THE VEXING CONTRADICTION OF U.S. JURISDICTION OVER EMBASSY PROPERTY IN THE CRIMINAL VERSUS CIVIL CONTEXTS

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I. INTRODUCTION

Picture this: you are a foreign service officer on mission in Port-au-Prince, Haiti. The United States Department of State has stationed you and your spouse in a government-leased house within the U.S. Embassy property. According to what you have been told, the house is “earthquake proof,” and in the event of an earthquake you will be safest by staying in the house. Despite the well-known fact that Haiti is no stranger to earthquakes, you feel assured that the house you will be living in for the foreseeable future is safe.

Unsurprisingly, an earthquake strikes, and it is devastating. Remembering what you were told, you and your spouse take shelter in the house. Before you realize what is happening, the house that is supposed to be “earthquake proof” is crumbling down around you. You and your spouse are trapped, and it is too late to get out of the house. The next thing you know, you are in a hospital somewhere in Haiti. You find out that your leg was crushed under the rubble, and you will likely lose it due to the severity of your injuries—but sadly, that is not all. Your spouse was trapped under the house for days and suffered a traumatic brain injury as a result. Your spouse is now paralyzed and will never be the same.

Obviously, the State Department-supplied housing that was supposed to be “earthquake proof” was the furthest thing from. After all, there was practically nothing left of the house after the earthquake. You and your spouse cannot go back to work due to the severity of your injuries, and you will both need very expensive and extensive medical care. You will need a prosthetic leg, and your spouse will need constant, around-the-clock, lifelong care, all of which will be outrageously expensive. How will you afford this, considering you will not be able to go back to work? You start thinking of compensation — who can you look to for damages? Your most obvious choice is the United States government since it was your employer, it supplied you the “earthquake proof” house, and because of its negligence and misrepresentation, your life will never be the same.

You decide to seek the advice of counsel and file a complaint in federal district court in accordance with the Federal Tort Claims Act

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(“FTCA”), the act that allows private parties to sue the federal government. To your surprise, your complaint gets dismissed. Why? According to the Court, it is simple—the FTCA has a codicil called the “foreign country exception,” which bars any claims “arising out of a foreign country.” This just does not seem right, so you exhaust all of your appeals. Nevertheless, you are left with no other options — you cannot recover from the federal government, meaning you cannot recover at all.

Would it surprise you to learn that the situation described above in fact is the current state of the law? I am sure you are thinking, “but how can this be fair?” Unfortunately, it is the current state of the law, at least according to some of the federal circuit courts and many district courts. The above narrative is based on the real case, Kathy-Lee Galvin & Blaise Pellegrin v. United States. Kathy-Lee and her husband, Blaise, are real people, and they were not able to recover anything, despite being employees of the United States Department of State, living in housing supplied to them by the Department of State advertised to them as “earthquake proof”, and despite their catastrophic injuries.

At first glance, this seems like a straightforward application of the law—embassy property is technically on foreign territory, and if the claim arose in a foreign country, then it is barred. The circuit courts have indeed approached these claims in this basic and formulaic way. Nevertheless, although it appears simple, there are multiple layers and caveats that make this particular exception far more complex.

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2 28 U.S.C. § 2674 (1948) (“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”).
5 This narrative is based on the case of Galvin v. United States, 859 F.3d 71. I worked on the Supreme Court petition for this case when I was a paralegal at the firm that represented her and her husband.
6 See, e.g., Macharia v. United States, 334 F.3d 61, 69 (D.C. Cir. 2003) (holding the FTCA’s sovereign immunity waiver does not extend to acts or omissions arising in territory subject to the sovereign authority of another nation because of the foreign country exception); Meredith v. United States, 330 F.2d 9, 10 (9th Cir. 1964) (holding the acts and omissions upon which appellant based her action occurred in Bangkok, Thailand, so the suit was barred by the foreign country exception); Romero v. Consulate of U.S., 860 F. Supp. 319, 324 (E.D. Va. 1994) (dismissing claims by aliens under the FTCA alleging emotional distress caused by the negligent denial of visas for entry to the U.S. by consular officials in Colombia because claims were barred by the foreign country exception to the FTCA); Gerritsen v. Vance, 488 F. Supp. 267, 268-70 (D. Mass. 1980) (granting the U.S.’s motion to dismiss a suit under the FTCA, holding that the plaintiff’s claim, which arose from an incident on the grounds of the Embassy in Zambia, occurred in a foreign country within the meaning of the foreign country exception).
7 Galvin, 859 F.3d at 71.
8 Id.
10 See, e.g., Galvin, 859 F.3d at 71; Macharia, 334 F.3d at 69; Meredith, 330 F.2d at 9.
What makes this situation more vexing is that there exists a conflicting statute aimed at criminal activity on embassy property, which was enacted around the same time as the FTCA’s foreign country exception.\(^{11}\) This statute seemingly gives the United States jurisdiction in the criminal context in the exact area that the foreign country exception purports to cut off jurisdiction in the civil context.\(^{12}\) Why is it that Kathy-Lee could be prosecuted according to United States law, under United States jurisdiction, in a United States Federal Court if she *murdered* her husband in the embassy housing, but she *cannot* recover damages according to United States law, under United States Jurisdiction, in a United States Federal Court after being crushed under housing supplied to her *by the United States*? It is this contradiction and double standard that I hope to explore further in this Comment.

