2016) specifies that a compliance and ethics program can be part of an organization's probation conditions. Barclays's May 2015 foreign exchange plea provided for a term of probation during which the bank was required to implement an adequate compliance program, cooperate with the CFTC, the FSA, and other regulatory agencies, and report annually to its federal probation officer. *See* Plea Agreement at 11–12, United States v. Barclays PLC, 3:15-cr-00077-SRU (D. Conn. May 20, 2015), https://www.justice.gov/atr/file/838001/download [https://perma.cc/5TE2-N87C].

99 *See* HSBC DPA, *supra* note 43, para. 5.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

man, simplified its global structure to better understand and address compliance risks, and restructured its bonus system.[105] Most strikingly, HSBC Holdings committed to "implement single global standards shaped by the highest or most effective anti-money laundering standards available in any location where the HSBC Group operates."[106] In practice, this meant that "all HSBC Group Affiliates will, at a minimum, adhere to U.S. anti-money laundering standards."[107] HSBC also undertook to use U.S. Office of Foreign Assets Control ("OFAC") sanctions lists "to conduct screening in all jurisdictions, in all currencies."[108] In addition to enforcing these U.S. standards worldwide, the bank agreed to restructure its global business in light of AML, sanctions, and other compliance risks.[109] The DPA indicated that it had already withdrawn from 42 businesses and 9 countries, begun a review of all customer files (which would cost $700 million), and adopted guidelines on whether to do business in high-risk countries and how that business should be limited.[110]

HSBC Holdings also agreed to the appointment of a corporate monitor to ensure implementation of these reforms and oversee its global compliance with U.S. AML and sanctions rules.[111] It agreed to cooperate fully with the monitor, appointed for 5 years, providing it access to all its information, facilities, and employees.[112] The monitor was instructed to prepare an initial report, delivered to HSBC and to U.S. authorities, whose recommendations HSBC was bound to implement—with the bank's only appeal being to DOJ itself.[113] The monitor was to report any "questionable, improper or illegal" AML practices, "any improper activity or activities [that] may constitute a significant violation of law," or "any criminal or regulatory violations by HSBC Group or any other entity discovered in the course of performing his or her duties" to HSBC's Chief Legal Officer and, in certain circumstances, directly to DOJ.[114] HSBC Holdings also consented to a Fed-

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.* para. 9; Corporate Compliance Monitor at B-1, B-2, Attachment B to HSBC DPA, *supra* note 43. On corporate monitors, see Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007).

112 *See* Corporate Compliance Monitor at B-4, Attachment B to HSBC DPA, *supra* note 43.

113 *Id.* at B-6, B-7.

114 *Id.* at B-9, B-10.

eral Reserve order requiring it to adopt a worldwide compliance program for U.S. AML and sanctions laws, subject to annual reviews by an independent consultant approved by the Federal Reserve and the U.K. Financial Services Authority.[115]

Although the HSBC DPA contains one of the most extensive sets of reforms imposed on any bank, it is far from unique. Several other international banks have also reached agreements with DOJ and U.S. regulators to resolve AML and sanctions violations charges containing compliance requirements affecting their global operations.[116] UBS, under its 2009 DPA on tax charges, agreed to exit its cross-border business with U.S. customers, improve its compliance with the IRS's "Qualified Intermediary" reporting program, implement revised group-wide legal and compliance governance structures, and appoint an external auditor to verify implementation.[117] More importantly, it agreed to disclose the identities of certain U.S. customers and cooperate with the U.S. government in prosecuting them.[118] This set the stage for a multiyear faceoff between the United States and Switzerland, resulting in unprecedented information-sharing agreements, settlements with numerous other Swiss banks, and several prosecutions of U.S. customers.[119] In resolving LIBOR and foreign exchange manipu-

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115 Written Agreement Between HSBC Holdings PLC at Board of Governors for the Federal Reserve System, Docket No.12-062-B-FB, at 6–7 (Dec. 11, 2012) (consenting to cease and desist order). The program must include, among others, "policies and procedures to ensure compliance with OFAC Regulations by Holdings's global business lines, including screening with respect to transaction processing and trade financing activities for the direct and indirect customers of Holdings subsidiaries," "the establishment of an OFAC compliance reporting system that is widely publicized within the global organization," "procedures to ensure that the OFAC compliance elements of the U.S. Law Compliance Program are adequately staffed and funded," and "training for Holdings employees in OFAC-related issues appropriate to the employee's job responsibilities." *Id.* It must be approved by the Federal Reserve Bank of Chicago. *Id.*

116 *See, e.g.*, Deferred Prosecution Agreement, United States v. Credit Agricole Corp. and Inv. Bank, No. 1:15 cr-00137 (D.D.C. Oct. 20, 2015); Deferred Prosecution Agreement, United States v. Commerzbank AG, 1:15-cr-00031-BAH (D.D.C. Mar. 11, 2015), ECF 1-1 [hereinafter Commerzbank DPA]; Deferred Prosecution Agreement, United States v. Lloyds TSB Bank PLC, No. 1:09-cr-00007 (D.D.C. Jan. 9, 2009); Alison Frankel, *S&C, Davis Polk Guide Royal Bank of Scotland to $500 Million Deferred Prosecution Agreement in Money-Laundering Case*, AmLaw Litig. Daily (May 11, 2010), https://www.sullcrom.com/siteFiles/News/Bourtin-Seymour-Am-Law-Litigation-Daily-RBS-05-11-2010.pdf [https://perma.cc/TBL4-4G4M]; Press Release, U.S. Dep't of Justice, Standard Chartered Bank Agrees to Forfeit $227 Million for Illegal Transactions with Iran, Sudan, Libya, and Burma (Dec. 10, 2012); Letter from Preet Bharara, U.S. Attorney, S.D.N.Y., et. al., to Karen Patton Seymour, Sullivan & Cromwell LLP (June 27, 2014) (regarding guilty plea of BNP Paribas).

117 UBS DPA, *supra* note 23.

118 *Id.*

119 *See* Press Release, Internal Revenue Serv., IRS to Receive Unprecedented Amount of Information in UBS Agreement (Aug. 19, 2009), https://www.irs.gov/newsroom/irs-to-receive-

lation cases, several foreign banks also agreed to reform their reporting procedures and implement other compliance reforms.[120]

The impact of these requirements on worldwide compliance with U.S. law is not limited to the individual bank that enters into an agreement with U.S. prosecutors. The DOJ Principles explicitly state that among the public benefits of corporate prosecutions is that "corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale."[121] This is particularly likely to be the case in global banks, which all engage in similar business lines, exchange employees on a regular basis, and spend billions on compliance—giving rise to an entire industry devoted to designing compliance solutions and best practices and disseminating them.[122] In

unprecedented-amount-of-information-in-ubs-agreement [https://perma.cc/8F4Y-S6FE] (describing an information-sharing agreement between the IRS, DOJ, and Swiss bank UBS); Protocol Amending the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, Signed at Washington on Oct. 2, 1996, Switz.-U.S., Sept. 23, 2009, S. TREATY DOC. NO. 112-1 (2011) [hereinafter Income Tax Protocol], https://www.congress.gov/112/cdoc/tdoc1/CDOC-112tdoc1.pdf [https://perma.cc/SNK4-JTBP] (describing a protocol between the United States and Switzerland, which has been signed but not ratified in the United States, to expand tax information sharing); *see also* Press Release, U.S. Dep't of Justice, United States and Switzerland Issue Joint Statement Regarding Tax Evasion Investigations (Aug. 29, 2013), https://www.justice.gov/opa/pr/united-states-and-switzerland-issue-joint-statement-regarding-tax-evasion-investigations [https://perma.cc/KG2F-GZZZ] (discussing program of cooperation and resulting settlement with Swiss banks); *Offshore Compliance Initiative*, U.S. DEP'T JUST., https://www.justice.gov/tax/offshore-compliance-initiative [https://perma.cc/2FG3-SBWN] (listing prosecutions related to offshore tax evasion); *Swiss Bank Program*, U.S. DEP'T JUST., https://www.justice.gov/tax/swiss-bank-program [https://perma.cc/VH9P-KR4T] (describing the Swiss Bank Program as "a path for Swiss banks to resolve potential criminal liabilities in the United States").

120 *See, e.g.*, Plea Agreement, United States v. Barclays PLC, *supra* note 98; Plea Agreement, United States v. Royal Bank of Scotland PLC, No. 3:15-cr-00080 (D. Conn. May 20, 2015); Plea Agreement, United States v. UBS AG, No. 3:15cr76(SRU) (D. Conn. May 20, 2015), https://www.justice.gov/file/440521/download [https://perma.cc/8UAD-3U3H]; Deferred Prosecution Agreement, United States v. Deutsche Bank AG, No. 3:15-cr-00061 (D. Conn. Apr. 23, 2015) [hereinafter Deutsche Bank DPA]; Deferred Prosecution Agreement, United States v. Lloyds Banking Group PLC, No. 3:14-cr-00165 (D. Conn. July 28, 2014); Deferred Prosecution Agreement, United States v. Royal Bank of Scotland PLC, 3:13-cr-00074-MPS (D. Conn. Feb. 5, 2013), https://www.justice.gov/iso/opa/resources/28201326133127414481.pdf [https://perma.cc/JN8Q-M6D6]; Letter from Denis McInerney, Chief, Criminal Division, Fraud Section, U.S. Dep't of Justice, to Steven R. Peikin et al., Sullivan & Cromwell LLP (June 26, 2012) (regarding Barclays Bank PLC); Letter from Denis McInerney, Chief, Criminal Division, Fraud Section, U.S. Dep't of Justice, to Gary R. Spratling, Gibson, Dunn & Crutcher LLP (Dec. 18, 2012) (regarding UBS AG).

121 U.S. DEP'T OF JUSTICE, *supra* note 73, § 9-28.200. Indeed, the DOJ expects such indictments to allow the government "to be a force for positive change of corporate culture." *Id.*

122 *See* Laura Noonan, *Banks Face Pushback over Surging Compliance and Regulatory*

several instances, banks also agreed to fire non-U.S. employees,[123] claw back their salaries or bonuses,[124] and assist in their prosecution,[125] enhancing the extraterritorial deterrent effect of U.S. law.

Finally, agreements with U.S. prosecutors leave banks under a Sword of Damocles. Under NPAs and DPAs, prosecutors typically reserve the right to revive criminal charges if the bank fails to implement its commitments. For example, the HSBC DPA provides that if DOJ determines "in its sole discretion" that HSBC has committed any U.S. crime, provided false information, or otherwise breached the agreement, the bank will be subject to prosecution.[126] Furthermore, HSBC specifically admits the truth of the allegations and facts in the DPA, and agrees that they will be admissible in evidence along with all information produced by the bank or obtained by DOJ in connection with the investigation.[127] This is consistent with the DOJ Principles, which provide that in corporate plea agreements "there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence."[128] As a result, conviction would be virtually certain.[129]

The threat of revived prosecution, however, should not be exaggerated. Despite the sweeping language of the agreements, which appear to give DOJ unfettered discretion as to determinations of breach, courts have held that they are, in fact, subject to due process limits.[130] In any event, prosecutors have so far treated violations of NPAs and DPAs relatively mildly. For example, in May 2015, Barclays recognized that it had engaged in foreign exchange manipulation during the pendency of a prior NPA relating to LIBOR manipulation. Like the

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*Costs*, FIN. TIMES (May 28, 2015), https://www.ft.com/content/e1323e18-0478-11e5-95ad-00144feabdc0 [https://perma.cc/HKW5-9T4Q] (regulatory and compliance costs are estimated at more than $4 billion per year at some of the largest global banks).

123 *See, e.g.*, Consent Order Under New York Banking Law § 44, *In re* BNP Paribas, S.A. (N.Y. Dep't Fin. Servs. June 30, 2014) (termination of 13 employees and discipline against a total of 45); Consent Order Pursuant to Banking Law § 44-a, *In re* Credit Suisse AG (N.Y. Dep't Fin. Serv. May 18, 2014) (termination of three employees and nonemployment of six others).

124 *See, e.g.*, Shane Croucher, *RBS Bankers' Bonuses Clawback to Pay for $475m US Libor Fixing Fine*, IBTIMES (July 2, 2014), https://www.ibtimes.co.uk/rbs-libor-fixing-fine-cftc-doj-greg-432187 [https://perma.cc/43YQ-BLJ9].

125 *See, e.g.*, Commerzbank DPA, *supra* note 116, para. 5; HSBC DPA, *supra* note 43, para. 6.

126 HSBC DPA, *supra* note 43, para. 16.

127 *See id.* para. 2.

128 U.S. DEP'T OF JUSTICE, *supra* note 73, § 9-28.1500 cmt.

129 *See* Garrett, *supra* note 54, at 927–28; *see also* Arlen & Kahan, *supra* note 96, at 334–35.

130 *See* Garrett, *supra* note 54, at 928 n.307; *see also* Arlen & Kahan, *supra* note 96, at 335 n.34.

other banks charged, it pleaded guilty and was convicted, although DOJ only increased Barclays's fine recommendation by $60 million in connection with the NPA violation.[131] Likewise, UBS's May 2015 plea agreement recognized that the bank breached its 2012 LIBOR-related DPA, and that it was "its fourth matter involving the Department over the course of approximately six years."[132] UBS agreed to a criminal fine of $203 million (and $342 million in Federal Reserve penalties), although it is unclear how much resulted from the breach.[133] Standard Chartered also paid $300 million to the New York State Department of Financial Services ("NYDFS") in August 2014 for improper implementation of its AML commitments.[134]

This suggests a real limitation of the new financial extraterritoriality: U.S. prosecutors may face a "ceiling" as to what they can do following repeat violations, beyond requiring guilty pleas and more fines. Although it was conventional wisdom in the post-*Enron* era that a financial institution could not survive a criminal indictment, let alone a conviction, this is clearly not the case today.[135] The five global banks targeted by foreign exchange manipulation charges in May 2015 all pleaded guilty and survived, as did BNP Paribas in its sanctions-evasion case and Credit Suisse in its tax-evasion case.[136] To be sure, U.S. authorities could take additional punitive steps, such as withdrawing authorization to operate in the United States or other essential licenses, such as U.S. dollar clearing. They could impose much larger fines, ones that would bring a global bank below regulatory capital levels, perhaps even force it into insolvency. But diplomatic and financial-stability considerations strongly militate against such steps.

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131 *See* Plea Agreement, United States v. Barclays, *supra* note 98, at 9–11; *see also* Plea Agreement, U.S. v. Royal Bank of Scotland, *supra* note 120. RBS, which also pleaded guilty to foreign exchange manipulation in May 2015, was also under a DPA from 2013, which is not mentioned in its plea agreement. *See id.*

132 *See* Plea Agreement, Exhibit 1 para. 2, United States v. UBS AG, *supra* note 120.

133 *See id.* para. 19.

134 *See* Consent Order under New York Banking Law §§ 39 and 44, *In re* Standard Chartered Bank, N.Y. Branch (Aug. 19, 2014).

135 *See* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 797–98 (2013) (providing empirical evidence that "no publicly traded company failed because of a conviction that occurred in the years 2001 to 2010").

136 *See* Press Release, U.S. Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas [https://perma.cc/9NV7-HK29]. In some cases, a foreign subsidiary pleaded guilty to U.S. charges alongside an NPA or DPA for the parent. *See e.g.*, Deutsche Bank DPA, *supra* note 120; Letter from Denis McInerney to Gary R. Spratling, *supra* note 120.

This state of affairs has led many commentators to complain that, like many large corporations, global banks are "too big to jail" and that the financial penalties imposed by U.S. authorities are, at best, an opportunistic tax on their global operations that does little to deter wrongdoing.[137] These commentators miss an important dimension of these agreements: their aim and effect is not just to punish and deter misconduct, but to enlist the largest banks in the world as worldwide enforcers of U.S. law and policy. By reshaping these banks' internal compliance programs, which have overall budgets of billions of dollars and thousands of employees who act as gatekeepers for financial transactions worldwide, the United States effectively acquires a force multiplier for its tax enforcement, anti–money laundering and anti–terrorist financing efforts, sanctions programs, and market regulation—in short, any U.S. law or policy in which global banks are involved. This is the core of the new financial extraterritoriality.

## II. Is the New Financial Extraterritoriality Lawful?

### *A. Legal Foundations of Criminal Extraterritoriality*

In recent years, the Supreme Court has vigorously enforced the presumption against extraterritorial application of federal statutes, substantially constraining the scope of federal securities-fraud law, the Alien Tort Statute, and RICO, among others.[138] Beyond reaffirming the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'"[139] the Court has provided extensive guidance regarding the application of the presumption, making it much more difficult to overcome than had previously been assumed by lower courts. The new, supercharged presumption

137 *See, e.g.*, Garrett, *supra* note 72, at 70 (pointing out that financial penalties in corporate prosecutions average to only 0.09% of market capitalization); Mary Kreiner Ramirez & Steven A. Ramirez, The Case for the Corporate Death Penalty: Restoring Law and Order on Wall Street 1–4 (2017). In March 2013, then–Attorney General Eric Holder told a Senate Committee that he was concerned about prosecuting large institutions "when we are hit with indications that if we do prosecute[,] . . . it will have a negative impact on the national economy, perhaps even the world economy." Garrett, *supra* note 72, at 252. Holder's remarks ignited a firestorm of controversy, and he later stated that they had been misconstrued and that no financial institution was immune from prosecution. *Id.* at 253–54.

138 *See, e.g.*, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

139 *Morrison*, 561 U.S. at 255 (quoting EEOC v. Arabian Am. Oil Co. ("*Aramco*"), 499 U.S. 244, 248 (1991) (citation omitted)).

prescribes that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[140]

Dissenters and commentators have criticized this new formulation for unduly turning an interpretive presumption into a "clear statement" rule,[141] although the Court has protested that it did no such thing.[142] Whether or not this is a fair characterization, it seems clear that the bar is high: in order for a statute to apply to foreign conduct, a court must find that "Congress has affirmatively and unmistakably instructed that the statute will do so."[143] The Court's recent cases have dismissed virtually all potential indications of congressional intent raised by litigants to rebut the presumption. Jurisdictional language referring to interstate and foreign commerce does not suffice,[144] nor do general congressional references to the international dimensions of the activities governed by the statute.[145] Historical background suggesting congressional intent that the statute apply abroad,[146] inferences from other provisions expressly excluding certain extraterritorial activities from the statute,[147] and the fact that the substantive law underlying a private cause of action has extraterritorial application or is universally accepted international law[148] have likewise failed to persuade the Court.

In sum, "[a]bsent clearly expressed congressional intent to the contrary,"[149] a federal statute does not apply extraterritorially. This does not mean that the statute cannot apply to any case with some international dimension: the second step of the Court's analysis re-

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140 *Morrison*, 561 U.S. at 255; *see also RJR Nabisco*, 136 S. Ct. at 2100 ("Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.").

141 *See, e.g.*, *Morrison*, 561 U.S. at 278 (Stevens, J., concurring) ("[T]he Court seeks to transform the presumption from a flexible rule of thumb into something more like a clear statement rule."); *Aramco*, 499 U.S. at 261 (Marshall, J., dissenting) ("[A]s our case law applying the presumption against extraterritoriality well illustrates, a court may properly rely on this presumption only after exhausting all of the traditional tools 'whereby unexpressed congressional intent may be ascertained.'" (citation omitted)).

142 *See, e.g.*, *Morrison*, 561 U.S. at 279–80 (Stevens, J., concurring) (quoting several such denials).

143 *RJR Nabisco.*, 136 S. Ct. at 2100 (quoting *Morrison*, 561 U.S. at 261); *see also Morrison*, 561 U.S. at 265 (requiring an "affirmative indication" that the statue applies extraterritorially).

144 *See Morrison*, 561 U.S. at 262–63 (quoting *Aramco*, 499 U.S. at 251).

145 *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 118–19 (2013); *Morrison*, 561 U.S. at 263.

146 *See Kiobel*, 569 U.S. at 119–21.

147 *See Morrison*, 561 U.S. at 263–65.

148 *See RJR Nabisco*, 136 S. Ct. at 2108; *Kiobel*, 569 U.S. at 117.

149 *RJR Nabisco*, 136 S. Ct. at 2100.

quires determining whether "the conduct relevant to the statute's focus occurred in the United States."[150] If so, "the case involves a permissible domestic application even if other conduct [related to the crime] occurred abroad."[151] Thus, the Court held in *Morrison* that purchase and sale transactions in securities were the focus of Section 10(b) of the Securities Exchange Act,[152] and that such transactions were sufficiently domestic only if the securities involved were listed on a U.S. exchange or, for unlisted securities, if the transaction took place in the United States.[153] The Court thus reversed the longstanding "conducts or effects" test applied by the Second Circuit.[154]

The Court's strict application of the presumption against extraterritoriality in *Morrison*, *Kiobel*, and *RJR Nabisco* suggests that it may revisit lower-court doctrine in other areas, including federal criminal law. The cases against global banks discussed above might have provided opportunities for such challenges, but, thus far, defendant banks have prudently elected to resolve them through NPAs, DPAs, or guilty pleas. As a result, there has been no authoritative determination regarding whether the federal criminal statutes invoked by prosecutors did, in fact, reach the misconduct of the defendant banks and their employees. To be sure, extraterritorial application of some relevant statutes, such as the Sherman Act, is strongly supported by statutory language and prior case law.[155] But, if challenged, substantial questions would arise regarding the application of other criminal statutes—such as wire fraud, conspiracy, and tax-related offenses—to conduct taking place largely or completely outside the United States.[156] More aggressive legal challenges may come as individual

150 *Id.* at 2101.

151 *Id.* Conversely, "if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*

152 *Morrison*, 561 U.S. at 267 (noting that these transactions were "the objects of the statute's solicitude," those which "the statute seeks to 'regulate,'" and whose "parties or prospective parties . . . the statute seeks to 'protect'" (quoting Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 10, 12 (1971))).

153 *Id.* at 273.

154 *See id.* at 255–61.

155 United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945). The Sherman Act itself gives no explicit indication of extraterritorial application, but since the 1940s federal courts have held that it applies to unlawful agreements in restraint of trade "though made abroad, if they were intended to affect imports and did affect them." *See id.*; *see also* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

156 Although the focus of this Article is federal criminal statutes, similar questions might arise in respect of other statutes applied in similar cases. For example, the CFTC imposed penal-

bank employees, whose incentives to settle differ from those of their employers, are prosecuted under the same statutes.

No recent Supreme Court case directly addresses the extraterritorial application of federal criminal statutes.[157] The leading precedent remains *United States v. Bowman*,[158] a 1922 case involving a conspiracy hatched by members of the crew of a U.S. ship to defraud the U.S. government by submitting false oil invoices.[159] The defendants invoked the presumption against extraterritoriality articulated in cases such as *American Banana Co. v. United Fruit Co.*[160] Chief Justice Taft, writing for the Court, drew a distinction between two categories of criminal statutes, the first of which did not apply extraterritorially absent express congressional direction:

> Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.[161]

The Chief Justice continued:

> [T]he same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or

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ties on banks involved in the LIBOR and foreign exchange scandals for violations of the antifraud provisions of the CEA, whose extraterritorial application has been questioned in light of *Morrison*. *See, e.g.*, Loginovskaya v. Batratchenko, 764 F.3d 266, 268 (2d Cir. 2014); *In re* Foreign Exch. Benchmark Rates Antitrust Litig., No. 13 Civ. 7789, 2016 WL 5108131, at *3, *7 (S.D.N.Y. Sept. 20, 2016). The application of state statutes could also be questioned based on state versions of the presumption.

157 *RJR Nabisco* centers on the extraterritorial application of RICO, but is primarily concerned with the statute's civil cause of action.

158 260 U.S. 94 (1922).

159 *Id.* at 95–96.

160 213 U.S. 347, 347 (1909); *see also* United States v. Flores, 289 U.S. 137, 155 (1933) ("[T]he criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extra-territorial effect.").

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

> agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.[162]

In subsequent years, lower courts gradually expanded *Bowman*'s reach, holding that a panoply of federal criminal statutes applied extraterritorially.[163] Some of these applications, such as to statutes prohibiting assault on U.S. agents,[164] theft of government property,[165] or murder of U.S. Congressmen,[166] plausibly fall within the second *Bowman* category. But other statutes held to have extraterritorial application, such as those proscribing possession of drugs with intent to distribute[167] or possession and production of child pornography,[168] appear on their face to fall within the first category. To reach this type of reprehensible conduct, lower courts effectively abandoned the distinction in *Bowman*, instead striving to discern congressional intent regarding each statute's reach. For example, *United States v. Baker*,[169] a widely cited Fifth Circuit decision, held that "[a]bsent an express intention on the face of the statutes," exercise of the power to legislate extraterritorially "may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime in-

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162 *Id.*

163 *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, 165 (2011); David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After* Morrison *and* Kiobel, 45 LOY. U. CHI. L.J. 71, 84–85 (2013).

164 *See, e.g.*, United States v. Al Kassar, 660 F.3d 108, 114–15, 118 (2d Cir. 2011); United States v. Vasquez-Velasco, 15 F.3d 833, 837, 841 (9th Cir. 1994); United States v. Felix-Gutierrez, 940 F.2d 1200, 1203–04 (9th Cir. 1991); United States v. Benitez, 741 F.2d 1312, 1313, 1317 (11th Cir. 1984).

165 *See, e.g.*, United States v. Cotten, 471 F.2d 744, 745, 750 (9th Cir. 1973).

166 *See, e.g.*, United States v. Layton, 855 F.2d 1388, 1392, 1395 (9th Cir. 1988).

167 *See, e.g.*, United States v. Wright-Barker, 784 F.2d 161, 165–67 (3d Cir. 1986); United States v. Baker, 609 F.2d 134, 135–37 (5th Cir. 1980).

168 *See, e.g.*, United States v. Harvey, 2 F.3d 1318, 1320, 1327 (3d Cir. 1993); United States v. Thomas, 893 F.2d 1066, 1067–69 (9th Cir. 1990). *But see* United States v. Martinelli, 62 M.J. 52, 53, 58 (C.A.A.F. 2005) (holding that the Child Pornography Prevention Act of 1996 cannot be viewed as extraterritorial under *Bowman*).

169 609 F.2d 134 (5th Cir. 1980).

volved."[170] Thus, according to the Eleventh Circuit, "courts have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm."[171]

The recent Supreme Court cases on extraterritoriality raise two questions concerning the continued viability of this framework. First, does *Bowman* itself remain viable precedent, or has it been implicitly overruled? It is questionable whether *Bowman*'s central notion—that an entire category of federal criminal statutes applies extraterritorially, without any textual support, because of those statutes' shared purpose to protect the government—would be sustained by today's Supreme Court. In *Morrison*, the Court derided such "judicial-speculation-made-law" and extolled universal application of the presumption against extraterritoriality to "preserv[e] a stable background against which Congress can legislate with predictable effects."[172] On the other hand, the Court has thus far upheld its own precedent in other areas, such as antitrust, where application of the modern presumption would have curtailed extraterritoriality.[173]

Second, even if *Bowman* remains binding precedent, lower courts have gone well beyond its reasoning in giving extraterritorial application to federal criminal statutes. *Bowman* held that courts could give extraterritorial effect to criminal statutes "enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents."[174] But lower courts have extended such application to statutes that do not fall within this category and whose text and structure do not reveal the "clear indication of an extraterritorial ap-

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170 *Id.* at 136. Indeed, at least one court has gone so far as to state in dicta that "[t]he ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes." United States v. Siddiqui, 699 F.3d 690, 700 (2d Cir. 2012).

171 United States v. MacAllister, 160 F.3d 1304, 1308 n.8 (11th Cir. 1998).

172 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010). The reporters of the RESTATEMENT (FOURTH) assert that *Bowman* is consistent with *RJR Nabisco* and *Morrison*, but in light of the Court's statements in *Morrison*, their attempt to reconcile these cases seems exceedingly optimistic. *See* RESTATEMENT (FOURTH), *supra* note 6, § 404 reporters' n.4.

173 On the continued viability of *Bowman* and extraterritorial application of U.S. criminal law, see Clopton, *supra* note 163; Keenan & Shroff, *supra* note 163. *See generally* CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2016); Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507 (2016); 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 (2018); S. Nathan Williams, Note, *The Sometimes "Craven Watchdog": The Disparate Criminal-Civil Application of the Presumption Against Extraterritoriality*, 63 DUKE L.J. 1381 (2014).

174 United States v. Bowman, 260 U.S. 94, 98 (1922).

plication" demanded by *Morrison*.[175] In doing so, they have often relied on precisely the sort of ambiguous indicia of congressional intent explicitly rejected by the Court. In other words, these precedents find little support in *Bowman* itself and often appear fundamentally incompatible with the Court's post-*Morrison* line of cases.[176] Although this does not necessarily mean that these statutes cannot apply to any cases involving conduct outside the United States, it does mean that the rules governing such application may be revisited in light of the Court's two-step analysis. The result could be a substantial tightening of these statutes' territorial reach.[177]

### *B. Two Pivotal Statutes: Wire Fraud and Conspiracy*

Consider two criminal statutes central to several of DOJ's cases against global banks: wire fraud[178] and conspiracy.[179] As used in cases of LIBOR and foreign exchange manipulation, the wire fraud statute falls within the second *Bowman* category: it simply protects "private individuals or their property,"[180] and as such is subject to the presumption against extraterritoriality. There is relatively little case law on the extraterritorial application of the wire fraud statute, but pre-*Morrison* cases held that any use of U.S. wires or other telecommunications systems in furtherance of the fraud was sufficient.[181] In *Pasquantino v. United States*,[182] the Supreme Court opined in dicta that because it "punishes frauds executed in 'interstate or foreign commerce,'" the wire fraud statute was "surely not a statute in which Congress had only 'domestic concerns in mind.'"[183] Although *Pasquantino* is often

175 *Supra* note 140 and accompanying text.

176 More recently, lower courts have begun to adopt the Court's robust version of the presumption in interpreting criminal statutes. *See, e.g.*, United States v. Vilar, 729 F.3d 62, 72–74 (2d Cir. 2013) (rejecting the government's argument, based on *Bowman*, that the presumption does not apply to criminal statutes). Earlier cases already questioned the stretching of *Bowman*. *See, e.g.*, Kollias v. D & G Marine Maint., 29 F.3d 67, 71 (2d Cir. 1994); United States v. Martinelli, 62 M.J. 52, 57–58 (C.A.A.F. 2005); United States v. Gladue, 4 M.J. 1, 4–5 (C.M.A. 1977).

177 *See* Keenan & Shroff, *supra* note 163, at 80 (arguing that courts should apply *Morrison* to narrow the reach of several federal criminal statutes); Williams, *supra* note 173, at 1384 (arguing that "the lax *Bowman* exception should be substantially narrowed or eliminated"). *But see* Clopton, *supra* note 163, at 139–40, 181–94 (arguing that in many cases extraterritorial application of federal criminal statutes is compatible with *Morrison*).

178 18 U.S.C. § 1343 (2012).

179 18 U.S.C. § 371 (2012).

180 United States v. Bowman, 260 U.S. 94, 98 (1922).

181 *See* United States v. Kim, 246 F.3d 186, 189 (2d Cir. 2001); United States v. Trapilo, 130 F.3d 547, 552 (2d Cir. 1997); United States v. Gilboe, 684 F.2d 235, 238 (2d Cir. 1982).

182 544 U.S. 349 (2005).

183 *Id*. at 371–72 (quoting 18 U.S.C. § 1343 (2000); Small v. United States, 544 U.S. 385, 388 (2005)).

cited to support extraterritorial application of the statute, it predated *Morrison*, which explicitly held that such generic "interstate or foreign commerce" language is insufficient to rebut the presumption against extraterritoriality.[184]

The Second Circuit, revisiting the issue in *RJR Nabisco* in light of *Morrison* and *Kiobel*, held that the wire fraud statute did not clearly demonstrate congressional intent that it apply extraterritorially.[185] However, the court went on to hold that the defendants' schemes had sufficient connections with the United States: the defendants designed them in the United States, used U.S. mails and wires, and traveled in and out of the country in furtherance thereof.[186] In effect, the court held that U.S. conduct in that case was sufficient to satisfy the second-step analysis. Although the court did not explicitly identify the statute's "focus," it stated that the defendant's conduct "clearly state[d] a domestic cause of action" and "satisfie[d] every essential element to prove a violation of a United States statute that does not apply extraterritorially."[187] Some recent cases have followed the Second Circuit's approach,[188] while other courts have declined to revisit the extraterritorial reach of the statute and reaffirmed that mere use of U.S. wires is sufficient.[189] Indeed, even in LIBOR-related cases dealing with nearly identical facts, courts have reached inconsistent results.[190]

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184 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 262–63 (2010).

185 *See* European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 141 (2d Cir. 2014). The Supreme Court explicitly declined to opine on this issue. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2099, 2105 (2016).

186 *See RJR Nabisco*, 764 F.3d at 142.

187 *Id.*

188 *See* Petroleos Mexicanos v. SK Eng'g & Constr. Co., 572 F. App'x 60, 61 (2d Cir. 2014) (holding that a company making "three minimal contacts with the United States: the financing was obtained here, the invoices were sent to the bank for payment, and the bank issued payment," was insufficient); United States v. Sidorenko, 102 F. Supp. 3d 1124, 1132 (N.D. Cal. 2015) (explicitly distinguishing *Bowman* and holding that the mail and wire fraud statutes do not apply extraterritorially).

189 *See* United States v. Driver, 692 F. App'x 448 (9th Cir. 2017); United States v. Georgiou, 777 F.3d 125, 138 (3d Cir. 2015); United States v. Kazzaz, 592 F. App'x 553, 554–55 (9th Cir. 2014).