Part II of this Comment will explore the background of the two statutes, starting with the foreign country exception, then the special maritime and territorial jurisdiction defined in 18 U.S.C. § 7. Part II will also discuss Supreme Court and Circuit Court decisions addressing each statute.

Part III will then analyze the practical and legal implications of this apparent statutory contradiction and propose solutions to these problems. One solution requires amending the foreign country exception so that it is clear about what the exception encompasses, explicitly stating that the property procured for an embassy is not subject to the exception. Another solution, although perhaps more cumbersome, requires the Supreme Court to grant certiorari to a case and create a rule construing the foreign country exception in a way that would exclude embassy property from its reach, just as it has done with the jurisdiction conferred through 18 U.S.C. § 7(3).\(^{13}\)

These solutions can find support in the statute defining special maritime and territorial jurisdiction, especially since it was enacted around the same time as the foreign country exception, and courts, including the Supreme Court, have examined it explicitly in the embassy context.\(^{14}\)

II. BACKGROUND

It is important to first discuss both the FTCA’s Foreign Country Exception and the Special Maritime and Territorial Jurisdiction of the United States, their purposes, their legislative histories, and cases discussing each statute. This discussion will provide important context and understanding for the subsequent analysis.

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\(^{12}\) See id.; United States v. Erdos, 474 F.2d 157, 160 (4th Cir. 1973) (holding that the district court had jurisdiction to try an American citizen for a crime occurring within the American Embassy located in a foreign country).

\(^{13}\) See, e.g., United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); Erdos, 474 F.2d at 157.

\(^{14}\) See, e.g., id.
A. A Basic Overview of The Federal Tort Claims Act

Prior to the enactment of the FTCA, the United States could not be sued under the doctrine of sovereign immunity.\textsuperscript{15} Sovereign immunity is defined as a “government’s immunity from being sued in its own courts without its consent” and a “state’s immunity from being sued in federal court by the state’s own citizens.”\textsuperscript{16} In \textit{Kawananakoa v. Polyblank}, Justice Holmes said that the doctrine of sovereign immunity derives from “the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”\textsuperscript{17} The FTCA basically suspends the United States’ sovereign immunity in tort actions caused by the acts and omissions of government officials and employees.\textsuperscript{18} The act makes it so the government can be held liable for torts the same way a private citizen could be.\textsuperscript{19}

Several exceptions to the FTCA are listed in section 2680.\textsuperscript{20} The foreign country exception is contained in Section 2680(k), and says that the United States shall not be liable for “[a]ny claim arising in a foreign country.”\textsuperscript{21} Although the term “foreign country” has been litigated in cases and discussed in secondary materials, it is not defined elsewhere in the FTCA.\textsuperscript{22}

B. Legislative History of the Federal Tort Claims Act

After twenty-eight years of drafting and redrafting, as Justice Reed says, “Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit,” and finally enacted the FTCA.\textsuperscript{23} The “Federal Tort Claims Act” was the official short title passed by the Seventy-Ninth Congress on August 2, 1946, as Title IV of the Legislative

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\textsuperscript{16} Sovereign Immunity, \textit{BLACK'S LAW DICTIONARY} (10th ed. 2014).
\textsuperscript{17} Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).
\textsuperscript{19} 28 U.S.C. §1346(b) (2018) (excluding interest prior to judgment or punitive damages).
\textsuperscript{20} 28 U.S.C. § 2860(a)-(n) (2018). For example, the act provides for exceptions for claims such as those that arise “out of the loss, miscarriage, or negligent transmission of letters or postal matter” (b), “for damages caused by the imposition or establishment of a quarantine by the United States” (f), and “from the activities of the Tennessee Valley Authority”(l). \textit{Id}.
\textsuperscript{21} 28 U.S.C. § 2860(k) (2018). This exception is commonly referred to as the “foreign country exception” and will be referred to as such throughout this discussion.
\textsuperscript{22} See, e.g., Galvin v. United States, 859 F.3d 71 (D.C. Cir. 2017); 158 A.L.R. Fed. 137 (Originally published in 1999).
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Reorganization Act. Title IV was substantially repealed and reenacted as sections 1346 and 2671 on June 25, 1948.

The foreign country exception has been part of the FTCA since its first enactment in 1942. Originally, the exception read, “arising in a foreign country on behalf of an alien,” making the government’s liability turn on the injured party’s citizenship, but that part was excised from the exception before the final version was enacted. An often cited and notable dialogue between Assistant Attorney General Francis Shea and Congressman Robinson of the House Judiciary Committee is illustrative in showing what Congress may have intended in including the foreign country exception. The dialogue reads as follows:

**MR. SHEA** ... Claims arising in a foreign country have been exempted from this bill, H.R. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.

**MR. ROBSION.** You mean by that any representative of the United States who committed a tort in England or some other country could not be reached under this?

**MR. SHEA.** That is right. That would have to come to the Committee on Claims in the Congress.

It is clear from this history that Congress was concerned about opening up the United States to liability under the laws of other countries. Nonetheless, it is also clear from the Congressional statement of purpose that “fair play and justice” was a primary goal of Congress in adopting the FTCA.