190 *Compare* Sullivan v. Barclays PLC, 13-cv-2811, 2017 WL 685570, at *33 (S.D.N.Y. Feb. 21, 2017) (holding that allegations that defendants used interstate wires to coordinate Euribor fraud, including conference calls in which employees located in New York participated, "do not plausibly allege that any acts of wire fraud were primarily domestic in nature"), *and* Laydon v. Mizuho Bank Ltd., No. 12 Civ. 3419, 2015 WL 1515487, at *8 (S.D.N.Y. Mar. 31, 2015) (holding that allegations that defendants used U.S. wires to transmit false TIBOR and Yen LIBOR submissions and to coordinate their actions through chat rooms were "far too attenuated to sufficiently plead that the scheme to defraud came about in the U.S."), *with* United States v. Hayes, 118 F. Supp. 3d 620, 628 (S.D.N.Y. 2015) (holding that "Darin's argument that the location of the wires is 'ancillary' to the location of the scheme to defraud must . . . be rejected because the

The Second Circuit's approach appears more faithful to the Supreme Court's case law on extraterritoriality. First, the wire fraud statute indisputably lacks any clear expression of congressional intent sufficient to overcome the presumption at the first step. At the second step, lower courts have attempted to salvage the broad "use of U.S. wires" test by holding that the focus of the statute "is upon the misuse of the instrumentality of communication."[191] But use of the wires is only one element of wire fraud: the first, arguably more important requirement, is that of a "scheme or artifice to defraud."[192] Holding that the sole "object[] of the statute's solicitude"[193] is use of U.S. wires rather than the fraudulent scheme seems at odds with the statute's language and intent. It would also preserve broad application of the wire fraud statute to frauds with marginal connections with the United States, despite the fact that the statute is clearly not extraterritorial. This result hardly seems consistent with the Supreme Court's admonition that the presumption "would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[194]

This is not to say that lower courts will not continue using the "U.S. wires" test, in part due to their reluctance to second-guess a prosecutor's decision that a case has sufficient U.S. connections. Abandoning that test would also require courts to face the thorny question of determining exactly what U.S. connections make a "scheme or artifice to defraud" sufficiently domestic. The most restrictive option, suggested by the Second Circuit's approach and Justice Alito's approach to the Alien Tort Statute in his concurrence in *Kiobel*,[195] would be to require that the domestic conduct be sufficient to violate the relevant norm. For criminal statutes, this would require that all elements of the offense occur in the United States, even if some other related conduct takes place outside the country. This approach would substantially constrain prosecutorial discretion, and

location of the wires is the Court's primary concern"), *and* United States v. Allen, 160 F. Supp. 3d 698, 707 (S.D.N.Y. 2016) (holding that allegations that "the wires used to settle payments under interest rate swap contracts, and the wires . . . used to publish LIBOR to subscribers in New York, originated or terminated in New York" were sufficient to "meet the requirements for domestic application").

191 *Kazzaz*, 592 F. App'x at 554 (citation omitted); *see also Driver*, 692 F. App'x at 448.

192 18 U.S.C. § 1343 (2012). The elements of wire fraud are "(1) a scheme to defraud, (2) use of the wires in furtherance of the scheme and (3) a specific intent to deceive or defraud." United States v. Garlick, 240 F.3d 789, 792 (9th Cir. 2001).

193 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 267 (2010).

194 *Id.* at 266.

195 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 125–27 (2013).

courts may be hesitant to go that far.[196] Nevertheless, the recent Supreme Court decisions have raised some uncertainty regarding the continued ability of U.S. prosecutors to use broad criminal statutes—like wire fraud—to bring cases against global banks.

In addition to wire fraud, U.S. prosecutors have frequently used conspiracy charges to reach alleged misconduct by global banks and their employees.[197] Unlike for wire fraud, there is a large and complex body of case law on the extraterritorial reach of conspiracy law. The leading Supreme Court case is *Ford v. United States*,[198] in which crew members of a British ship captured on the high seas were charged with conspiracy to smuggle liquor into the United States.[199] The defendants objected that "they were corporeally at all times . . . out of the jurisdiction of the United States and so could commit no offense against it."[200] Chief Justice Taft dismissed the objection:

> The overt acts charged in the conspiracy[—landing liquor in San Francisco on three occasions, and attempting to do so on another—]were acts within the jurisdiction of the

196 This approach would curtail the application of federal criminal law to a greater extent than the MODEL PENAL CODE, which applies state criminal law if "either the conduct that is an element of [the] offense or the result that is such an element occurs within this State." MODEL PENAL CODE § 1.03(1)(a) (AM. LAW INST. 1962); *see* RESTATEMENT (FOURTH), *supra* note 6, § 404 reporters' n.5. But without specific congressional direction, the MODEL PENAL CODE approach would be difficult to reconcile with the presumption against extraterritoriality. Alternative approaches might include finding that the "focus" of the provision is on victims in the United States or on substantial fraudulent conduct in the United States. For a recent attempt to fashion a "focus" test, see United States v. All Assets Held at Bank Julius, Baer, & Co., 251 F. Supp. 3d 82, 101–03 (D.D.C. 2017).

197 Several of the LIBOR and foreign exchange manipulation cases included conspiracy charges. In the tax case against UBS, DOJ charged the bank with conspiracy to "aid[] or assist[] in, or procure[], counsel[], or advise[] in the preparation or presentation" of false income tax returns to the IRS. 26 U.S.C. § 7206(2) (2012). More generally, the tax cases against global banks relied heavily on conspiracy: to defraud the United States, *see* 18 U.S.C. § 371, to commit tax evasion, *see* 26 U.S.C. § 7201, and to make fraudulent returns, *see id.* § 7206. *See, e.g.*, Plea Agreement, United States v. Credit Suisse AG, No. 1:14-CR-188 (E.D. Va. May 19, 2014) (charging 26 U.S.C. § 7206(2)); UBS DPA, *supra* note 23; Letter from Preet Bharara, U.S. Attorney, S.D.N.Y., to Mark F. Pomerantz, Paul, Weiss, Rifkind, Wharton & Garrison LLP (Dec. 21, 2010) (charging violations of 18 U.S.C. § 371, 26 U.S.C. § 7201, and 26 U.S.C. § 7206). The NPAs under the Swiss Bank Program are more vague. *See, e.g.*, Letter from Carline D. Ciraolo, Acting Assistant U.S. Attorney Gen., to Marc R. Cohen & Jonathan A. Sambur, Mayer Brown LLP (Dec. 8, 2015) (declining to prosecute "tax-related offenses under 18 or 26 [U.S.C.]" and "monetary transactions offenses under [31 U.S.C. §§ 5314 and 5322 (2012)]").

198 273 U.S. 593 (1927).

199 *See id.* at 616. The capture was authorized by a treaty with Great Britain. The charges were under the predecessor to the current federal conspiracy statute and consisted of conspiracy to violate the National Prohibition Act and the Tariff Act of 1922. *See id.* The statute required, as it still does, an overt act by at least one of the coconspirators. *See* 18 U.S.C. § 371.

200 *Ford*, 273 U.S. at 619–20.

> United States, and the conspiracy charged, although some of the conspirators were corporeally on the high seas, had for its object crime in the United States and was carried on partly in and partly out of this country, and so was within its jurisdiction . . . .[201]

Thus, under *Ford*, for a conspiracy centered abroad to be covered by the general federal conspiracy statute, it must be directed toward the commission of a crime that itself would be within U.S. jurisdiction, and at least one of the coconspirators must commit an overt act in the United States in pursuance of the conspiracy.[202]

Although *Ford* is the starting point, the analysis is complicated by the fact that apart from the general conspiracy statute,[203] there exist specialized statutes that diverge significantly.[204] For example, although the general statute requires an "overt act," some others do not.[205] *Ford* also did not explain how the analysis should take into account whether the underlying offense itself applies extraterritorially. This has led to some dispute in the lower courts, but the case law can tentatively be summarized as follows: if the underlying offense applies extraterritorially, conspiracy to commit that offense also does, regardless of whether the overt act—if required—occurs within the United States.[206] If the underlying offense does not apply extraterritorially, the answer depends on whether the conspiracy statute requires an

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201 *Id.* at 624.

202 *See id.*; *see also* United States v. MacAllister, 160 F.3d 1304, 1307 (11th Cir. 1998) ("The general rule is that a conspiracy to violate the criminal laws of the United States, in which one conspirator commits an overt act in furtherance of that conspiracy within the United States, is subject to prosecution in the district courts.").

203 18 U.S.C. § 371.

204 *See* RICHMAN, STITH & STUNTZ, *supra* note 58, at 483–84 ("When conspiracy is charged under 18 U.S.C. § 371, the government must prove an overt act in furtherance of the conspiracy. Not so as to other federal conspiracy provisions.").

205 *See, e.g.*, 21 U.S.C. § 846 (2012) (narcotics conspiracy); *id.* § 963 (conspiracy to import controlled substances); 8 U.S.C. § 1324(a)(1)(A)(v)(I) (2012) (conspiracy to commit certain immigration offenses).

206 *See, e.g.*, United States v. Ballestas, 795 F.3d 138 (D.C. Cir. 2015) (conspiracy to distribute drugs on a vessel within U.S. jurisdiction); United States v. Belfast, 611 F.3d 783 (11th Cir. 2010) (conspiracy to commit torture); United States v. Delgado-Garcia, 374 F.3d 1337 (D.C. Cir. 2004) (conspiracy to commit immigration offenses); United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) (conspiracy to bomb aircraft); United States v. Layton, 855 F.2d 1388 (9th Cir. 1988) (conspiracy to kill a member of Congress); Chua Han Mow v. United States, 730 F.2d 1308 (9th Cir. 1984) (conspiracy to import illegal drugs); United States v. Cotten, 471 F.2d 744 (9th Cir. 1973) (conspiracy to steal U.S. government property); Brulay v. United States, 383 F.2d 345 (9th Cir. 1967) (conspiracy to smuggle drugs into the United States). *But see MacAllister*, 160 F.3d 1304 (suggesting that overt act in the United States may be required even for an extraterritorial offense); United States v. Postal, 589 F.2d 862 (5th Cir. 1979).

overt act. If it does, the underlying offense must be domestic, and at least one overt act must be in the United States.[207] If no overt act is required, it appears that conspiracy can be charged if either the underlying crime is domestic or U.S. effects are intended.[208]

For example, the charge against UBS—conspiracy to file false tax returns in the United States[209]—is caught by the general conspiracy statute[210] even though the bank's activities were primarily conducted outside the country. The U.S. jurisdictional connection is sufficient because the underlying offense (the U.S. client filing a false tax return) occurred in the United States, and prosecutors alleged several overt acts in the United States by the conspirators, UBS bankers and their U.S. customers. In particular, the information stated that in 2004, 32 UBS bankers travelled to the U.S. to meet existing clients and solicit new ones, including at Art Basel Miami Beach.[211] The bank reportedly trained its employees on how to conceal documents and answer questions by U.S. customs officials without arousing suspicion when crossing the border.[212] The information also referred to clients' tax filings as overt acts committed in the United States.[213]

Nevertheless, the question arises once again whether the framework established in the case law remains tenable in light of recent Supreme Court cases. The federal conspiracy statute contains no express indication that it applies extraterritorially, and there is little to no evidence that the statute, on its face, is sufficient to surmount the first step of the *RJR Nabisco* analysis. At the second step, the Supreme Court would need to agree that an "overt act" in the United States provides a sufficient connection with the country so that applying U.S. law to a conspiracy centered outside the United States does not constitute "extraterritorial application." Once again, it seems

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207 *See, e.g.*, Ford v. United States, 273 U.S. 593 (1927) (conspiracy to smuggle liquor); United States v. Valenzuela, 849 F.3d 477 (1st Cir. 2017) (conspiracy to possess drugs with intent to distribute); United States v. Endicott, 803 F.2d 506 (9th Cir. 1986) (conspiracy to commit various firearms offenses); United States v. Davis, 608 F.2d 555 (5th Cir. 1979) (conspiracy to transport stolen goods in foreign commerce).

208 *See, e.g.*, United States v. Loalza-Vasquez, 735 F.2d 153 (5th Cir. 1984) (conspiracy to import drugs); United States v. Ricardo, 619 F.2d 1124, 1129 (5th Cir. 1980) (same); United States v. Brown, 549 F.2d 954 (4th Cir. 1977) (same).

209 UBS DPA, *supra* note 23, at 1.

210 18 U.S.C. § 371 (2012).

211 UBS Information, *supra* note 23, paras. 36, 39; *see also* UBS Statement of Facts, *supra* note 24, para. 6. One might also argue in such cases that because the fraud targeted the U.S. government, no overt act in the United States is necessary pursuant to *United States v. Bowman*. *See* 260 U.S. 94, 98–99 (1922).

212 *See* BIRKENFELD, *supra* note 29, at 71–72.

213 *See* UBS Information, *supra* note 23, para. 37.

doubtful that the statute's "focus" is a single "overt act" rather than the conspiracy as a whole, especially given that under federal conspiracy law the overt act "may be entirely insignificant or preliminary."[214] To be sure, the existence of Supreme Court precedent (*Ford*) may lead the Court to uphold the current framework, but given the ferociousness with which it has applied the presumption, this ought not to be taken for granted.[215]

### *C. Extraterritorial Criminal Remedies*

As seen above, U.S. criminal cases against global banks often result in the imposition of extensive reforms of the bank's activities. Many of these reforms must be implemented by the bank outside the United States, as in the HSBC case. A largely unexplored question is whether U.S. courts and prosecutors may be exceeding the territorial reach of their authority in imposing these reforms. At first glance, this may not seem like much of a problem: if the applicable U.S. criminal statute reaches the defendant's conduct, it would appear logical that the court can impose remedies designed to deter and prevent that conduct, regardless of where the defendant must implement them. Moreover, it is well established that a federal court "in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction."[216] One might assume that a U.S. court with personal jurisdiction over a criminal defendant likewise may order it to alter its behavior anywhere.

Upon closer examination, however, the application of extraterritorial criminal remedies to corporate defendants is fraught with legal difficulties. First, the Supreme Court has never ruled on the conditions

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214 RICHMAN, STITH & STUNTZ, *supra* note 58, at 484.

215 The contrary view could find support in quotations from lower-court cases that emphasize the overt act. *See, e.g.*, United States v. Hernandez-Orellana, 539 F.3d 994, 1006–07 (9th Cir. 2008) ("[T]he emphasis in a § 371 conspiracy is on whether one or more overt acts was undertaken."). But the fact that other conspiracy statutes do not require an overt act weakens the argument that it is central to conspiracy. Moreover, in practice, the overt act requirement in § 371 is almost negligible because "the prosecution is able to meet that burden by proving *any* action in furtherance of the conspiracy by *any* of the conspirators." RICHMAN, STITH & STUNTZ, *supra* note 58, at 484. Maintaining the rule that an overt act in the United States is sufficient to bring an extraterritorial conspiracy within the reach of U.S. law hardly seems consistent with the Court's "craven watchdog" dictum. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2015). Notably, in *RJR Nabisco, Inc. v. European Community*, the Court did not rule on the extraterritorial reach of RICO's conspiracy provision. 136 S. Ct. 2090, 2103 (2016).

216 Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952); *see also* Bano v. Union Carbide Corp., 361 F.3d 696, 716 (2d Cir. 2004) ("The federal court sitting as a 'court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere.'" (quoting Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 647 (2d Cir. 1956))).

under which U.S. courts possess personal jurisdiction over a foreign corporate defendant in a criminal case, and the lower court case law is sparse and inconsistent.[217] Some courts have drawn on civil standards of personal jurisdiction and held that the defendant must have "sufficient contacts with the United States to fall within the court's general or specific jurisdiction."[218] At least one court recently rejected this approach, holding that "due process in the civil and criminal contexts simply is *different*" and that a "federal district court has personal jurisdiction to try any defendant brought before it on a federal indictment charging violation of federal law."[219] Under this view, a foreign corporate defendant's appearance, even by counsel, amounts to submission to personal jurisdiction, and in a criminal case such jurisdiction is unconstrained by the due process limits applied in civil cases.[220]

The latter approach raises obvious problems. The view that appearance by counsel is sufficient to establish jurisdiction over a foreign corporate defendant seems superficially consistent with the treatment of individual defendants, with appearance by counsel serving as a substitute for the individual defendant's physical presence before the court.[221] The Supreme Court, however, has not decided whether the defendant could make a special appearance for the sole purpose of contesting personal jurisdiction. If so, what standard would apply, given that the appearance itself would not be a sufficient basis

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217 *Cf.* United States v. Chitron Elecs. Co., 668 F. Supp. 2d 298, 302 (D. Mass. 2009).

218 United States v. Nippon Paper Indus. Co., 944 F. Supp. 55, 62 (D. Mass. 1996), *rev'd on other grounds*, 109 F.3d 1 (1st Cir. 1997); *see also In re* Sealed Case, 832 F.2d 1268, 1273 (D.C. Cir. 1987) (suggesting that some version of the "minimum contacts" test applies in corporate criminal cases); Marc Rich & Co. v. United States, 707 F.2d 663, 667 (2d Cir. 1983) (same); *Chitron Elecs.*, 668 F. Supp. 2d at 302 (same).

219 United States v. Maruyasu Indus. Co., 229 F. Supp. 3d 659, 670 (S.D. Ohio 2017) (quoting United States v. Rendon, 354 F.3d 1320, 1326 (11th Cir. 2003)).

220 *See id.*

221 FED. R. CRIM. P. 43(a) ("[T]he defendant must be present at . . . every trial stage . . . ."). Because the defendant's physical presence is required for a criminal trial to begin, personal jurisdiction is usually assumed and rarely discussed explicitly. *Cf.* Crosby v. United States, 506 U.S. 255, 262 (1993). Those cases that discuss it simply assert that appearance or custody establishes personal jurisdiction. *See, e.g.*, United States v. Morris, 561 F. App'x 180, 184 (3d Cir. 2014) ("The District Court . . . had personal jurisdiction because Morris was brought before the District Court on a federal indictment charging a violation of federal law."); United States v. Boling, No. 87-5051, 1988 WL 3477, at *2 (6th Cir. Jan. 19, 1988) ("[T]he court had personal jurisdiction over Boling because he was in its custody."); Powell v. United States, No. Civ.A.03-3754, CRIM.99-719, 2004 WL 1576633, at *3 (E.D. Pa. July 1, 2004) ("This Court has personal jurisdiction over the petitioner because a court acquires personal jurisdiction over a criminal defendant when he appears before the court, whether voluntarily or involuntarily."). The Rules explicitly carve out an exception for corporate defendants, who need not be present if they are represented by counsel. FED. R. CRIM. P. 43(b)(1).

for jurisdiction? If not, would the result be consistent with *International Shoe*[222] due process if the defendant had few or no contacts with the United States? And what if a foreign corporate defendant simply failed to appear through U.S. counsel? Unless there is an alternative means of establishing personal jurisdiction, the defendant's absence would prevent the case from proceeding.[223]

By contrast, what appears to be the prevailing view in lower courts—that some version of the "minimum contacts" test applies—would presumably involve importing personal jurisdiction analysis from the well-developed case law on civil jurisdiction over foreign corporate defendants. In light of recent cases such as *Daimler AG v. Bauman*,[224] this could substantially constrain U.S. prosecutors' ability to bring cases against foreign corporations. Under *Daimler*, the test for general jurisdiction is "whether [a foreign] corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.'"[225] The Court adopted a restrictive view, stating that "the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction'"[226] and signaling reluctance to go beyond these bases to sanction "exorbitant exercises of all-purpose jurisdiction."[227]

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222 Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945).

223 In a series of recent cases, criminal proceedings against foreign corporations were paralyzed by prosecutors' inability to serve process under FED. R. CRIM. P. 4(c)(3)(C), which required that the summons be served on an officer or agent of a corporation and that a copy be mailed to its "last known address within the district or to its principal place of business elsewhere in the United States." United States v. Kolon Indus., 926 F. Supp. 2d 794, 798 (E.D. Va. 2013); *see also* United States v. Pangang Grp. Co., No. CR 11-00573-7, 2013 WL 12203118, at *3 (N.D. Cal. April 8, 2013); United States v. Alfred L. Wolff GMBH, No. 08 CR 417, 2011 WL 4471383, at *3 (N.D. Ill. Sept. 26, 2011). The rule was amended in 2016 to allow for service of summons on corporate defendants outside the United States, but it remains unclear whether such service is sufficient to establish personal jurisdiction over the defendant. *See* FED. R. CRIM. P. 4(c)(3)(C). In any event, under FED. R. CRIM. P. 43(a), trial cannot proceed unless a defendant is present. Interestingly, the Judicial Conference's Advisory Committee on Criminal Rules "recognized that the government may not be able to prosecute foreign entities that fail to respond to service," but "it is expected that entities subject to collateral consequences (forfeiture, debarment, etc.) will appear." Memorandum from Hon. Reena Raggi, Chair, Advisory Committee on Criminal Rules, to Hon. Jeffrey S. Sutton, Chair, Standing Committee on Rules of Practice and Procedure 2–3 (May 6, 2015). A defense law firm commenting on the proposal objected that under the new rules, if a corporate defendant failed to appear, "the court might . . . appoint counsel and conduct trial in absentia." *Id*. at 6.

224 134 S. Ct. 746 (2014).

225 *Id.* at 761 (alteration in original) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

226 *Id.* at 760 (alterations in original) (quoting *Goodyear*, 564 U.S. at 924).

227 *Id.* at 761–62. An additional question, left open by the Supreme Court, is whether the restrictions on personal jurisdiction imposed on federal courts by the Fifth Amendment are the

Because many global banks maintain branches in the United States, one might argue that they have sufficient contacts with the United States to sustain general jurisdiction.[228] However, at least one recent case holds that even a substantial U.S. presence by a foreign bank is insufficient to meet the *Bauman* test.[229] In addition, the recent tendency—encouraged by U.S. regulators—is for global banks to do business in the United States through locally organized holding companies and bank subsidiaries.[230] If a bank's contacts with the United States are insufficient to create general jurisdiction, U.S. courts may have specific jurisdiction, which requires that the bank's activities in the United States give rise to the relevant liabilities.[231] The presence of specific jurisdiction would depend on the factual circumstances of each case. Given the importance of U.S. markets and institutions, such contacts may be present in many cases, but this is far from inevitable. For example, the LIBOR manipulation conspiracies were conducted overwhelmingly outside the United States, and although UBS's and Credit Suisse's employees frequently visited the United States to service their clients, one might easily imagine a more carefully constructed tax evasion scheme in which foreign bankers would avoid visiting the country.

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same as those imposed on states by the Fourteenth Amendment. *See* Bristol-Meyers Squibb v. Superior Court, 137 S. Ct. 1773, 1784 (2017).

228 In several cases, courts have allowed subpoenas to be issued to U.S. branches or other establishments of foreign banks for production of records maintained abroad. *See, e.g.*, United States v. Bank of N.S., 740 F.2d 817 (11th Cir. 1984); United States v. Bank of N.S., 691 F.2d 1384 (11th Cir. 1982).

229 *See In re* Foreign Exch. Benchmark Rates Antitrust Litig., No. 13 Civ. 7789, 2016 WL 1268267, at *3–4 (S.D.N.Y. Mar. 31, 2016) (holding that there was no general jurisdiction over The Bank of Tokyo-Mitsubishi UFJ, Ltd. and Société Générale, despite substantial U.S. branches).

230 *See* 12 C.F.R. § 252.153 (2018). Reasons for this shift include the fact that branches can no longer take retail deposits. 12 U.S.C. § 3104(d) (2012). The Federal Reserve's recent rules governing the U.S. operations of large foreign banks also require most of them to form intermediate U.S. holding companies, although they may simultaneously operate branches. 12 C.F.R. § 252.153 (2018).

231 *See Daimler*, 134 S. Ct. at 754 ("'[T]he commission of some single or occasional acts of the corporate agent in a state' may sometimes be enough to subject the corporation to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity. Adjudicatory authority of this order . . . is today called 'specific jurisdiction.'" (citations omitted)); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); *In re* Foreign Exch. Benchmark Rates, 2016 WL 1268267, at *6 (finding specific jurisdiction over The Bank of Tokyo-Mitsubishi UFJ, Ltd. and Société Générale in an antitrust case relating to foreign exchange manipulation, due to their substantial U.S.-based foreign exchange operations and their alleged involvement in the antitrust violations).

Another, perhaps more serious, problem is that the analogy with the court's equitable power to enjoin acts everywhere may be flawed, even where the court has personal jurisdiction over the defendant. In imposing criminal sentences, federal courts are not exercising equitable powers, but rather authority granted to them pursuant to federal statutes, namely, the sentencing provisions of Title 18 of the U.S. Code.[232] Do these statutes authorize U.S. courts to regulate the defendant's conduct extraterritorially? As noted above, one might assume that the territorial reach of these sentencing provisions is coextensive with that of the substantive criminal provisions under which the case was brought. The Supreme Court, however, has explicitly rejected the notion that remedial provisions have the same reach as the corresponding substantive statutes. In *RJR Nabisco*, the Court stated that the presumption against extraterritoriality applies "regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction."[233] Even after finding that the substantive prohibitions of RICO applied extraterritorially, the Court analyzed the statute's private cause of action separately and held that it did not.[234] Likewise, the Supreme Court held in *Kiobel* that causes of action under the Alien Tort Statute[235] did not reach extraterritorially, even though the underlying substantive law—derived from customary international law—unquestionably applied outside the United States.[236]

The Court's bifurcated approach suggests that courts must analyze the statutes authorizing imposition of criminal remedies separately from the underlying substantive criminal statutes.[237] If this is correct, it is hard to see how prosecutors could overcome the first step of the Court's analysis under the presumption. The relevant federal criminal-sentencing statutes do not explicitly authorize extraterritorial application. In particular, the section authorizing courts to impose

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232 18 U.S.C. § 3551 (2012).

233 RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016).

234 *Id.* at 2106 ("Irrespective of any extraterritorial application of § 1962, we conclude that § 1964(c) does not overcome the presumption against extraterritoriality. A private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property.").

235 28 U.S.C. § 1350 (2012).

236 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117 (2013).

237 The Court has stopped short of applying the presumption to "purely jurisdictional statutes" such as 18 U.S.C. § 1331 (federal question), § 1332 (diversity of citizenship), and § 3231 (original jurisdiction of district courts). *See* RESTATEMENT (FOURTH), *supra* note 6, § 404 reporters' n.3. But it has applied the presumption to statutes creating private causes of action, and nothing appears to exclude its application to other remedial statutes, including those concerning criminal sentencing.

probation conditions, 18 U.S.C. § 3563 (2012), does not explicitly authorize these conditions to have extraterritorial effect.[238] As a matter of international law, regulating the business of non-U.S. parent companies and affiliates could also constitute an impermissible exercise of prescriptive jurisdiction.[239] If so, the *Charming Betsy* canon would also point to circumscribing the territorial reach of the criminal-sentencing provisions.[240]

The analysis so far has focused on the court's power to impose a sentence following conviction. Because global banks have systematically chosen to resolve criminal cases by entering into agreements with U.S. prosecutors, however, potential limitations on U.S. jurisdiction might appear moot. But the bank's consent alone cannot defeat jurisdictional limitations on the territorial reach of U.S. law. First, as a matter of U.S. criminal law, it is questionable whether prosecutors should be able to impose conditions by agreement that the court itself could not impose following conviction.[241] Second, as a matter of international law, "[t]he United States may exercise jurisdiction to prescribe in the territory of another state when authorized by the consent *of that state*."[242] A bank cannot unilaterally waive the territorial sovereignty of its home state, nor can it waive the territorial sovereignty of the foreign states in which it does business. For these reasons, the

238 Federal courts have occasionally held that individuals violated probation or supervised release conditions with no specific territorial scope by engaging in prohibited acts outside the United States. *See, e.g.*, United States v. Detraz, No. 99-30722, 2000 WL 959576, at *1 (5th Cir. June 9, 2000) (hunting in Mexico); United States v. Dane, 570 F.2d 840, 845 (9th Cir. 1977) (handling weapons in foreign countries); Reed v. United States, 181 F.2d 141, 142 (9th Cir. 1950) (writing bad checks in Mexico). In at least one case, the court imposed a specific condition governing conduct abroad. *See* United States v. Polchlopek, 897 F.2d 997, 998 (9th Cir. 1990) (requiring the defendant to appear for trial in Canada). None of these cases discusses the presumption against extraterritoriality in any detail, and they all predate the recent, more restrictive line of Supreme Court cases.

239 *See* RESTATEMENT (FOURTH), *supra* note 6, § 402 cmt. a (defining prescriptive jurisdiction as "the authority of a state to make law applicable to persons, property, or conduct," whereas adjudicative jurisdiction is "the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals"). Although it is not settled whether the imposition by a court of remedies that affect activities outside the United States is an exercise of prescriptive or adjudicative jurisdiction, the former characterization seems more accurate where, as in some of the banking cases described above, the remedies effectively impose a new and durable regulatory regime on a defendant's non-U.S. activities.

240 *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."); *see also* RESTATEMENT (FOURTH), *supra* note 6, § 406.

241 *See* Garrett, *supra* note 54, at 917–18.

242 RESTATEMENT (FOURTH), *supra* note 6, § 402 cmt. k (emphasis added).

bank's consent does not obviate the questions raised above regarding the legality of extraterritorial criminal remedies.[243]

In conclusion, recent Supreme Court decisions have made the case for extraterritorial application of federal criminal statutes more fragile. In the global bank cases, federal prosecutors relied on flexible statutes whose broad extraterritorial application has long been assumed but may now be revisited. This raises the possibility that global bank prosecutions may be curtailed, not by lack of prosecutorial will or resources, but by legal constraints arising from the Supreme Court's concern with the appropriateness of the United States acting as the world's policeman. At the same time, the Court's doctrinal framework is flexible, raising the possibility that the broad reach of these statutes will remain more or less untouched. Thus, the future of extraterritorial bank prosecutions will likely turn not on doctrinal arguments, but rather on their implications for the policies that motivate the presumption against extraterritoriality. It also implicates broader policy considerations, including the desirability of extraterritorial prosecutions as a U.S. enforcement tool. The following two Parts examine these issues.

## III. Financial Extraterritoriality and Foreign Relations

The central policy underlying the modern presumption against extraterritoriality is separation of powers. As the Supreme Court stated in *Kiobel*, the presumption "helps ensure that the Judiciary does not erroneously adopt an interpretation of [U.S.] law that carries foreign policy consequences not clearly intended by the political branches."[244] According to this rationale, the political branches, not the courts, are constitutionally empowered and practically equipped to manage the foreign relations implications of extraterritorial application of U.S. law and balance its costs and benefits to the United

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243 Even if U.S. remedies can legally be applied, comity may recommend a more restrained approach. In *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952), the Supreme Court indicated that extraterritorial power to compel through injunctions should only be exercised "[w]here . . . there can be no interference with the sovereignty of another nation." *See also* Bano v. Union Carbide Corp., 361 F.3d 696, 716 (2d Cir. 2004) (noting that a court of equity may enjoin extraterritorial conduct, but that "this power should be exercised with great reluctance . . . when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country" (quoting Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 647 (2d Cir. 1956))).

244 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013); *see also* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016).

States.[245] More specifically, the presumption confers on Congress the primary role in shaping the extraterritorial application of U.S. law: it is Congress that must clearly express intent that a statute apply extraterritorially and, where it does not, define its "focus" of permissible application.[246]

At the same time, U.S. constitutional law has long recognized a special role for the executive in conducting the country's foreign relations. Although the Court has retreated from its most expansive statement of this role in *United States v. Curtiss-Wright Export Corp.*,[247] the idea that the President possesses superior expertise and resources to manage foreign relations remains a powerful influence on separation-of-powers doctrine.[248] From this perspective, criminal prosecutions differ from many other extraterritorial applications of U.S. law in that they can only be initiated by prosecutors, who are part of the federal executive. The Court emphasized this distinction in some of its recent decisions. For example, in *RJR Nabisco*, the majority argued that private civil remedies for foreign conduct pose a heightened risk of international tensions because they allow enforcement "without the check imposed by prosecutorial discretion."[249] By contrast, in a criminal case, "it may be assumed that . . . the Executive has assessed this prosecution's impact on [foreign relations], and concluded that it poses little danger of causing international friction."[250]

This reasoning suggests that extraterritorial U.S. criminal cases against global banks do not engage the central policy underlying the

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245 *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 120–22 (1998).

246 *RJR Nabisco*, 136 S. Ct. at 2100.

247 299 U.S. 304 (1936). While *Curtiss-Wright* expansively held that "the President alone has the power to speak or listen as a representative of the nation," the Court has since narrowed its view of the executive's role by giving the President's view "serious weight" rather than absolute deference. *See Kiobel*, 569 U.S. at 128; *Curtiss-Wright*, 299 U.S. at 319.

248 *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION ch. 2 (2d ed. 1996).

249 *RJR Nabisco*, 136 S. Ct. at 2106 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004)); *see Kiobel*, 596 U.S. at 108 (2013) (applying the presumption against extraterritoriality to the private cause of action under the ATS). *But see* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010) (rejecting the suggestion that the territorial reach of section 10(b) of the Securities Exchange Act should turn on whether the case is brought by the government or a private party).

250 Pasquantino v. United States, 544 U.S. 349, 351 (2005); *see also* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 171 (2004) ("[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government . . . ." (quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 194 (1999))).

presumption and that courts should resolve the doctrinal ambiguities discussed above to allow such cases to proceed.[251] The executive, so the theory goes, is best situated to balance the risk of clashes with foreign governments with other policy objectives, engage in diplomacy, and make appropriate adjustments where necessary.[252] However, a closer examination of the executive's role reveals a more complicated picture. On the one hand, global bank prosecutions touch upon several areas of federal concern, including criminal justice, financial regulation, and foreign relations, each of which is under the responsibility of a different set of actors whose priorities often conflict. On the other hand, the President's usual role as arbiter of such conflicts cannot be exercised in the usual manner because of important norms under which the President does not intervene in prosecutorial decisions. These considerations raise questions regarding whether and how the executive branch can successfully fulfill the role assigned to it by the theory.

This Part examines the process by which the executive branch has managed extraterritorial bank prosecutions. It concludes that although the story is more complicated than the theory would suggest, the relevant actors appear to have successfully managed competing policy objectives without compromising prosecutorial autonomy. Despite the fact that extraterritorial bank prosecutions raise potential conflicts with foreign nations and have sometimes attracted protests at the highest political levels, the President and executive branch officials have reaffirmed prosecutorial autonomy and declined to intervene directly. Similarly, although specialized regulatory agencies possess unique information and expertise as to the implications of prosecuting banks and financial firms, prosecutors have often acted independently, without regard to these agencies' traditional gatekeeping role. Nevertheless, global bank prosecutions have not led to major clashes with foreign nations, nor have they seriously threatened financial stability. This may be the result of informal consultations between DOJ officials and other executive branch actors. Even though creating a more formal framework for such consultations might be desirable,

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251 *See* Clopton, *supra* note 163, at 187 ("To the extent that this consideration evinces a concern with international relations, the courts may rely on the executive branch to pay due deference to potential conflicts in criminal cases."). *But see* Keenan & Shroff, *supra* note 163, at 89 (arguing that "[s]uch deference . . . is constitutionally appropriate only where the Executive's power is exclusive or its power to prosecute is clear"); Williams, *supra* note 173, at 1407–16, 1421 (arguing against deference to the executive in determining the territorial scope of federal criminal statutes).

252 *Cf.* Clopton, *supra* note 163, at 186–89.

past experience supports the separation-of-powers argument for allowing extraterritorial bank prosecutions to continue.