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25 Id. Coincidentally, the statute authorizing Special Maritime and Territorial Jurisdiction, discussed later, was also part of the Legislative Reorganization Act of 1948.
27 H.R. 5373, 77th Cong., 2d Sess., § 303 (12).
28 *Spelar*, 338 U.S. at 221; *See also* Mark Dean, Smith v. United States: Justice Denied under the FTCA Foreign Country Exception, 38 ST. LOUIS U. L.J. 553, 561 (1993).
29 *Spelar*, 338 U.S. at 221.
Certainly, barring any and all claims by people like Kathy-Lee Galvin explicitly goes against Congress’s policy goal in enacting the FTCA.

Furthermore, the legislative history does not provide a clear indication as to what the foreign country exception is specifically intended to cover.\(^{31}\) It was originally proposed that the FTCA would only cover the United States, Puerto Rico, and the Canal Zone, but Congress ultimately decided against providing specific geographical areas covered under the foreign country exception.\(^ {32}\)

Rejection of the geographical and citizenship requirements left the scope of the exception inconclusive and subject to interpretation.\(^ {33}\) As Mark Dean explains, “the implication is that since the drafters rejected a proposal that would have specifically limited the Act to defined areas, the purpose of the exception was only to avoid United States liability under foreign law,” not to leave the government free from all liability.\(^ {34}\) Federal Courts on all levels have attempted to interpret the foreign country exception, but the pursuit to explicitly define the phrase “foreign country” has been less than successful.\(^ {35}\)

C. “Foreign Country” Defined Elsewhere in the United States Code and Case Law

The phrase “foreign country” appears more than 2,000 times when searched on Westlaw.\(^ {36}\) Yet defining “foreign country” with exact specificity has proven to be difficult. The Supreme Court addressed the difficulty in defining “foreign country” in *Burnet v. Chicago Portrait Co.* In *Burnet,* the Court said:

The word “country” in the expression “foreign country,” is ambiguous. It may be taken to mean foreign territory or foreign government. In the sense of territory, it may embrace all the territory subject to foreign sovereign

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\(^{31}\) Dean, *supra* note 28, at 560.

\(^{32}\) *Tort Claims Against the United States: Hearings on S. 2690 Before the Subcomm. of the Senate Comm. on the Judiciary,* 76th Cong., 3d Sess., at 65 (1940).

\(^{33}\) Dean, *supra* note 28, at 562.

\(^{34}\) *Id.*


power. When referring more particularly to a foreign government, it may describe a foreign state in the international sense… or it may mean a foreign government which has authority over a particular area or subject matter… the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation.\textsuperscript{37}

The term “foreign country” as applied to the foreign country exception to the FTCA is not defined in the Act’s definitions section,\textsuperscript{38} so it is not clear what exactly the exception is referring to. The United States Code is not replete with any definition of “foreign country” in any context. Title 19, Chapter 17 of the United States Code does provide one definition for “foreign country.”\textsuperscript{39} This chapter says, “[t]he term ‘foreign country’ includes any foreign instrumentality.\textsuperscript{40} Any territory or possession of a foreign country that is administered separately for customs purposes, shall be treated as a separate foreign country.”\textsuperscript{41}

In \textit{United States v. Spelar}, discussed in greater detail later, the Supreme Court tried to define “foreign country” for the purposes of the foreign country exception in a straightforward and simplistic way.\textsuperscript{42} The Court said there is “no more accurate phrase in the common English usage than ‘foreign country’ to denote territory subject to the sovereignty of another nation.”\textsuperscript{43} This definition, however, forms a rather circular argument: a “because we say so” kind of approach. Justice Frankfurter’s concurrence alludes to the circularity of this definition:

To assume that terms like ‘foreign country’ and ‘possessions’ are self-defining, not at all involving a choice of judicial judgment, is mechanical jurisprudence at its best. These terms do not have fixed and inclusive meanings, as is true of mathematical and other scientific terms. Both ‘possessions’ an[d] ‘foreign country’ have penumbral meanings, which is not true, for instance, of the verbal designations for weights and measures. It is this precision of content which differentiates scientific from most political, legislative and legal language.\textsuperscript{44}

\textsuperscript{37} Burnet v. Chicago Portrait Co., 285 U.S. 1, 5-6 (1932). \textit{Burnet} discussed the ambiguity in “foreign country” in reference to the Revenue Code.

\textsuperscript{38} 28 U.S.C. § 2671 (2000). This section does define a “federal agency” and an “employee of the government,” but provides no other definitions.


\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.}


\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.} at 223 (Frankfurter, J., concurring).
As courts have approached other cases involving the foreign country exception, they continue to cite the “because we say so” style of defining “foreign country” for the purposes of the foreign country exception. The problem with this definition, as Justice Frankfurter points out, is that there is no specificity to it. For example, what happens when a territory is subject to the dual sovereignty of two different nations? An Air Force base is arguably under the sovereignty of the United States, even if it is technically situated in another country. This was the argument in Spelar, which the Court rejected, but without really explaining why this argument had been rejected.