### *A. Tensions with Foreign Governments*

Unlike most criminal prosecutions, cases against global banks have substantial implications for U.S. foreign relations. First, the mere fact of using criminal law as an enforcement and regulatory tool may offend foreign sensibilities. The U.S. corporate criminal law regime is highly exceptional with regards to its breadth and its strict standards.[253] Until recently, many foreign countries did not recognize corporate criminal liability at all, and some, like Brazil and Germany, "remain steadfastly opposed" to the concept.[254] Even in countries that have adopted some version of corporate criminal liability, it is governed by far more restrictive rules than in the United States. For example, in contrast with the broad U.S. *respondeat superior* doctrine, foreign corporate liability may be limited to the acts of high-level corporate officials or to widespread criminality adopted as corporate policy.[255] Foreign legal systems, especially civil-law ones, also place much less discretion in the hands of prosecutors.[256] Until recently, plea deals, NPAs, and DPAs were unheard of in many foreign legal systems, and often are still viewed with suspicion.[257] Fines and other sanctions are also usually much less stringent than in the United States.[258]

Beyond objections to criminal liability in principle, the sanctions imposed on foreign banks have attracted foreign criticism. First, foreign governments complain that U.S. prosecutors treat their banks unfairly. In a study of federal corporate criminal prosecutions, Professor Garrett found that foreign corporations are less likely to receive DPAs or NPAs and face higher fines than domestic ones.[259] As he acknowledges, the study cannot control for numerous extraneous factors that may explain these differences.[260] For example, it may be that U.S. prosecutors only prosecute the most egregious violations by foreign corporations. Nevertheless, the correlation provides at least some fa-

253 *See* GARRETT, supra note 72, at 223.

254 *Id.* at 223–24.

255 *Id.* at 223; Arlen, *supra* note 72, at 147.

256 *See* Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 159–65 (2008).

257 *See* GARRETT, *supra* note 72, at 225.

258 *See id.* at 224.

259 *Id.* at 219–20.

260 *Id.*

cial plausibility to complaints of unfair treatment, as do a number of salient cases. Several of the largest penalties ever levied by U.S. authorities have targeted foreign banks like BNP Paribas ($8.9 billion),[261] Credit Suisse ($2.6 billion),[262] Deutsche Bank ($2.5 billion),[263] HSBC ($1.9 billion),[264] and UBS ($780 million).[265] Further, U.S. prosecutors required BNP Paribas and Credit Suisse to plead guilty to criminal charges, something they had not done for any major U.S. bank at the time.[266]

It is thus unsurprising that foreign governments have complained of perceived bias. In a September 2012 letter to Federal Reserve Chairman Ben Bernanke, U.K. Chancellor of the Exchequer George Osborne observed that the proposed settlement with HSBC "would be around three times greater than the largest US settlement to date for comparable AML/sanctions breaches" and that "[t]he scale of this enforcement action, particularly following the [Standard Chartered Bank] case, is leading many to suggest that UK banks are being unfairly targeted."[267] He pointedly demanded that "the outcome of cur-

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261 Press Release, U.S. Dep't of Justice, BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (June 30, 2014), https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial [https://perma.cc/ET57-KL5H].

262 Press Release, U.S. Dep't of Justice, Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns (May 19, 2014), https://www.justice.gov/opa/pr/credit-suisse-pleads-guilty-conspiracy-aid-and-assist-us-taxpayers-filing-false-returns [https://perma.cc/3ANJ-SNW6].

263 Press Release, U.S. Dep't of Justice, Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR (Apr. 23, 2015), https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation [https://perma.cc/TEH5-6Q4U].

264 Press Release, U.S. Dep't of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations [https://perma.cc/TX9F-7BG8].

265 Press Release, U.S. Dep't of Justice, UBS Enters into Deferred Prosecution Agreement (Feb. 18, 2009), https://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement [https://perma.cc/NDR7-YX2F].

266 *See* Ben Protess & Jessica Silver-Greenberg, *BNP Paribas Admits Guilt and Agrees to Pay $8.9 Billion Fine to U.S.*, N.Y. TIMES: DEALBOOK (June 30, 2014, 4:21 PM), http://dealbook.nytimes.com/2014/06/30/bnp-paribas-pleads-guilty-in-sanctions-case/ [https://perma.cc/FK4L-E4DK]. Deutsche Bank also pleaded guilty to criminal charges in April 2015, as did RBS, UBS, and Barclays in May 2015.

267 Letter from George Osborne, U.K. Chancellor of the Exchequer, to Ben Bernanke, Chairman, U.S. Fed. Reserve Sys. 2 (Sept. 10, 2012), *reprinted in* REPUBLICAN STAFF OF H. COMM. ON FIN. SERVS., 114TH CONG., TOO BIG TO JAIL: INSIDE THE OBAMA JUSTICE DEPARTMENT'S DECISION NOT TO HOLD WALL STREET ACCOUNTABLE 42, 43 (2016) [hereinafter Osborne Letter].

rent and future investigations against UK-headquartered banks [be] consistent with previous settlements, and with US settlements made with banks headquartered throughout the world."[268] Likewise, when a U.S. newspaper reported that DOJ was considering a $10 billion fine for BNP Paribas,[269] French President François Hollande criticized the possible penalty amount as "disproportionate" and said it was "his duty" to raise the issue with President Barack Obama.[270]

The BNP case illustrates the potentially serious foreign policy implications of bank prosecutions. Following disclosure of the proposed fine, the French government came under intense pressure to intervene at the highest political levels: the French finance minister contacted the U.S. Treasury Secretary;[271] the head of the Bank of France travelled to New York to meet the Manhattan District Attorney and NYDFS head;[272] and President Hollande raised the issue with President Obama several times, including at a dinner commemorating the anniversary of the D-Day landings.[273] French officials explicitly linked the case to other bilateral issues: the Foreign Minister said that the case could undermine transatlantic trade negotiations.[274] The tussle also threatened to cloud relations with other U.S. allies, as France sought the support of the British and German governments.[275] France's far-right National Front Party scored political points by complaining that the government "was failing to protect the country's biggest bank from the 'racketeering' of US authorities."[276]

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268 *Id.*

269 *See* Michael Stothard, *French Outcry over Threat to BNP Paribas of $10bn US Fine*, FIN. TIMES (June 2, 2014), https://www.ft.com/content/99a8077e-ea3b-11e3-8dde-00144feabdc0 [https://perma.cc/423H-3KZQ].

270 *See* Martin Arnold et al., *Europe-US Tussle over BNP Escalates*, FIN. TIMES (June 4, 2014), https://www.ft.com/content/5f9a6b8c-ebf1-11e3-8cef-00144feabdc0 [https://perma.cc/EX4D-PG3U].

271 *See* Michael Stothard et al., *Paris Trade Talks Threat over US BNP Fine*, FIN. TIMES (June 3, 2014), https://www.ft.com/content/9a8e516c-eafd-11e3-9c8b-00144feabdc0 [https://perma.cc/2G7W-QC7V].

272 *See id.*

273 *See* Karen Friefeld & Yann Le Guernigou, *Obama Deflects French Pressure to Intervene in BNP Dispute*, REUTERS (June 5, 2014), https://www.reuters.com/article/us-bnpparibas-usa/obama-deflects-french-pressure-to-intervene-in-bnp-dispute-idUSKBN0EG15420140605 [https://perma.cc/F3G2-LK74d].

274 *See* Stothard et al., *supra* note 271.

275 *See* Hugh Carnegy et al., *France Seeks Germany's Support on BNP Paribas Case*, FIN. TIMES (June 23, 2014), https://www.ft.com/content/609dbabe-faf3-11e3-a9cd-00144feab7de [https://perma.cc/U3H2-QWM5].

276 *See* Stothard, *supra* note 269.

Second, foreign governments complain about the financial implications of U.S. criminal sanctions. Large U.S. fines amount to transfers of billions of dollars from the foreign bank's shareholders to the U.S. government. In some cases, they may amount to a fiscal transfer from the government itself, if it owns the bank or is forced to inject funds to sustain it. This may be required if U.S. fines and other sanctions threaten the bank's viability, or worse, its home country's financial stability. Foreign officials have repeatedly raised this concern. In his letter, Chancellor Osborne stated that the Standard Chartered case "highlighted the potential financial stability risks of enforcement action"; specifically, he stated that "if such action created a liquidity crisis for the bank concerned[,] . . . this could jeopardise its stability," and "[f]or a systemically important financial institution, this could lead to contagion."[277] Likewise, President Hollande warned that "totally disproportionate, unfair sanctions" on BNP "could have economic and financial consequences for the whole of the euro zone."[278]

Beyond the magnitudes of the fines, foreign officials have been concerned about the implications for banks of losing access to the U.S. dollar market. Benjamin Lawsky, New York's head banking regulator, ordered Standard Chartered to appear "to demonstrate why [its] license to operate in the State of New York should not be revoked."[279] In his letter, Chancellor Osborne stated that "[i]t was the perceived threat of [Standard Chartered Bank]'s loss of access to this market, rather than any potential financial penalty, that triggered such a significant reaction" in the markets.[280] Likewise, BNP was in danger of losing its New York banking license, or of having U.S. dollar clearing through its New York branch suspended—drastic actions that could have crippled the bank.[281] In the end, NYDFS's consent order against BNP stopped short of revoking its license and gave BNP six months to prepare for a one-year clearing ban, allowing the bank to arrange for Bank of America to clear dollars during the suspension.[282]

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277 Osborne Letter, *supra* note 267.

278 *See* Carol E. Lee & Devlin Barrett, *Obama Says He Has No Role in BNP Paribas Penalties*, WALL ST. J. (June 5, 2014), https://www.wsj.com/articles/obama-says-he-has-no-role-in-bnp-paribas-penalties-1401977243 [https://perma.cc/8FKG-7L66].

279 Consent Order Pursuant to Banking Law § 39, at 26, *In re* Standard Chartered Bank, N.Y. Branch (N.Y. Dep't Fin. Servs. Aug. 6, 2012).

280 Osborne Letter, *supra* note 267.

281 *See* FT Reporters, *What Action is BNP Paribas Facing?*, FIN. TIMES (June 23, 2014), https://www.ft.com/content/c87f669e-fb0e-11e3-a9cd-00144feab7de [https://perma.cc/EU7T-BH4G].

282 *See* Consent Order Under New York Banking Law § 44, at 18, *In re* BNP Paribas, S.A. (N.Y. Dep't Fin. Servs. June 30, 2014).

In addition, criminal prosecutions produce information, including detailed admissions of wrongdoing, that can assist plaintiffs in bringing civil lawsuits. The LIBOR and foreign exchange manipulation prosecutions were followed by multiple civil lawsuits, including antitrust claims.[283] By September 2017, 14 banks had settled foreign exchange class actions for $2.1 billion.[284] Moreover, the mere disclosure of an investigation or resolution can weaken a bank and threaten financial stability in its home state; for example, in the Fall of 2016, Deutsche Bank's shares lost more than 22% on rumors that U.S. authorities were demanding a $14 billion settlement for the bank's misselling of mortgage-related securities, putting the German government under pressure to consider a bailout.[285]

Finally, U.S. criminal prosecutions may also cause tensions by interfering with foreign law or policy. U.S. law may impose obligations on global banks or their employees that conflict directly with foreign law, including that of their home state. U.S. criminal prosecutions based on such conflicting obligations create an obvious potential for clashes with foreign governments. This sort of direct conflict is not salient in global bank prosecutions so far: no foreign law compelled them to manipulate benchmarks, strip information from wire-transfer instructions, or accept undeclared U.S. customers. Even without such direct conflict, however, U.S. policy can clash with that of foreign governments. Even states that espouse similar objectives, such as repressing fraud and market manipulation, may resist the use of criminal sanctions or weigh competing considerations—such as financial stability—differently.

The remedies imposed by the United States can also create conflicts. UBS's 2009 DPA required the bank to disclose the identities of U.S. customers.[286] Immediately after the DPA, DOJ filed a civil action demanding that the bank report up to 52,000 accounts.[287] Because the

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283 *See, e.g.*, Gelboim v. Bank of Am. Corp., 823 F.3d 759, 764 (2d Cir. 2016); *In re* Foreign Exch. Benchmark Rates Antitrust Litig., 13 Civ. 7789, 2016 WL 5108131, at *1 (S.D.N.Y. Sept. 20, 2016).

284 Lananh Nguyen, *Currency-Rigging Scandal Leaves $2 Billion Up for Grabs*, BLOOMBERG (Sept. 11, 2017), https://www.bloomberg.com/news/articles/2017-09-11/fx-rigging-scandal-leaves-2-billion-up-for-grabs-for-traders [https://perma.cc/8JJY-T4GF].

285 *See* Laura Noonan et al., *Deutsche Bank Received Special Treatment in EU Stress Tests*, FIN. TIMES (Oct. 10, 2016), https://www.ft.com/content/44768ea8-8c71-11e6-8aa5-f79f5696c731 [https://perma.cc/J7V8-V7HB]; James Shotter et al., *Deutsche Bank: Settling for Less*, FIN. TIMES (Sept. 30, 2016), https://www.ft.com/content/e71cd3d0-86ed-11e6-bcfc-debbef66f80e [https://perma.cc/WNS2-56BD].

286 *See* UBS DPA, *supra* note 23, para. 9.

287 *See* Petition to Enforce John Doe Summons, United States v. UBS AG, No. 1:09-20423

disclosures would have been illegal under Swiss law, the demand led to a diplomatic row with Switzerland and protracted state-to-state negotiations involving the U.S. Secretary of State and the Swiss Foreign Minister.[288] Eventually, the two countries reached an agreement allowing for disclosure under certain conditions.[289] Other NPAs, DPAs, and plea agreements require compliance reforms abroad, which could interfere with the home state's authority to regulate its banks. The appointment of corporate monitors to oversee foreign banks can also conflict with foreign corporate governance and access to information rules.[290]

This Section does not aim to provide a complete inventory of conflicts with foreign governments that could arise from U.S. global bank prosecutions. In addition to their impacts on the United States' relationship with the bank's home state, U.S. prosecutions may also implicate the states of the banks' customers and other stakeholders, and the targets of financial sanctions and other U.S. policies channeled through global banks. These prosecutions may also affect broader U.S. interests, such as by discouraging use of the U.S. dollar and financial infrastructure for international transactions. Clearly, global bank prosecutions have serious implications for U.S. foreign relations.

### *B. Prosecutors and the Executive*

The separation-of-powers argument relies on the premise that the executive branch is best situated to manage the foreign relations implications of applying U.S. law extraterritorially. In most contexts, the argument envisions the executive balancing the benefits of advancing U.S. policies against the risk of international tensions, negotiating with foreign governments, and perhaps choosing to refrain from enforcement action in favor of a diplomatic compromise. Although dif-

(S.D. Fla. Feb. 19, 2009); Press Release, U.S. Dep't of Justice, United States Asks Court to Enforce Summons for UBS Swiss Bank Account Records (Feb. 19, 2009), https://www.justice.gov/opa/pr/united-states-asks-court-enforce-summons-ubs-swiss-bank-account-records [https://perma.cc/GK6D-9RPQ].

288 *See generally* Lisa Jucca, *Special Report: How the U.S. Cracked Open Secret Vaults at UBS*, REUTERS (Apr. 9, 2010, 1:49 AM), https://www.reuters.com/article/us-banks-ubs-idUSTRE6380UA20100409 [https://perma.cc/EE4M-QEGU].

289 *See* Agreement Between the United States of America and the Swiss Confederation on the Request for Information from the Internal Revenue Service of the United States of America regarding UBS AG, a Corporation Established under the Laws of the Swiss Confederation, U.S.-Switz, Aug. 19, 2009 [hereinafter UBS AG Agreement], https://www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf [https://perma.cc/H2ZL-ZM24].

290 *See, e.g.*, GARRETT, *supra* note 72, at 247.

ferent components of the executive branch may differ in their priorities or in their assessments of the consequences of proposed decisions, the President stands atop the federal bureaucracy and ultimately chooses among competing views.

There is some precedent for this type of presidential control in the context of criminal proceedings. In 1952, DOJ initiated a grand jury investigation of the international oil cartel following a damning report by the Federal Trade Commission.[291] The Departments of State, Defense, and the Interior, however, opposed the investigation and any indictments against U.S. oil companies or executives.[292] These Departments presented a report to the National Security Council that assessed the global oil industry, its importance to U.S. strategic objectives, and a prosecution's potential impact on Cold War politics.[293] The report relied heavily on the notion that the investigation would be used by the Soviet bloc as "evidence of American monopolistic imperialism";[294] it also stated that an indictment would be "almost as effective in foreign propaganda terms as a decision finding the oil companies guilty" and that this propaganda "obviously harms the prestige of the companies in other countries."[295] DOJ submitted its own report, arguing that the companies "consciously and persistently" violated the Sherman Act, that a civil action would be much less effective, and that "[w]e cannot promote free private enterprise and productivity abroad unless we are seen to conscientiously enforce our laws designed to preserve them for our own economy."[296] Shortly after receiving the reports, President Truman instructed DOJ to drop the criminal investigation.[297]

This example will likely strike the contemporary reader as problematic. The notion that the executive should directly manage criminal prosecutions in light of their implications for U.S. foreign relations contradicts important norms, solidified since Watergate, under which

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291 *See* STAFF OF S. COMM. ON FOREIGN RELATIONS, 93D CONG., 2D SESS., THE INTERNATIONAL PETROLEUM CARTEL, THE IRANIAN CONSORTIUM AND U.S. NATIONAL SECURITY 29–33 (Comm. Print 1974).

292 *See id. See generally* Burton I. Kaufman, *Oil and Antitrust: The Oil Cartel Case and the Cold War*, 51 BUS. HIST. REV. 35 (1977).

293 *See generally* 1 BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1952–1954, GENERAL: ECONOMIC AND POLITICAL MATTERS 1317–37 (1953).

294 *Id.* at 1324.

295 *Id.* at 1326.

296 *Id.* at 1336.

297 *See* James F. Rill & Stacy L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line?*, 79 ANTITRUST L.J. 577, 584–85 (2014).

prosecutors are supposed to exercise independent judgment and should be insulated from political influence.[298] This norm of separation between the President and the criminal enforcement arm of the executive branch has provided DOJ with substantial autonomy. In typical federal criminal prosecutions, case-specific decisions are made by the line prosecutors most familiar with the relevant facts and circumstances,[299] reflecting each prosecutor's obligation to "serve justice in each case being prosecuted."[300] As Attorney General Robert Jackson put it in a celebrated speech, prosecutors are bound to "select the cases for prosecution . . . in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain."[301] Their superiors, including the Attorney General, usually manage prosecutions through general policies and resource-allocation decisions rather than by intervening in specific cases.[302] In contrast, "the President ordinarily does not involve himself in individual criminal prosecutions."[303]

This norm of separation continues to be reaffirmed by lawmakers and government officials across the political spectrum,[304] despite the fact that it is neither constitutionally required nor imposed by statute. The prevailing legal opinion is that law enforcement, including investigation and prosecution by the DOJ, fall squarely within the President's executive powers under Article II.[305] Therefore, criminal bank

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298 *See* Jack Goldsmith, *Independence and Accountability at the Department of Justice*, LAWFARE (Jan. 30, 2018, 2:16 PM), https://www.lawfareblog.com/independence-and-accountability-department-justice [https://perma.cc/2TEJ-H49G].

299 *Cf.* Bruce A. Green & Fred C. Zacharias, *"The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187, 196 (2008) (explaining a "grant of discretion to lower-level attorneys is necessary" given the volume of cases prosecuted by each office).

300 *Id.* at 231–32. Thus, "[p]rosecutors are expected to avoid punishing innocent individuals, apply a sense of proportionality (i.e., the punishment should fit the crime), and treat all defendants with rough equality." *Id*. at 232 n.136.

301 Robert H. Jackson, Att'y Gen. of the U.S., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys 4 (Apr. 1, 1940).

302 *Cf.* Green & Zacharias, *supra* note 299, at 190–92.

303 *Id.* at 211.

304 *See, e.g.*, Goldsmith, *supra* note 298; Sally Q. Yates, *Sally Yates: Protect the Justice Department from President Trump*, N.Y. TIMES (July 28, 2017), https://www.nytimes.com/2017/07/28/opinion/sally-yates-protect-the-justice-department-from-president-trump.html [https://perma.cc/U4GU-GJLW].

305 *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 691 (1988) (Rehnquist, C.J.) (noting that, in line with Article II, "law enforcement functions . . . typically have been undertaken by officials within the Executive Branch"); *see also id.* at 706 (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function."). There is considerable debate regarding the extent to which Congress may regulate and constrain these powers, for instance, by vesting prosecutorial authority in officers insulated from presidential control and

prosecutions fall within the authority of prosecutors appointed by the President and subject to his ultimate oversight; the norm protecting prosecutorial autonomy is essentially a self-imposed constraint within the executive branch. It reflects the widely held view in government and among members of the public that criminal prosecutions should be free of political interference, as well as the practical reality that routine intervention in such prosecutions would create unacceptable demands on the President's time and attention.

In responding to foreign complaints and requests to intervene in global bank cases, U.S. officials have repeatedly reiterated their reluctance to curb DOJ independence. For example, when DOJ required Credit Suisse to plead guilty to resolve its tax-evasion case, Attorney General Holder was asked whether non-U.S. banks were being singled out.[306] Already under fire for his previous "too big to jail" statements, the Attorney General stated that prosecutions would be based on the facts and that "[b]anks, financial institutions will not be treated differently on the basis of their nationality."[307] When challenged by the French government, Treasury officials responded that it was "up to prosecutors to decide the BNP fine."[308] President Obama likewise stated that "[t]he tradition of the US is that the president does not meddle in prosecutions . . . . I don't pick up the phone and call the attorney-general. These are decisions made by an independent Department of Justice."[309] These comments reflect a sense that intervention by the President or other senior U.S. officials in criminal prosecutions in response to foreign complaints would undermine prosecutorial autonomy, create the appearance of political favoritism, and open the floodgates to more such complaints in the future.

On the other hand, autonomous exercise of discretion by U.S. prosecutors might run into conflict with foreign policy: What if the prosecution threatens an alliance, a major trade relationship, or other important U.S. interests? The current approach appears to be for prosecutors to escalate such matters within DOJ and for senior offi-

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removal. *See* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 521 (2005) (describing the controversy surrounding the President's power to direct and oversee federal prosecutions); *see also, e.g.*, *Morrison*, 487 U.S. at 696–97 (upholding a statute allowing the appointment of independent counsel, selected by a special court and protected from removal without cause, to investigate violations of federal law by high-ranking officials).

306 Stothard, *supra* note 269.

307 *Id.*

308 Stothard et al., *supra* note 271.

309 Sam Fleming, *French Regulator Warns on BNP Fine Uncertainty*, FIN. TIMES (June 5, 2014), https://www.ft.com/content/fd411910-ecb1-11e3-a754-00144feabdc0 [https://perma.cc/5762-HSFY].

cials to consult with their counterparts in other departments and agencies on an *ad hoc* basis. There is no obligation to defer to their views, nor comprehensive guidance as to what degree of communication is appropriate, who should participate, and what weight should be attributed to the view of other agencies.[310] Thus, prosecutors and their superiors within DOJ are the final decisionmakers with respect to these issues. If this description of the process is correct, prosecutorial autonomy is preserved, but important competing policy considerations or diplomatic consequences may be neglected, forcing the President and other executive officials to respond after the fact.

This concern, however, appears exaggerated. A striking feature of U.S. global bank prosecutions to date is that although there have been some protests, U.S. authorities have imposed substantial sanctions and compliance obligations without provoking major international clashes. In many cases, foreign governments have cooperated with U.S. investigations and prosecutions, participated in their resolution, and even taken a role in supervising compliance.[311] The threat of U.S. prosecutions has even helped the executive achieve foreign policy goals: the government apparently used pending actions against UBS as a bargaining chip to secure concessions on tax disclosure from Switzerland.[312] In virtually all cases so far, the banks' wrongdoings were clear, serious, and abundantly documented, and U.S. prosecutions advanced common interests such as repressing fraud, market manipulation, money laundering, and tax evasion. This suggests that prosecutors, while not deferential to outside intervention, are sensitive to the foreign relations dimensions of their decisions and select cases based on the potential for international cooperation and effective enforcement.

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310 Under current policies, direct communications with the White House on pending cases are strictly circumscribed. *See* Memorandum from the Attorney Gen. to Heads of Dep't Components & U.S. Attorneys on Communications with the White House (Dec. 19, 2007).

311 *See, e.g.*, Press Release, Fin. Conduct Auth., Lloyds Banking Group Fined £105m for Serious LIBOR and Other Benchmark Failings (July 28, 2014), https://www.fca.org.uk/news/press-releases/lloyds-banking-group-fined-%C2%A3105m-serious-libor-and-other-benchmark-failings [https://perma.cc/T7VZ-6VUF] (characterizing the case as a "significant cross-border investigation" and thanking the CFTC and DOJ for their cooperation).

312 In August 2009, with UBS facing an IRS John Doe summons that could have led to revival of U.S. criminal charges, Switzerland entered into an agreement with the United States designed to allow the bank to release more than 4,000 customer names without breaching Swiss law. *See* UBS AG Agreement, *supra* note 289. In the following months, the two countries signed a protocol amending their tax treaty to facilitate disclosure of taxpayer information in tax-evasion cases. Income Tax Protocol, *supra* note 119.

### C. *Prosecutors and Regulators*

In addition to their potential to trigger tensions with foreign governments, extraterritorial bank prosecutions have important implications for the regulation of financial markets and institutions, traditionally the purview of specialized agencies. For example, the benchmark-manipulation and money-laundering cases aim at protecting the integrity of financial markets and payment systems, objectives normally within the jurisdiction of agencies like the Securities and Exchange Commission ("SEC"), CFTC, Treasury, and the Federal Reserve. As mentioned above, large fines on financial institutions may affect financial stability, a core concern of the Financial Stability Oversight Council and of individual banking agencies such as the Office of the Comptroller of the Currency ("OCC"), Federal Deposit Insurance Corporation ("FDIC"), and Federal Reserve. More generally, the Federal Reserve has primary authority over the U.S. activities of foreign banks. The implementation and oversight of compliance programs within banks is a central concern of banking regulators, but also of specialized agencies like FinCEN and OFAC.

Financial regulatory agencies are not concerned solely with the domestic implications of prosecutions. As the internationalization of finance progressed in recent decades, these agencies carved out an important role in managing cross-border coordination with their foreign counterparts.[313] They participate in global forums like the Basel Committee on Banking Supervision, the International Organization of Securities Commissions, and the Financial Stability Board, exchanging information, coordinating their actions, and developing common regulatory standards.[314] Officials from the world's leading jurisdictions also communicate frequently on a more informal basis, with U.S. agencies playing a central role as hubs for coordination. Thus, regulatory agencies are embedded in multiple networks of international cooperation, giving them substantial expertise and capabilities to assess and manage the international consequences of enforcement actions.

There is thus some overlap between the role of prosecutors in bringing criminal cases against foreign banks and that of specialized agencies in regulating and supervising the financial industry through coordination with their international counterparts. This raises questions about how the relevant actors should manage conflicts that arise between them. For example, prosecutors and regulators may disagree

313 *See* Verdier, *supra* note 52.

314 *See id.* at 114.

about the appropriateness of criminal charges related to a specific industry practice. They may similarly disagree about the impact of a proposed fine on financial stability or on future cooperation with the bank's home regulator. In addition, disagreements may arise regarding which compliance reforms a foreign bank should undertake and who should oversee their implementation.

The traditional model of enforcement emphasized the role of regulatory agencies as gatekeepers in initiating criminal prosecutions against financial institutions. Agencies are on the front line of industry supervision: they continuously monitor markets, examine banks and other institutions, and receive and process most complaints. As a result, agency officials maintain continuing relationships with banks; when the latter detect misbehavior, they are expected to contact their regulating agency to disclose the misbehavior and detail the remedial steps taken. The agency may be satisfied with the bank's response or decide to take administrative or civil enforcement action. Banking regulators possess extensive powers to escalate their intervention from informal "moral suasion" to formal agreements, cease-and-desist orders, individual sanctions, industry bars, and civil penalties.[315] However, the regulatory agencies cannot themselves bring criminal charges. In this model, they "only refer serious cases to the DOJ, and the DOJ explicitly considers whether a prosecution is a necessary supplement to pending agency action before asserting jurisdiction."[316]

By contrast, many of the new wave of global bank prosecutions have been initiated outside of this framework, with regulatory agencies playing a smaller role. For example, the tax-evasion case against UBS began because a whistleblower within the bank went directly to DOJ and Congress.[317] Similarly, attorneys in the CFTC's enforcement division initiated the LIBOR investigation based on media reports, seemingly independently of the regulator's market and institutional monitoring function.[318] In contrast, the case against HSBC arose from

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315 12 U.S.C. § 1818 (2012).

316 Garrett, *supra* note 54, at 885. This model was not universally followed, but it was accurate with respect to most federal criminal prosecutions relating to financial institutions. For example, most prosecutions arising from the savings and loan crisis were referred by banking agencies, and most prosecutions relating to corporate accounting scandals of the early 2000s were referred by the SEC. *See, e.g.*, RICHARD L. FOGEL, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/T-GGD-90-61, SAVINGS AND LOAN CRISIS: FEDERAL RESPONSE TO FRAUD IN FINANCIAL INSTITUTIONS 6–7 (1990).

317 *See* BIRKENFELD, *supra* note 29, at 2–3.

318 *See* ENRICH, *supra* note 42, at 39–47. The most influential report was Carrick Mollenkamp, *Bankers Cast Doubt on Key Rate amid Crisis*, WALL ST. J. (Apr. 16, 2008), https://www.wsj.com/articles/SB120831164167818299 [https://perma.cc/T37F-VZQV].

an OCC regulatory action against the bank for AML noncompliance, but OCC began its action after a federal prosecutor and ICE officials investigating money-laundering crimes contacted it.[319]

Other developments help explain prosecutors' growing role in independently initiating such cases. First, DOJ corporate-prosecution policies have incentivized firms—including banks—to self-report directly to DOJ following internal investigations.[320] Leniency programs have also encouraged whistleblowers who seek more forceful action than that offered by regulators to go directly to prosecutors.[321] These developments reduce prosecutors' traditional dependence on agencies for evidence and expertise. Second, the perceived lack of criminal prosecutions following the financial crisis placed pressure on prosecutors to bring criminal enforcement actions when serious wrongdoing emerged.[322] Third, the autonomy of individual U.S. Attorney's offices complicates any attempts to enforce the traditional escalation mechanism.[323] For example, the tax-shelter case against Deutsche Bank, which resulted in more than $500 million in penalties, was brought by the U.S. Attorney's office for the Southern District of New York.[324]

The result is that prosecutors have bypassed regulators and brought criminal cases that regulators may have preferred to address in a less public—and possibly more lenient—manner. Indeed, when prosecutions become public, regulators sometimes face harsh criticism for their relative inaction. A salient example, worth recounting at some length, is the case against Barclays for LIBOR manipulation. On June 27, 2012, DOJ, the CFTC, and the Financial Services Authority ("FSA") announced that Barclays, one of the U.K.'s largest banks, had agreed to penalties totaling $453 million for manipulating LI-

319 HSBC PSI REPORT, *supra* note 45, at 310. An ICE unit investigating money laundering of drug proceeds and a U.S. Assistant Attorney General in West Virginia investigating Medicare fraud contacted the OCC in mid-2009. These developments "intensified OCC's focus on AML problems at [HSBC Bank USA N.A. ("HBUS")]," which had been festering for years. *See id.*

320 *See* GARRETT, *supra* note 72, at 240.

321 *See id.* at 238.

322 *See, e.g.*, Ryan Chittum, Frontline *Hits Hard on the Lack of Crisis Prosecutions*, COLUM. JOURNALISM REV. (Jan. 31, 2013), https://archives.cjr.org/the_audit/frontline_hits_hard_on_the_lac.php [https://perma.cc/XSU2-PF4H]; Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions [https://perma.cc/89GA-J8TU].

323 *See* RICHMAN, STITH & STUNTZ, *supra* note 58, at 9–10 (explaining that "U.S. Attorneys have a long tradition of independence from Washington," and, as a result, U.S. Attorneys tend to be "responsive to local concerns, and to the interests of local enforcement authorities").

324 *See* Letter from Preet Bharara, U.S. Attorney, S.D.N.Y., to Mark F. Pomerantz, Paul, Weiss, Rifkind, Wharton & Garrison LLP 1, 3 (Dec. 21, 2010).

BOR.[325] This was the first criminal benchmark-manipulation case, and it caused a media frenzy in the United States and the United Kingdom.[326] The filings revealed that Barclays had not only understated its LIBOR submissions during the financial crisis to avoid revealing its funding difficulties, but that its traders had routinely conspired to manipulate LIBOR to benefit their positions.[327]

These revelations led many to question the efforts of banking regulators to investigate manipulation and protect the integrity of this vital benchmark. Parliamentary investigations, internal audits, and investigative reporting on both sides of the Atlantic filled in the details. First, they revealed that although a 2008 *Wall Street Journal* article and other clues to potential manipulation created pressure to act, British officials had little appetite for robust steps. The revelations occurred near the peak of the financial crisis, and regulators were concerned foremost about financial stability.[328] They favored a private-sector solution, relying on the BBA, the trade association that managed LIBOR, to adopt internal reforms to improve LIBOR's reliability. The BBA, for its part, saw the situation as mainly a "perceptions problem" and resisted fundamental changes.[329]

U.S. regulators, for their part, seemed content to defer to British authorities, even though LIBOR manipulation had potentially enormous implications for U.S. financial markets. Even before allegations appeared in the media, the Federal Reserve Bank of New York ("FRBNY") had received from its market contacts reports of LIBOR

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325 *See supra* note 32 and accompanying text.

326 *See* ENRICH, *supra* note 42, at 357–59.

327 *See supra* notes 35–39 and accompanying text.

328 According to the FSA's internal audit report, the agency's "focus on dealing with the implications of the financial crisis for the capital and liquidity positions of individual firms . . . led to the FSA being too narrowly focused in its handling of LIBOR-related information." FIN. SERVS. AUTH., INTERNAL AUDIT REPORT 9 (2013), https://www.fca.org.uk/publication/corporate/fsa-ia-libor.pdf [https://perma.cc/UD32-U47K]. Paul Tucker, then deputy governor of the Bank of England, admitted that "[m]aybe we were just too focused on the financial crisis." HOUSE OF COMMONS TREASURY COMM., FIXING LIBOR: SOME PRELIMINARY FINDINGS, 2012, HC 481-I, at 28 (UK).