As the three cases discussed below make clear, to argue that the term “foreign country” does not include embassy property is contrary to the current state of the law. There have been many lower circuit court and district court decisions that explicitly hold that claims arising on embassy property are barred by the foreign country exception. Nonetheless, none of these cases entirely foreclose the possibility of allowing these kinds of claims.

i. United States v. Spelar

United States v. Spelar is the most important and most cited case involving the foreign country exception. Lillian Spelar, as Administratrix of the Estate of her husband Mark Spelar, sued the United States under the FTCA for Mark’s death in an airplane crash at Harmon Field, Newfoundland, an air base leased for 99 years by Great Britain to the United States. Lillian Spelar alleged that the fatal accident was caused by the government’s negligent operation of Harmon Field and sought damages under Newfoundland’s wrongful death statute. The district court held that the claim was barred by the foreign country exception and dismissed the complaint for lack of jurisdiction, but the Court of Appeals reversed. The Supreme Court reversed the decision of the Court of Appeals, holding that the Newfoundland air base fell within the foreign country exception.

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47 Id. at 219.
48 See, e.g., Sosa, 542 U.S. at 692; Galvin, 859 F.3d at 73; Meredith, 330 F.2d at 10.
50 Spelar, 338 U.S. at 218.
51 Id.
52 Id. at 218-19.
53 Id. at 222.
The Supreme Court based its decision in part on the legislative history and in part on the words of the exception on its face without further analysis into any possible ambiguities. The Court held that “[s]ufficient basis for our conclusion lies in the express words of the statute” because the 99-year lease between Great Britain and the United States “did not and [was] not intended to transfer sovereignty over the leased areas from Great Britain to the United States.” Because the Air Force base where Mr. Spelar’s death occurred “remained subject to the sovereignty of Great Britain,” the claim arose in a foreign country and was thus barred.

Ms. Spelar’s claim may have been more successful had she sued according to United States’ wrongful death laws, but the Court did not discuss that possibility. Nonetheless, many courts, including the Supreme Court in *Sosa v. Alvarez-Machain*, have cited to this reasoning in denying subsequent claims pursuant to the foreign country exception.

Justice Frankfurter and Justice Jackson submitted concurring opinions. Justice Frankfurter, although he agreed that the claim was barred by the foreign country exception, argued that “a ‘foreign country’ in which the United States has no territorial control does not bear the same relation to the United States as a ‘foreign country’ in which the United States does have the territorial control that it has in the air base in Newfoundland.” Justice Jackson reached the same result, but did not agree with the majority’s analysis. He argued, much like embassies in this context, that Congress had treated U.S air bases differently in two different pieces of legislation, leading to confusion. He explained “[t]o those uninitiated in modern methods of statutory construction it may seem a somewhat esoteric doctrine that the same place at the same time may legally be both a possession of the United States and a foreign country.”

54 *Id.* at 219–21.
55 *Id.* at 219.
56 *Id.*
57 *Id.*
58 There are, of course, choice of law issues that would need to be explored here. Nonetheless, that is a topic that could be the subject of an entire comment and will not be discussed in depth here.
60 *Spelar*, 338 U.S. at 222-25.
61 *Id.* at 223.
62 *Id.* at 224.
63 *Id.* at 225.
64 *Id.*
ii. *Sosa v. Alvarez-Machain*

In *Sosa*, the plaintiff, a Mexican national, was acquitted of murder after facing prosecution in the United States. The plaintiff claimed that he was abducted and transported to the United States to face prosecution, and sought damages from the United States for false arrest under the FTCA. The district court granted the government’s motion to dismiss the FTCA claim, but awarded summary judgment and damages for a claim pursuant to the Alien Tort Statute. The circuit court affirmed the Alien Tort Statute judgment, but reversed the dismissal of the FTCA claim. The Supreme Court reversed both judgments.

The government argued that because the arrest occurred in Mexico, the foreign country exception barred the claim. The Court explained that the plaintiff’s “arrest, however, was said to be “false,” and thus tortious, only because, and only to the extent that, it took place and endured in Mexico. The actions in Mexico are thus most naturally understood as the kernel of a “claim arising in a foreign country,” and barred from suit under the exception to the waiver of immunity. Conversely, the plaintiff and the circuit court argued that the suit should proceed under the “headquarters doctrine” since the arrest was planned and directed in the United States. "Headquarters claims typically involve allegations of negligent guidance in an office within the United States of employees who cause damage while in a foreign country, or of activities which take place within a foreign country." When the headquarters doctrine applies, the suit is not barred by the foreign country exception.

The Supreme Court held that the foreign country exception bars all claims against the government based on any injury suffered in a foreign country, regardless of where the tortious act or omission that gave rise to the injury occurred. According to the Court, the proximate cause “between domestic behavior and foreign harm or injury is not sufficient of itself to bar application of the foreign country exception to a claim resting on that same foreign consequence.” The Court expressed concern that the “headquarters

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66 Id. at 698.
67 Id. at 699.
68 Id.
69 Id.
70 Id.
71 Id. at 700-01.
72 Id. at 701.
73 Id.
74 Id. (internal quotations omitted).
75 Id.
76 Id. at 700.
77 Id. at 703-04.
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The doctrine threatens to swallow the foreign country exception whole, certainly at the pleadings stage.78

Just as the Court had done in Spelar, the Court rehearsed the legislative history of the foreign country exception and came to the same conclusion that the exception’s main purpose was to shield the United States from liability according to the laws of other countries.79 The Court did not provide an actual definition of “foreign country” for the purposes of the foreign country exception, relying more on its implied meaning.80

iii. Meredith v. United States

The facts of Meredith v. United States are quite similar to those in Galvin v. United States.81 In Meredith, the plaintiff was seeking damages for an injury that occurred on embassy property in Bangkok, Thailand.82 Like the Supreme Court in Spelar and Sosa, the 9th Circuit reviewed the legislative history of the foreign country exception, stating “[t]he words ‘foreign country’ are not words of art, carrying a fixed and precise meaning in every context.”83 Ironically, the 9th Circuit did not go further to define the “fixed and precise meaning” in the context of the foreign country exception, leaving still the ambiguity described in Burnet. Instead, the 9th Circuit went no further than to state that “[t]he phrase ‘in a foreign country’ is used in § 2680(k) with the meaning dictated by ‘common sense’ and ‘common speech.’”84 In the end, the 9th Circuit affirmed the district court’s decision to dismiss the claim on summary judgment.85


The lack of definitional specificity for “foreign country” and the courts’ opinions regarding the foreign country exception become even more confusing when compared to the United States’ Special Maritime and Territorial Jurisdiction found in 18 U.S.C § 7.

18 U.S.C. § 7(3) states that the “special maritime and territorial jurisdiction of the United States” includes “[a]ny lands reserved or acquired

78 Id. at 703.
79 Id. at 707.
80 See id. at 700-01 (“Alvarez’s arrest, however, was said to be ‘false,’ and thus tortious, only because, and only to the extent that, it took place and endured in Mexico. The actions in Mexico are thus most naturally understood as the kernel of a ‘claim arising in a foreign country,’ and barred from suit under the exception to the waiver of immunity.”).
81 See Meredith v. United States, 330 F.2d 9, 10 (9th Cir. 1964); see also Galvin v. United States, 859 F.3d 71, 72 (D.C. Cir. 2017).
82 Meredith, 330 F.2d at 10.
83 Id.
84 Id. at 11.
85 Id.
for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.\(^86\) As discussed later, the Supreme Court has explicitly held that the clause “other needful building” does indeed include property procured for use by a United States’ Embassy.\(^87\)

F. Legislative History of the Special Maritime and Territorial Jurisdiction of the United States

The original version of 18 U.S.C § 7, passed in 1790, provided basic criminal laws for lands outside the jurisdiction of any sovereign nation, including the United States.\(^88\) At the time the original version was enacted, the intent was “to prevent that detestable crime [murder] from finding harbor and impunity in places where no other law than that of the United States could reach to punish.”\(^89\) As the United States expanded its power and control, Congress continued to expand federal criminal jurisdiction.\(^90\) By the nineteenth century, the special territorial jurisdiction of the United States included territory beyond the actual boundaries of the mainland United States.\(^91\)

Congress understood criminal jurisdiction to extend to all lands claimed by the United States, without regard to a particular state, or even within the continental United States, when it granted jurisdiction through the single statute.\(^92\) “Congress declined to assert jurisdiction over territories subject to the more comprehensive criminal codes of the states or self-governing territories,” but “it showed no intent to limit jurisdiction on the basis of geography alone.”\(^93\) In 1940, Congress further expanded the Act’s jurisdiction to include those lands under the concurrent authority of the United States.\(^94\)


Although they are not the only cases addressing the special maritime and territorial jurisdiction of the United States, both United States v. Corey

\(^{87}\) See United States v. Erdos, 474 F.2d 157, 159 (4th Cir. 1973).
\(^{88}\) United States v. Corey, 232 F.3d 1166, 1173 (9th Cir. 2000).
\(^{89}\) \textit{Id.} at 173-74.
\(^{90}\) \textit{Id.} at 1174.
\(^{91}\) \textit{Id.}
\(^{92}\) \textit{Id.}
\(^{93}\) \textit{Id.}
\(^{94}\) \textit{Id.}
and *United States v. Erdos* discuss crimes perpetrated on embassy property.\(^95\) In both cases, the circuit court allowed the United States to exercise jurisdiction over the embassy.\(^96\)

i. *United States v. Corey*

Corey, a United States citizen, lived abroad with his family while working for the U.S. Air Force as a civilian postmaster.\(^97\) Corey ran the post office at the American Embassy in Manila, Philippines, and for several years prior, managed the office at the U.S. Air Force Base at Yokota, Japan.\(^98\) In 1996, Corey's stepdaughter told her doctor that Corey had sexually abused her starting when she was fifteen.\(^99\) After an investigation, the government charged Corey with aggravated sexual abuse and sexual abuse.\(^100\) Corey was convicted on eight of eleven counts and sentenced to 262 months in prison.\(^101\) On appeal, he challenged the district court's jurisdiction.\(^102\)

The 9th Circuit in *Corey* conducts an in-depth analysis of what it means for a piece of property to be “reserved or acquired for the use of the United States.”\(^103\) “There is no requirement that the United States be an owner, or even an occupant, so long as the land has been set aside for the use of an instrumentality of the federal government.”\(^104\) Because the “State Department leased the apartment building from a private landlord for the purpose of housing our embassy personnel,”\(^105\) “the lease runs without regard to the residence of a particular employee.”\(^106\) Because “the government pays rent and utilities, and provides security for the buildings,”\(^107\) “it was an apartment acquired by the State Department for governmental use.”\(^108\)