329 *See* BRITISH BANKERS' ASS'N, UNDERSTANDING THE CONSTRUCTION AND OPERATION OF BBA LIBOR—STRENGTHENING FOR THE FUTURE paras. 2.4, 13.8 (2008) (defending BBA's LIBOR setting process against "misunderstandings and misperceptions" and stating that "[t]here will be no knee jerk change and no alterations without clear rationale"); Email from Paul Tucker, Deputy Governor, Bank of Eng., to Michael Cross, Head of Foreign Exch. Div. & Reserves Mgmt., Bank of Eng. et al. (May 28, 2008, 16:36 GMT), https://archive.org/stream/402835-more-bank-of-england-documents-on-libor/402835-more-bank-of-england-documents-on-libor_djvu.txt (reporting that "working level pre meeting held by [BBA] last week was minded to conclude no change needed substantively, although some recognition of perceptions problem").

manipulation—including what seemed to amount to a direct admission by Barclays.[330] However, the FRBNY did not initiate an investigation or communicate that information to the Bank of England ("BOE").[331] Instead, it sent the BOE a list of recommendations to overhaul the benchmark.[332] The BOE officially welcomed the recommendations, but privately ignored most of the proposals because they went farther than BOE officials and the BBA thought necessary.[333] In the end, the BBA, with the tacit blessing of British authorities, announced minor reforms that did not address the more fundamental problems that made LIBOR vulnerable to manipulation.[334]

The regulators' approach changed dramatically after U.S. prosecutors announced the Barclays DPA and details of the scandal became

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330 Telephone Interview by N.Y. Fed. Reserve Bank with Fabiola Ravazzolo (Apr. 11, 2008, 2:42 PM GMT), https://www.newyorkfed.org/medialibrary/media/newsevents/news/markets/2012/libor/April_11_2008_transcript.pdf [https://perma.cc/4VC3-YYJN] (providing transcript of a call with a FRBNY staffer during which a Barclays employee admitted that "we know that we're not posting um, an honest LIBOR" in order to "fit in with the rest of the crowd").

331 News Release, Bank of Eng., Further Information and Correspondence in Relation to the BBA Libor Review in 2008 (July 20, 2012) [hereinafter BOE News Release], https://www.bankofengland.co.uk/-/media/boe/files/news/2012/july/further-information-and-correspondence-in-relation-to-the-bba-libor-review-2008.pdf?la=en&hash=372CFEDF9158AE609F62CCC5A6CBC4E2627F3365 [https://perma.cc/8ZBZ-T7NG] ("At no point did the FRBNY draw the attention of the Bank to evidence of wrongdoing in the setting of BBA Libor.").

332 *See* Memorandum from Timothy Geithner, Sec'y, U.S. Dep't of Treasury, to Mervyn King, Governor, Bank of Eng. 1–2 (May 27, 2008), https://www.newyorkfed.org/medialibrary/media/newsevents/news/markets/2012/libor/June_1_2008_LIBOR_recommendations.pdf [https://perma.cc/62KT-2ZEX] (recommending conducting audits of banks' reporting practices and testing the accuracy of their submissions as well as other reforms, including adding more U.S. banks to the panel; adding a second fixing later in the day, when U.S. markets were open; reporting fewer maturities; and randomly selecting each day's panel banks). The memorandum made no reference to the Barclays admission, and it does not appear to have been otherwise communicated to the Bank of England or other British officials, nor to have given rise to a FRBNY investigation. Before Congress, Geithner stated that he had referred the issue of potential manipulation to the CFTC and other regulators at a meeting of the President's Working Group on Financial Markets. *The Annual Report of the Financial Stability Oversight Council: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 10, 22 (2012). Other accounts, including that of former CFTC head Gary Gensler, assert that the CFTC initiated its investigation based on *the Wall Street Journal* article and other media reports, not on information from the FRBNY. *See id.* at 34; *see also* FIN. SERVS. AUTH., *supra* note 328, at 53–54.

333 BOE officials appeared to see the recommendations as unjustified American challenges to the "London-centric" LIBOR. *See* BOE News Release, *supra* note 331; Email from Michael Cross, Head of Foreign Exch. Div. and Reserves Mgmt., Bank of Eng., to Paul Fisher, Dir. of Markets, Bank of Eng., and Paul Tucker, Deputy Governor, Bank of Eng. 23 (June 2, 2008, 14:21 GMT).

334 Justin T. Wong, Note, *LIBOR Left in Limbo; A Call for More Reform*, 13 N.C. BANKING INST. 365, 366–67 (2009) (describing the reforms as "minor" and stating that they did "not fundamentally address the significant reliability issues related to the perceived ability of banks to manipulate data").

public. Barclays's CEO and COO soon resigned under intense pressure from the media and the BOE, which itself was facing scrutiny from British lawmakers.[335] The British government commissioned an independent review of LIBOR, which eventually led to much more substantial reform under which responsibility for the benchmark was removed from the BBA.[336] The U.K. Financial Services Authority initiated an internal investigation into its handling of LIBOR, and was eventually dismantled as part of a vast regulatory reform.[337] The British Parliament questioned officials from Barclays, the Bank of England, and the FSA, revealing many additional details about the scandal,[338] while the U.S. Congress questioned then–Treasury Secretary Tim Geithner about his actions during his tenure as FRBNY head.[339] In sum, the Barclays criminal prosecution triggered a more robust regulatory response to a major case of market manipulation.

Likewise, as noted above, the OCC was sharply criticized for its approach to AML problems at HSBC in the years preceding its criminal prosecution.[340] A report of the Senate Permanent Subcommittee on Investigations found that "[d]espite the many AML problems identified by its examiners, OCC supervisors took no formal or informal enforcement action during nearly that entire period, allowing the bank's AML problems to fester."[341] Between 2005 and 2010, OCC examiners identified 85 "Matters Requiring Attention" in their supervisory letters, more than for any other major bank.[342] In response to OCC examinations, HSBC Bank USA N.A. ("HBUS") typically developed "narrowly targeted" remedial policies and procedures, and "sometimes failed to implement or comply with them."[343] Nevertheless, "the OCC never cited HBUS for a violation of law, never took a formal or informal enforcement action, and turned down recommendations to issue Cease and Desist Orders targeting particularly egre-

335 *See* HOUSE OF COMMONS TREASURY COMM., *supra* note 328, at 90.

336 *See* FIN. SERVS. AUTH., *supra* note 328, at 7; MARTIN WHEATLEY, THE WHEATLEY REVIEW OF LIBOR: FINAL REPORT 22 (2012).

337 FIN. SERVS. AUTH., *supra* note 328, at 4; WHEATLEY, *supra* note 336, at 5; Eilís Ferran, *The Break-Up of the Financial Services Authority*, 31 OXFORD J. LEGAL STUD. 455, 456 (2011).

338 *See generally* HOUSE OF COMMONS TREASURY COMM., *supra* note 328.

339 *See The Annual Report of the Financial Stability Oversight Council: Hearing Before the H. Comm. on Fin. Servs.*, 112th Congress 8–51 (2012) (statement of Timothy F. Geithner, Sec'y, U.S. Dep't of the Treasury).

340 *Cf.* HSBC PSI REPORT, *supra* note 45, at 282.

341 *Id.*

342 *Id.* at 315–17.

343 *Id.* at 303.

gious AML problems."[344] It was only after a "jolt from law enforcement" that the OCC developed "a broad-based plan to look at the HBUS AML program as a whole, tie various problems together, and identify the most important AML deficiencies requiring correction."[345]

These cases show that although regulatory agencies possess unique expertise in the field, there are good reasons to restrict their gatekeeping role in criminal prosecutions. As Professor Garrett suggests, "If regulators cannot always enforce adequately, then prosecutors may be a crucial backstop."[346] If this is correct, the system that has developed—in which prosecutors consult with regulatory agencies but do not defer to them—may best reconcile prosecutorial autonomy and evenhanded handling of cases based on criminal justice considerations with due attention to other important policy objectives such as financial stability. Although foreign officials have sometimes warned of dire consequences from U.S. criminal prosecutions, these consequences have not materialized.

## IV. The Future of Financial Extraterritoriality

Although global bank prosecutions may face legal challenges based on the presumption against extraterritoriality, the analysis above shows that such prosecutions do not engage the separation-of-powers concerns that motivate the presumption. It also shows that these prosecutions have not caused disruptions to financial stability or damaging clashes with foreign states. Despite the competing policy considerations they raise, these cases also do not appear to have compromised the norms that protect prosecutorial autonomy. Thus, from the standpoint of legal process, the case for curtailing global bank prosecutions seems relatively weak.

This Part broadens the analysis by examining three policy questions. First, are U.S. criminal prosecutions of global banks desirable, given the availability of other enforcement tools such as administrative and civil proceedings? Second, could alternatives—such as enforcement by the bank's home state or international cooperation—achieve the same benefits without the whiff of unilateralism associated with extraterritorial prosecutions? Third, could the decisionmaking process within the executive branch be improved to consider risks

344 *Id.* at 316.

345 *Id.* at 327.

346 Garrett, *supra* note 72, at 268.

to financial stability and foreign relations more consistently and transparently?

### *A. Policy Rationales for Extraterritorial Bank Prosecutions*

Classic economic models of criminal liability suggest that government can effectively deter crime by imposing a sanction such that criminals face expected liability equal to the social harm caused by the crime.[347] However, as Professors Jennifer Arlen and Reinier Kraakman have shown, this simple model of criminal liability does not optimally deter corporate crime: although imposing expected liability equal to social harm encourages firms to adopt efficient levels of activity and preventive measures, it provides insufficient incentives to detect, investigate, and report crimes.[348] They show that government can provide optimal incentives by using composite liability schemes under which firms face strict liability and a large default fine, which is mitigated if the firm satisfactorily performs monitoring, investigating, and reporting duties.[349] They also show that U.S. corporate criminal prosecution and sentencing policy generally follows this pattern: firms face large fines, which can be mitigated by showing an appropriate compliance program, internal investigation, reporting, and sanctions.[350]

The bank prosecutions considered in this Article differ from ordinary corporate criminal prosecutions only insofar as they are extraterritorial, sanctioning conduct outside the United States by non-U.S. actors. However, to the extent that a crime causes social harm in the United States, deterring it improves U.S. welfare regardless of the location of the conduct or the actors involved. Barclays's LIBOR manipulation undermined the integrity of numerous U.S. financial transactions.[351] UBS's scheme undermined the United States' ability to derive revenue from its income taxation system.[352] Likewise,

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347 *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979); A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984).

348 Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 707–08 (1997) (explaining that although monitoring and investigative measures reduce the incidence of crime by employees, they also increase the probability of detection, offsetting their private benefits to the firm; reporting detected crimes to the government is costly to the firm, assuming that the government would otherwise not detect them); *see also* Arlen, *supra* note 72, at 151.

349 Arlen & Kraakman, *supra* note 348, at 742.

350 *Id.* at 745.

351 *See supra* notes 32–42 and accompanying text.

352 *See supra* notes 23–31 and accompanying text.

HSBC's lax anti–money laundering and sanctions controls facilitated criminal activity and potential terrorism targeting the United States.[353] The crimes all caused social harm in the United States, and deterring them improves U.S. welfare.[354]

This rationale is consistent with other, well-established forms of extraterritorial application of U.S. law. In a comprehensive study, Professor Tonya Putnam finds that courts apply U.S. economic laws extraterritorially "where conduct outside U.S. borders threatens the future integrity or operation of a domestic regulatory law or regime."[355] This is the case where the conduct meets three conditions: it would be prohibited if done in the United States, it produces harmful effects in the United States, and the actors involved expect to benefit from their illegal conduct.[356] Thus, extraterritorial jurisdiction addresses the harmful spillovers of economic activities beyond the state where they originate.[357] It compels the relevant actors to internalize these costs and provides them with incentives to reduce the cross-border harms resulting from their activities.[358]

Unlike most forms of extraterritorial liability or regulation, the prosecutions considered in this Article are criminal in nature. Because corporations cannot be jailed, the sanctions imposed—fines, other financial penalties, and compliance reforms—are similar in nature to those in civil or administrative proceedings.[359] Why, then, resort to criminal law? First, civil penalties may not suffice to deter corporate crimes that cause widespread harm but have a low probability of detection.[360] The global bank prosecutions considered here fit this pattern: DOJ has imposed much larger penalties than are typical in civil and administrative proceedings.[361] Criminal convictions also carry the

353 *See supra* notes 43–46 and accompanying text.

354 The analysis in this Section assumes that a normatively desirable goal for the U.S. government is to take actions that improve U.S. welfare. A subsequent Section will argue that U.S. extraterritorial bank prosecutions also likely improve global welfare. *Infra* Section IV.B.

355 TONYA L. PUTNAM, COURTS WITHOUT BORDERS 33 (2016).

356 *Id.*

357 *See generally* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101 (1998); Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1 (2001).

358 *See* Trachtman, *supra* note 357, at 6–7.

359 *See* GARRETT, *supra* note 72, at 266.

360 *See id.* at 268.

361 Indeed, the size of the fines imposed on foreign banks may reflect not discrimination but the fact that criminal activities by their employees abroad is difficult for U.S. authorities to detect and must therefore be deterred by harsher penalties.

threat of disbarment and market sanctions, which are potentially much costlier for banks than monetary sanctions.[362]

Second, criminal prosecutors have access to investigative tools and skills developed specifically to detect and prosecute intentional misconduct, dishonesty, and concealment, which these cases often involve. As Professor Mariano-Florentino Cuéllar has noted, law enforcement agencies detect crime, conduct investigations, make arrests, and secure convictions using specialized law enforcement techniques in which regulatory agencies generally lack experience.[363] Thus, in the LIBOR and foreign exchange cases, the DOJ and FBI relied on methods such as wiretaps, surveillance, informants, criminal interrogations, and the use of lesser charges to "flip" lower-level conspirators.[364]

Third, even though regulatory agencies wield potent civil and administrative enforcement powers, they often fail to use them. Several factors may contribute to this phenomenon.

To fulfill their functions, financial regulators become embedded in close cooperative relationships with the institutions and markets they oversee. They rely on industry participants to produce and explain information, keep them apprised of market conditions, contribute to the rulemaking process, and cooperate in addressing market disruptions. Their work would be virtually impossible without some degree of candid exchange, trust, and confidentiality. This is particularly true of agencies with supervisory responsibilities, such as the OCC and the Federal Reserve, which have large teams of examiners stationed at the offices of the largest banks, managing continuous supervision programs and the firm's relationship with the agency.[365] These agencies may be hesitant to bring enforcement actions that could compromise these relationships.[366]

In addition, banking regulators are primarily concerned with the safety and soundness of banks: their most important responsibility is to prevent bank failures that could disrupt the financial system and expose taxpayers to losses.[367] By comparison, detecting and punishing

362 *See* Arlen, *supra* note 72, at 189.

363 *See* Mariano-Florentino Cuéllar, *The Institutional Logic of Preventive Crime*, *in* PROSECUTORS IN THE BOARDROOM 132, 135–36 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

364 *See generally* VAUGHAN & FINCH, *supra* note 42 (describing the use of some of these techniques in the LIBOR investigation).

365 *Cf.* FED. RESERVE BANK OF N.Y., REPORT ON SYSTEMIC RISK AND BANK SUPERVISION (2009); Eric J. Pan, *Four Challenges to Financial Regulatory Reform*, 55 VILL. L. REV. 743, 749 n.13 (2010).

366 *See* Pan, *supra* note 365.

367 *See id.* at 759.

illegal behavior may take second billing, especially if the two objectives are in tension.[368] Thus, regulators may prefer to resolve matters quietly, in close cooperation with banks, and resort to formal enforcement tools as a last resort. They also often express concern that strong sanctions against wrongdoing may undermine the financial soundness of banks. To be sure, financial stability is a crucial policy goal, but regulators' hesitancy to "rock the boat" may lead to underdeterrence of genuinely harmful practices. This phenomenon is illustrated by the LIBOR and HSBC cases, in which regulators initially encouraged banks to quietly adopt reforms and refrained from using their formal investigation and enforcement powers.[369]

Regulators must also consider the impact of enforcement on their relationships with their foreign counterparts. American regulators not only require foreign agencies' cooperation in supervising international banks, but they also interact with them in many other settings, such as in developing international regulatory standards and managing crises. These continuing relationships require trust, confidentiality, and predictability. They also provide a strong incentive to avoid offending foreign peers with harsh sanctions against their banks. The interactions between FRBNY and the BOE regarding LIBOR seem typical: the U.S. regulator approached British authorities informally, alerting them to a potential problem but deferring to their authority over "their" market. FRBNY provided recommendations, but did not insist or protest when they were effectively ignored.[370]

Financial regulators also face monetary and political constraints on enforcement. The budgets of the SEC and CFTC depend on con-

368 *See id.* at 759–60.