Although the embassy remains the territory of the receiving state to a certain degree, diplomatic conventions disable the government from exerting effective control over the area.\(^109\) The local police could not enter the premises to investigate crimes without the consent of the ambassador, nor could they prosecute Corey, or any other American member of the embassy staff.\(^110\) The United States has the legal authority to regulate conduct on those
The Court concluded that the United States exercises concurrent, even primary, jurisdiction over the actions of United States nationals on both the Air Force base and the embassy property.\footnote{Id.}

\section*{ii. \textit{United States v. Erdos}}

In a case specifically dealing with United States’ criminal law jurisdiction on embassy property, the Court of Appeals for the 4th Circuit explicitly held that the United States can exercise jurisdiction over embassy property.\footnote{Id.}

On American Embassy property in the New Republic of Equatorial Guinea, Alfred Erdos killed Donald Leahy.\footnote{Id. at 158.} Both were American citizens and embassy employees.\footnote{Id.} Erdos was tried and convicted of voluntary manslaughter in the District Court for the Eastern District of Virginia.\footnote{Id.} One of the issues on appeal was whether the district court had jurisdiction to try Erdos for a crime occurring on American Embassy property located in a foreign country.\footnote{Id. at 159.}

Ironically, the 4th Circuit applied almost identical reasoning to allow this jurisdictional reach to embassy property that the Supreme Court used to deny this kind of jurisdictional reach under the foreign country exception.\footnote{See id. at 160.} The 4th Circuit explicitly stated that “[t]he test, as to property within or without the United States, [is] one of practical usage and dominion exercised over the embassy or other federal establishment by the United States government.”\footnote{Id. at 160.} The court further explained that the first and second clause of the statute\footnote{18 U.S.C. § 7(3) (2018) (“Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof…”).} clearly intended to “create a jurisdictional category: lands reserved or acquired for the use of the United States under its exclusive or concurrent jurisdiction.”\footnote{Erdos, 474 F.2d at 160.}

The 4th Circuit held that 18 U.S.C. § 7(3) is a proper grant of “special” territorial jurisdiction embracing property acquired for the use of the United States’ embassy and under its concurrent jurisdiction.\footnote{Id.} Clearly, courts can construe statutes in such a way as to extend the jurisdiction of the United States onto embassy properties. The question remains, however, as to\footnote{111 Id.}
why Congress and the courts have been so hesitant as to allow in a civil context what they have so freely given in a criminal context.

III. ANALYSIS

As the law stands right now, Kathy-Lee Galvin (or any foreign service member, for that matter) could be tried and convicted of murder in a United States Federal Court, under the jurisdiction of the United States, and according to the laws of the United States, as Erdos and Corey make clear.\(^\text{123}\) Yet, Kathy-Lee Galvin was awarded no relief for severe injuries caused by the negligence of the United States government. She sued the United States in federal court, under the jurisdiction of the United States, and according to the laws of the United States.\(^\text{124}\) In fact, if the family of Erdos’ victim was to sue Erdos for wrongful death their claim, too, would be dismissed. Same set of operative facts, same location, dramatically different results.

A. Legal Problems of Applying the Foreign Country Exception on Embassy Property

It is quite possible that Congress has the same choice of law concerns that it had when it first enacted the FTCA. One particular reason courts have given for excluding embassies under the foreign country exception is that “obviously our embassy . . . has no tort law of its own”\(^\text{125}\) and “[p]resumably the law applicable on these premises would be that of the receiving country.”\(^\text{126}\) An additional concern, according to Judge Sobeloff in Meredith, is “the absence of United States courts in such countries, with resulting problems of venue, and the difficulty of bringing defense witnesses from the scene of the alleged tort to places far removed.”\(^\text{127}\)

In the early days of the foreign country exception, courts were generally operating under the assumption that the negligence and the injury occurred in the same place\(^\text{128}\), which is not quite true today. More recently, courts have focused on the site of the negligence, as opposed to that of the injury, to determine where the claim arose.\(^\text{129}\) In Kathy-Lee Galvin’s case, which would be true for other foreign service officers, it was the State Department in the United States that was negligent in selecting the housing.\(^\text{130}\)

\(^{123}\) United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); Erdos, 474 F.2d at 157.

\(^{124}\) See Galvin v. United States, 859 F.3d 71, 72 (D.C. Cir. 2017).

\(^{125}\) Meredith v. United States, 330 F.2d 9, 10 (9th Cir. 1964).

\(^{126}\) Id.

\(^{127}\) Id. (quoting Burna v. United States, 240 F.2d 720, 722 (4th Cir. 1957)).

\(^{128}\) See, e.g., United States v. Spelar, 338 U.S. 217 (1949); Meredith, 330 F.2d at 9.

\(^{129}\) McCracken, supra note 49, at 603.