369 *See* HSBC PSI REPORT, *supra* note 45, at 282; FED. RESERVE BANK OF N.Y., *supra* note 365. Other aspects of the relationship between regulators and the financial industry that often attract criticism are the "revolving door" between agencies and the industry, similarities in academic and professional backgrounds, and a tendency for regulators to adopt the industry's "world view." One might debate whether the relationship amounts to "regulatory capture" as defined by Daniel Carpenter & David A. Moss, *Introduction* to PREVENTING REGULATORY CAPTURE 1, 13 (Daniel Carpenter & David A. Moss eds., 2014) ("*Regulatory capture* is the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself."). Although the financial industry strives to influence agency policy using tools Carpenter and Moss associate with capture (e.g., threats of political retaliation or lawsuits), other aspects of the relationship may serve the public interest insofar as they are inevitable byproducts of the close cooperation required to monitor safety and soundness. In either case, these relationships make specialized agencies suboptimal enforcers against financial institutions of criminal prohibitions meant to prevent harm to third parties. *See id.*

370 *See supra* Section III.C.

gressional appropriations that fluctuate widely.[371] Indeed, critics blame these agencies' practice of entering into "neither confirm nor deny" settlements with banks on their chronic lack of resources for in-depth investigations.[372] In addition, commissioners at these agencies must authorize enforcement actions, making it more difficult to pursue certain cases. At the early stages of their LIBOR investigation, CFTC staffers reportedly avoided taking steps that would require approval by skeptical commissioners.[373] In some cases, U.S. regulators may simply lack jurisdiction over the component of a global bank that engages in misconduct. Thus, UBS's illegal business with U.S. customers was conducted entirely out of Europe, with great care taken to insulate the bank's U.S.-regulated branches and subsidiaries.[374]

Giving prosecutors an independent role in enforcing U.S. law against global banks offsets some of these shortcomings of regulatory enforcement. Unlike regulators, prosecutors are not embedded in persistent cooperative relationships with the financial industry or foreign governments. The norms that protect criminal prosecutions from political interference limit the ability of powerful actors to deflect enforcement to a greater extent than in regulatory agencies.[375] On the contrary, to the extent prosecutors are affected by political pressures, public accountability, or personal ambition, these generally encourage aggressive investigation and prosecution.[376] In addition, because DOJ is a large "generalist" agency, the costs of capture by any particular industry are high and its benefits are diluted.[377] In sum, these considerations indicate that criminal prosecutions are a valuable component of the U.S. enforcement arsenal against global banks.

A final distinctive feature of foreign bank prosecutions is that they often impose specific compliance obligations and external monitoring.[378] Not only do these features appear intrusive of foreign regulatory authority, they are also unusual in criminal law, where deterrence is usually achieved through sanctions rather than man-

371 *See* GARRETT, *supra* note 72, at 266–67.

372 *See id.* at 267; *see also* JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017).

373 *Cf.* VAUGHAN & FINCH, *supra* note 42, at 45.

374 *See* UBS Information, *supra* note 23, paras. 3–4; UBS Statement of Facts, *supra* note 24, paras. 3, 6.

375 Cuéllar, *supra* note 363, at 139.

376 *See* Diskant, *supra* note 256, at 159–60.

377 *Cf.* Michael A. Livermore & Richard L. Revesz, *Can Executive Review Help Prevent Capture?*, *in* PREVENTING REGULATORY CAPTURE, *supra* note 369, at 420, 434–37.

378 *See supra* Section I.C.

dates.[379] In a recent paper, Professors Jennifer Arlen and Marcel Kahan argue that mandates are economically justified only in circumstances where firms face policing agency costs, such that the incentives created by the prospect of fines or other punishment for the firm are not internalized by its managers.[380] As a result, managers do not react by adopting optimal monitoring, investigation, and reporting policies.[381] In such cases, mandates can be an efficient solution because they impose duties on specific officials and subject them to monitoring by third parties who do not incur the same agency costs.[382]

Professors Arlen and Kahan identify several features of firms that are *unlikely* to face high policing agency costs: those with a powerful controlling shareholder who can compel managers to act in the firm's interest; those that have "undergone a transformative change, such as a change in control," after the crime occurred; and those whose "top managers proactively responded to suspected wrongdoing."[383] None of these features typically applies to global banks: they have broad and dispersed ownership; their control rarely changes after the crime; and, in several of the cases discussed here, criminal activities were not rooted out until the government acted.[384] In addition, the employees involved in wrongdoing are often outside the United States, making them difficult to extradite and prosecute; but prosecutors can impose sanctions on these individuals through mandates on the firm.[385] Thus, although mandates are not imposed on foreign banks in all cases, their use can be a powerful way to advance U.S. law enforcement objectives.

### *B. Unilateralism or Cooperation?*

U.S. corporate criminal prosecutions are a unilateral tool: they are initiated and steered by U.S. prosecutors, penalties enrich the U.S. Treasury, and U.S. officials design the structural remedies. Because

379 Arlen & Kahan, *supra* note 96, at 327–28.

380 *Id.*

381 *See id.* at 328.

382 *See id.*

383 *Id.* at 329, 379.

384 *Id.* at 379; *see id.* at 354–55 (noting that despite some reforms, managers likely still do not fully "bear much of the cost of sanctions imposed on the firm for failure to satisfy policing duties"); *see, e.g.*, Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247, 249 (2010) (noting that compensation arrangements at large banks are often blamed for encouraging short-term misbehavior).

385 *See* Arlen & Kahan, *supra* note 96, at 366; *supra* note 123 (providing examples of this challenge).

unilateralism may cause tensions with foreign governments,[386] one must ask whether there are viable alternatives. The most obvious substitute would be adequate regulation by the home state, which would avoid the perception of U.S. jurisdictional overreach and ensure that the authorities most familiar with a given bank are responsible for overseeing its activities. There is, however, an obvious problem: the harms caused by banks' unlawful practices often fall outside their home state. As a result, foreign governments lack incentives to impose and enforce adequate regulation.[387]

Indeed, the very activities that cause harm to the United States may be beneficial to the bank's home state. The Swiss government did not devote much effort to eradicating its largest banks' practice of assisting tax evasion by U.S. customers, and even sought to protect them against U.S. enforcement.[388] This is unsurprising, given that these banks are among its largest employers and taxpayers. Likewise, U.K. authorities appear to have been more concerned with protecting the standing of their banks and markets than with effectively addressing LIBOR manipulation.[389] In sanctions cases, foreign governments may actively resist U.S. policy. Even where foreign governments would benefit from better regulating global banks' activities, they may lack adequate investigation and enforcement powers, expertise, and leverage over these banks relative to the United States.[390] Thus, exclusive reliance on home-state regulation would not adequately protect the United States against cross-border harms.

A second alternative would be international cooperation in setting and enforcing global standards. However, eradicating unlawful banking practices often has uneven distributive consequences: the United States' gain from ending tax evasion is Switzerland's loss. In principle, if the gain to the United States and other countries is greater than Switzerland's loss, a mutually beneficial agreement could be reached in which the rest of the world would offer offsetting benefits to Switzerland as an incentive for cracking down on tax evasion. Once concluded, the agreement would require monitoring and enforcement to ensure that participants do not renege on their respective commitments.

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386 *See supra* Section III.A.

387 *See* Dodge, *supra* note 357, at 153.

388 *See supra* Section III.C.

389 *See supra* Section III.C.

390 *See supra* Section III.A.

However, the current system of international financial regulation is ill-equipped to handle these types of distributive and enforcement problems. Its basic tenets—voluntary cooperation among agencies, consensus-based decisionmaking, nonbinding standards, and limited monitoring and enforcement—mean that opportunities for tradeoffs are limited and that international bodies lack effective tools to monitor and enforce compliance.[391] As a result, international standards are usually lowest-common-denominator outcomes that cannot be effectively enforced against states unwilling or unable to control harmful externalities.[392] Despite a major reform effort after the financial crisis, these basic tenets remain largely unchanged.[393] These considerations indicate that, given the paucity of viable alternatives, extraterritorial application of U.S. law is necessary to correct failures by foreign governments to consider cross-border harms when making policy decisions.[394]

Beyond preventing harm to the United States, there are several reasons to believe that U.S. global bank prosecutions also advance global welfare. First, the practices against which U.S. prosecutors have brought charges are highly unlikely to generate global welfare benefits. The benefits to Switzerland of allowing its banks to facilitate tax evasion—bank profits and local tax revenues—are unlikely to be greater than the tax revenues lost to the United States and other countries. The same is true of lax foreign regulation of benchmark manipulation, money laundering, and terrorist financing. These all appear to be instances where home states fail to act because the harms, although greater than the overall benefits, mostly fall abroad. As noted above, inaction may also result from lack of capacity or regulatory capture. In either case, U.S. enforcement can improve global welfare.

Second, U.S. prosecutions may catalyze improvements in international financial regulation. In some cases, this may be accomplished without any explicit agreement with foreign governments, through the quasi-regulatory impact of prosecutions. Large fines create industry-wide deterrence, and compliance programs imposed on individual firms provide models for others. The DOJ's practice of mitigating

391 *See* Verdier, *supra* note 52, at 118, 129, 163.

392 *See id.* at 129, 163.

393 *See* Eric Helleiner, The Status Quo Crisis: Global Financial Governance After the 2008 Financial Meltdown 4 (2014); Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 Ind. L.J. 1405, 1459–60, 1473 (2013).

394 *See* Dodge, *supra* note 357, at 144.

punishment for firms that adopt adequate compliance programs and report violations may strengthen a culture of compliance and voluntary reporting. Thus, U.S. prosecutions may also benefit other states that are harmed by the same practices but lack the capacity to enforce their own laws on global banks. For example, financial markets in many countries rely on LIBOR and other global benchmarks. As a result, U.S. actions that preserve their integrity also benefit them, as do stronger AML and terrorist-financing safeguards.

U.S. prosecutions may also lead to greater international cooperation. In several instances, they have been instrumental in breaking international deadlocks and catalyzing the establishment of treaties or other cooperative mechanisms. The U.S. case against UBS led to an agreement with Switzerland to disclose information on U.S. customers,[395] a pattern that has since expanded to other countries via the Foreign Account Tax Compliance Act ("FATCA").[396] The U.S. example has led other jurisdictions to adopt similar enforcement methods and tax reporting laws, collectively attacking a longstanding and seemingly intractable problem.[397] A similar phenomenon has occurred in international corruption, where U.S. enforcement has spurred the adoption of stronger anticorruption laws worldwide, as well as a multilateral treaty.[398] Following U.S. bank prosecutions, the Financial Stability Board and European authorities introduced initiatives to reduce "misconduct risk" by improving compliance procedures, compensation arrangements, and benchmark governance.[399]

### *C. Controlling Extraterritorial Prosecutions*

The preceding Sections have argued that extraterritorial criminal prosecutions of global banks can bring substantial benefits. Nevertheless, tensions are likely to persist between the criminal justice considerations that normally guide prosecutors—such as the degree of public harm, the strength of the evidence, and the need for deterrence—and important competing policy objectives about which they

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395 *See* UBS AG Agreement, *supra* note 289, at 1–2.

396 26 U.S.C. §§ 1471–1474 (2012).

397 *See* Itai Grinberg, *The Battle over Taxing Offshore Accounts*, 60 UCLA L. REV. 304, 337 (2012).

398 *See generally* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611 (2017).

399 *See generally, e.g.*, EUROPEAN SYSTEMIC RISK BD., REPORT ON MISCONDUCT RISK IN THE BANKING SECTOR (2015); FIN. STABILITY BD., MEASURES TO REDUCE MISCONDUCT RISK: PROGRESS REPORT (2015); FIN. STABILITY BD., MEASURES TO REDUCE MISCONDUCT RISK: SECOND PROGRESS REPORT (2016); FIN. STABILITY BD., STOCKTAKE OF EFFORTS TO STRENGTHEN GOVERNANCE FRAMEWORKS TO MITIGATE MISCONDUCT RISKS (2017).

lack expertise. The lack of a formal decisionmaking framework has so far not led to severe disruptions in diplomatic relations or financial stability, nor does it appear to have compromised prosecutorial autonomy.[400] However, prosecutions to date have proceeded under favorable conditions, with U.S. and home-state interests often aligned in fighting benchmark manipulation, tax evasion, and money laundering. In other areas, such as sanctions evasion, allies have raised diplomatic protests, which may grow louder as U.S. and European policies on sanctioned countries like Iran diverge. As banks from China and other emerging jurisdictions gain ground in global markets, the United States may also face a choice between sparing them—thus limiting the effectiveness of its policies—or risking dangerous clashes.

This Section argues that the decisionmaking process regarding global bank prosecutions can be improved. It does not present in detail a fully developed process, but rather lays out its basic components. In doing so, it starts from the premise that prosecutors' autonomous role in initiating and conducting criminal cases against foreign banks should be maintained. It is desirable both from a policy standpoint and in light of the norms that protect criminal prosecutions from political interference. At the same time, the process should incorporate steps to take into account the broader implications of such prosecutions with the benefit of appropriate expertise within the executive branch. These steps should be governed by DOJ policies that provide for consistent and transparent consideration of these implications, while leaving the final decision to prosecutors.

First, DOJ policies should require central approval for initiating such cases and for major sentencing or remedial decisions, such as fines, financial penalties, and structural reforms. In itself, this would not be a major innovation; DOJ policies already require central approval of several categories of sensitive prosecutorial decisions.[401] Such a policy would also largely reflect current practice, given that central DOJ units, such as the tax and fraud divisions, have initiated virtually all cases against global banks so far. Nevertheless, there are some exceptions, and it is possible that individual U.S. Attorney's offices might become more active in such prosecutions now that precedents have been established.

Second, the policies should identify a specific, limited list of competing policy considerations that may appropriately inform prosecutorial decisions. This list should be limited to two items: finan-

400 *See supra* Section III.B.

401 Green & Zacharias, supra note 299, at 190.

cial stability and national security. Thus, if a proposed action would threaten the viability of a major foreign financial institution, the financial stability of a bank's home country or third countries, or international financial stability, that risk should be considered. Likewise, prosecutors could legitimately adjust their decisions to reflect the likelihood that a proposed action would threaten a vital U.S. national security relationship or attract retaliation that would pose a serious threat to national security. The list should not include more attenuated risks, such as attracting complaints from foreign governments, straining relations between U.S. regulatory agencies and their foreign counterparts, or complicating trade and investment relationships. Although these risks are real, they should not be injected in cases of such seriousness that prosecutors have determined that criminal charges are appropriate.

Third, the policies should establish a formalized process for consultation with other actors within the executive branch who possess the information, resources, and expertise to evaluate the seriousness of competing considerations. The purpose of this process is not to establish a rigid approval framework or to give other executive actors a veto over prosecutions, but rather to ensure that inquiries from DOJ are directed to officials in other agencies who have the necessary authority, expertise, and perspective to evaluate the relevant issues and assess them consistently across cases. In practice, this could be accomplished by establishing an interagency panel, perhaps based on the CFIUS model, that includes representatives from the Departments of Treasury and State, the primary U.S. federal banking regulator for the relevant institution, and the SEC or CFTC where cases fall within their jurisdiction. To respect the norms prohibiting presidential involvement in criminal prosecutions,[402] the process would not include the White House or its direct appendages, such as the National Security Council. In all cases, consultations would be limited to the specific considerations described above, and final decisional authority would remain with DOJ.

Finally, DOJ should develop guidelines for cooperation between prosecutors and regulators at both the investigative stage and the structural remedy stage. These guidelines would streamline choices in various situations; for example, they might govern whether prosecutors should rely on external monitors or regulatory agencies to supervise implementation of reforms, and in which circumstances each

402 *See supra* Section III.B.

option should be used. They would also provide rules for cooperation between DOJ prosecutors and foreign regulatory agencies and other authorities, taking into account that although such cooperation is valuable for obtaining evidence and effecting arrests, foreign governments may preempt, and even undermine, ongoing U.S. investigations. The goal of these guidelines would be to promote uniformity and predictability, thus reducing the likelihood that prosecutions will create tension with foreign governments or work at cross-purposes with regulatory efforts to address industry-wide practices.

## Conclusion

This Article focuses on U.S. extraterritorial bank prosecutions because these actions have been uniquely salient in recent years. They have led to the largest fines ever imposed by U.S. prosecutors, diplomatic tussles with close U.S. allies, and policy debates about the merits of regulating international banking using criminal remedies. However, the problems discussed in this Article are not unique to the U.S. criminal enforcement campaign against global banks; the doctrinal problems raised by U.S. extraterritorial criminal enforcement in the post–*Morrison*, *Kiobel*, and *RJR Nabisco* era have much broader implications. U.S. criminal prosecutors have targeted many foreign corporations outside the financial industry, often relying on the same statutes and theories to reach more traditional cross-border crime, including drug trafficking, money laundering, and terrorism.

Likewise, whenever there are good reasons for certain government entities to conduct their functions autonomously—as in criminal prosecution, industry regulation, or monetary policy—difficult problems arise about whether and how the executive branch can effectively fulfill its putative role to aggregate and arbitrate perspectives within government, allowing the country to "speak with one voice."[403] In the case of law enforcement against global banks, this Article argues that the benefits of criminal investigative tools and penalties and autonomous prosecutorial initiative justify a system in which prosecutors retain the unilateral authority to bring extraterritorial criminal cases. It also recommends a more defined framework to help prosecutors consult effectively with government actors outside DOJ in assessing the potential impact of extraterritorial prosecutions on financial stability and national security. In other areas, designing appropriate processes will also require a detailed examination of the relevant pol-

403 The "one voice doctrine" is a central, if much criticized, tenet of U.S. foreign relations law. *See* David H. Moore, *Beyond One Voice*, 98 Minn. L. Rev. 953, 954–55 (2014).

icy considerations, and a greater or lesser degree of coordination may be desirable.

Finally, none of these considerations should obscure the fact that overall policy and enforcement priorities are ultimately shaped by politics and market developments. For example, criminal enforcement against corporations, including foreign banks, has reportedly been slowing down under the Trump Administration. This may be the result of a conscious policy shift or other factors, such as transition difficulties or lack of personnel within DOJ. In either case, now that precedent has been established, it is likely that extraterritorial criminal prosecutions against foreign banks and other corporations will eventually be revived. Likewise, as banks decline in importance in international finance in favor of other firms and technological platforms, regulatory and enforcement priorities will likely shift towards these sectors. But extraterritorial criminal prosecutions will remain part of the U.S. enforcement toolbox. The legal and policy questions they raise will therefore likely prove enduring.