\(^{130}\) See Galvin v. United States, 859 F.3d 71 (D.C. Cir. 2017).
Furthermore, these same concerns arguably arise when a crime is committed on embassy property, and yet Congress has explicitly provided for United States law to reach those crimes. For example, the murder in Erdos took place on American Embassy property in the New Republic of Equatorial Guinea; yet, Erdos was tried in the United States District for the Eastern District of Virginia and the appeal was heard in the United States Court of Appeals for the 4th Circuit. Similarly, the crimes in Corey were perpetrated in the Philippines and Japan; yet, Corey was prosecuted and convicted in the United States District Court for the District of Hawaii, and his appeal was heard in the United States Court of Appeals for the 9th Circuit. In the context of the FTCA, Congress can provide for how to handle civil claims arising on embassy property in much of the same way it dealt with how to handle criminal actions on embassy properties. Although there are certainly arguments to be made regarding a federal common law that encompasses embassies and United States’ jurisdiction over such, the Supreme Court has held that “few areas, involving ‘uniquely federal interests,’ are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed... by the courts—so-called ‘federal common law.’” Clearly, jurisdiction over a United States embassy is an area of unique federal interests.

B. Practical Problems of Applying the Foreign Country Exception on Embassy Property

The practical problems of applying the foreign country exception on embassy property are even clearer than the legal problems, especially considering how many federal employees are affected by this bar. As of December 31, 2017, there were 13,678 foreign service employees, 9,441 FS and CS overseas employees, and 31 government agencies represented overseas. In addition, the United States had 276 overseas posts, including 170 embassies. In 2013, there were only seven countries in which the United States did not have any diplomatic presence: Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Guinea-Bissau. According to the current interpretation of the foreign country exception, each and every one of these people, if they

133 United States v. Corey, 232 F.3d 1166, 1169 (9th Cir. 2000).
136 Id.
were injured overseas on embassy or consulate property, are barred from seeking recovery from the United States.

The legislative history makes it clear that Congress’s purpose in enacting the FTCA was one of fair play and justice – in enacting the FTCA, Congress allowed claimants to recover against the United States in the same way as if they had been injured by private individuals.\textsuperscript{138} How, then, can the FTCA be fulfilling its purpose by barring thousands of individuals employed on United States embassies from recovery? Factor in the number of civilians employed by the U.S. military, and that number grows exponentially.\textsuperscript{139} As Kelly McCracken explained in her article, “sending Americans and their families abroad, as the United States government does with military and embassy personnel, then not allowing them to recover when injured by United States officials or employees is particularly unfair.”\textsuperscript{140}

C. Solutions to These Problems

Two solutions come to mind when thinking about how to solve the legal and practical problems that are created by barring all claims arising on embassy property.

The first solution: Congress should amend the FTCA’s foreign country exception that essentially creates an exception-within-an-exception. This new exception should parallel the special maritime and territorial jurisdiction of the United States found in 18 U.S.C. § 7(3), which the courts have explicitly found extends to embassy property.\textsuperscript{141}

The second, arguably more cumbersome solution: the Supreme Court can construe the foreign country exception to exclude embassy properties. This would, of course, first require a case to be filed in the district court, that gets appealed to the Court of Appeals, and then appealed to the Supreme Court. The Supreme Court would then need to grant certiorari – a rare and difficult feat. Nevertheless, it is not impossible.


I am not denying that as the law currently stands, the United States is not liable for tort claims that arise on embassy property. I am arguing,

\textsuperscript{138} McCracken, supra note 49, at 623.

\textsuperscript{139} Indeed, as of June 2020 there are a reported 761,000 civilian employees of the Department of Defense and “224,000 combined personnel in over 170 countries.” Kimberly Amadeo, Department of Defense and Its Effect on the Economy, BALANCE (Nov. 10, 2020), https://www.thebalance.com/department-of-defense-what-it-does-and-its-impact-3305982.

\textsuperscript{140} McCracken, supra note 49, at 623.

\textsuperscript{141} See United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); United States v. Erdos, 474 F.2d 157, 158 (4th Cir. 1973).
however, that the United States should be liable for tort claims that arise on embassy property. I am also not denying the validity of the original enacting Congress’ general policy reasons for not wanting the United States to be liable according to another country’s laws. Nonetheless, the legislative history suggests that the main purpose for enacting the FTCA was for “fair play and justice.”

How, then, can the statute really be living up to its main purpose of “fair play and justice” by excluding a sizeable population of the federal government’s workforce?

When Congress enacts legislation, there is generally a “presumption against extraterritoriality.” “The territorial presumption is . . . based on the common-sense inference that, where Congress does not indicate otherwise, legislation dealing with domestic matters is not meant to extend beyond the nation’s borders.” However, in explaining the presumption against extraterritoriality, the 9th Circuit has stated that “the presumption does not apply where the legislation implicates concerns that are not inherently domestic.”

The foreign country exception clearly deals with “concerns that are not inherently domestic.” It is clear from the legislative history that in enacting the foreign country exception, Congress was driven primarily by protecting the United States from liability under the laws of another country. There are, of course, choice of law questions that would have to be addressed if Congress were to expand the FTCA to allow claims arising on embassy property. Nevertheless, there is nothing that expressly prohibits Congress from expanding the FTCA. In fact, “no one challenges the power of Congress to extend the remedy provided by the Federal Tort Claims Act to persons injured on premises occupied by this nation’s foreign embassies and consulates.” Congress should “extend the remedy provided by the Federal Tort Claims Act to persons injured on premises occupied by this nation’s foreign embassies and consulates,” and Congress has the legal authority to do so.

Embassies are, in a way, “possessions” of the United States, making it clear that the applicable United States law should apply, at least when the injured party is a citizen of the United States. The United States has a

142 U.S. Dep’t of State, supra note 135.
144 Corey, 232 F.3d at 1170.
144 Id.
146 Id.
146 Id.
147 Id.
149 See id.
150 Meredith v. United States, 330 F.2d 9, 10 (9th Cir. 1964).
151 Id.
152 See id.
153 See id.
154 McCracken, supra note 49, at 630.
strong interest in permitting recovery by its own citizens, and narrowing the foreign country exception not to include embassy properties would better serve the interests of fair play and justice by permitting more meritorious claimants to recover under the FTCA.\textsuperscript{155} Congress should include a section analogous to 18 U.S.C. § 7(3) that allows the FTCA to reach “[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof…”\textsuperscript{156}

ii. Solution 2: The Supreme Court Can Construe The Foreign Country Exception To Not Reach Embassy Properties.

Even if Congress is not willing to narrow the exception to not include embassy property, the courts can read the statute in such a way as to not include embassy property. Like the foreign country exception, 18 U.S.C. § 7(3) does not explicitly mention anything about embassy properties.\textsuperscript{157} Nevertheless, the 4th and 9th Circuits have read into the statute jurisdiction over crimes occurring on embassy property.\textsuperscript{158} Just as the 4th Circuit did in \textit{Erdos} and the 9th Circuit did in \textit{Corey},\textsuperscript{159} courts can construe the foreign country exception in such a way as to allow jurisdiction over claims arising on embassy property.

In \textit{United States v. Corey}, the 9th Circuit explained that “embassy property remains the territory of the receiving state, and does not constitute [the] territory of the United States.”\textsuperscript{160} Nonetheless, “acknowledging the claims of the foreign government does not determine whether the United States exercises concurrent jurisdiction over that territory—particularly with regard to the actions of its own citizens.”\textsuperscript{161} The 9th Circuit further recognized that “[t]here is no question that domestic lands may fall under the concurrent jurisdiction of the state and federal governments.”\textsuperscript{162} “What matters is not whose law trumps in particular situations, but that there is a law-driven means for resolving any conflict.”\textsuperscript{163} Because the United States does in fact exercise concurrent jurisdiction over embassy properties, the Courts can construe the foreign country exception in such a way that it does not encompass embassy properties.

\textsuperscript{155} Id. at 622.
\textsuperscript{157} Id.
\textsuperscript{158} See United States v. Corey, 232 F.3d 1166, 1172 (9th Cir. 2000); United States v. Erdos, 474 F.2d 157, 158 (4th Cir. 1973).
\textsuperscript{159} Corey, 232 F.3d at 1172.
\textsuperscript{160} Id. at 1178 (quoting McKeel v. Islamic Republic of Iran, 722 F.2d 582, 588 (9th Cir. 1983)).
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 1180.
\textsuperscript{163} Id.
IV. CONCLUSION

There is no reason that people like Kathy-Lee Galvin may be prosecuted according to United States law in United States Federal Courts for crimes committed on embassy property; yet have their claims dismissed when they attempt to recover for the government’s negligence. Why is it that the same location would yield polar opposite results in two different legal contexts? Why is it that Kathy-Lee could be prosecuted according to United States law, under United States Jurisdiction, in a United States Federal Court if she murdered her husband in the Embassy housing, but she cannot recover damages according to United States law, under United States Jurisdiction, in a United States Federal Court after being crushed under housing supplied to her by the United States?

The legislative history makes it clear that when implementing the Federal Tort Claims Act, the Seventy-Ninth Congress was concerned about subjecting the United States to liability under the laws of other countries. It is well established that the foreign country exception was included in the Act specifically to combat this fear. As a result, the foreign country exception is so broadly written that it has come to encompass far more than the enacting Congress perhaps ever intended, and has led to some truly unfair outcomes—with the narrative described at the beginning of this comment being a prime example.

The law, as it currently stands, allows the United States to prosecute people for crimes committed on embassy property using the same explanation as it does for not allowing citizens to recover for torts committed on embassy property. If the Federal Tort Claims Act’s main aim truly is “fair play and justice,” then excluding such a sizeable portion of the federal workforce is certainly not fulfilling that purpose.

But it does not need to be this way. Despite the current state of the law regarding the FTCA’s foreign country exception, the United States can exercise its jurisdiction on embassy property. Just as Congress has provided for jurisdiction over crimes committed on embassy property, it can also provide jurisdiction over torts committed on embassy property. Congress legally can, and should, provide for relief according to the FTCA for claims arising on embassy property. Since the United States exercises concurrent jurisdiction over embassy property, Congress can provide a route to relief according to the FTCA – no one doubts that fact.

There are many opportunities for further research surrounding the foreign country exception. The foreign country exception has already been examined in the context of the frontier of Antarctica, as well as in the context of military bases. But it can also be examined in an employment context.

164 See Dean, supra note 28, at 553.
context – foreign service officers injured overseas are barred from bringing claims against the United States as their employer. This issue will not likely come to rest until either Congress or the Supreme Court offers a clear definition of a foreign country, or specifically provides for what does, and does not, fall within the exception. Unfortunately, however, I do not think that is likely to happen anytime soon.