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"DEFENSIVE TERRITORIALITY": A NEW PARADIGM FOR THE PROSECUTION OF EXTRATERRITORIAL BUSINESS CRIMES

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I. INTRODUCTION

As we move to a global environment, more consideration needs to be given to issues of jurisdiction. In the criminal sphere, the question becomes: who should hold perpetrators of criminal activity accountable for their conduct? Should we look to the location where the crime is initiated,[1] the country that is substantially affected by the criminality,[2] the nationality of the perpetrator,[3] the nationality of the victim,[4] or all of these factors?[5] Would it be a better course to consider international tribunals[6] when more than one country has a

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[1] In international law, there are five accepted bases of jurisdiction. Harvard Research in International Law, Edwin D. Dickinson, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 437, 445 (Supp. 1935). This is the essence of one of these international bases of jurisdiction referred to as territorial jurisdiction. *See infra* notes 47-48 and accompanying text.

[2] This is an international base of jurisdiction referred to as "objective territorial" jurisdiction. *See infra* notes 48-49 and accompanying text.

[3] This is an international base of jurisdiction referred to as nationality jurisdiction. *See infra* notes 50, 52 and accompanying text.

[4] This is an international base of jurisdiction referred to as the passive personality principle of jurisdiction. *See infra* notes 51-52 and accompanying text.

[5] Courts sometimes refer to more than one jurisdictional base when using international bases of jurisdiction. *See, e.g.*, United States v. Roberts, 1 F. Supp. 2d 601, 606-08 (E.D.LA. 1998) (using the objective territorial principle and the passive personality principle).

[6] Although international tribunals have been created to prosecute war crimes, and a proposed International Criminal Court is presently being considered by countries throughout the

connection to the activity? In determining the appropriate jurisdiction in a global society a multitude of different factors need to be examined. Two variables are particularly important in extraterritorial jurisdiction questions. These are: (1) who is examining the issue of extraterritoriality, and (2) for what conduct.

This Article focuses on business crimes that occur outside this country. It limits the context for consideration of extraterritorial jurisdiction to business crimes.[7] It also limits the perspective for examining the appropriate jurisdiction in that it considers conduct solely from the standpoint of whether the United States should be permitted to prosecute the alleged extraterritorial business crime. This is not a comparative piece, and as such it does not focus on how other countries might approach similar questions. It is important, however, to recognize that with the globalization of society, a national perspective often carries with it international implications.

This Article begins by defining the scope of the term "business crimes." In examining the extraterritorial reach of United States prosecutions, the focus is on congressional wording, executive action, judicial interpretation, and international bases of jurisdiction.[8] It then turns to the conduct involved and the impact it can have on whether an extraterritorial prosecution will be permitted.[9] It is argued here that in the limited context of business crimes, extraterritorial prosecutions should be limited to instances when the federal government is the victim of the crime and the conduct requires prosecution as protection of a governmental interest. Conduct merely having a substantial effect on individuals within the country should not be a sufficient basis for a United States prosecution of a business crime. A defensive approach to prosecuting extraterritorial criminal acts, as opposed to proceeding in a proactive or aggressive manner, is advocated here.

II. WHAT IS A BUSINESS CRIME?

In order to consider the extraterritorial prosecution of business crimes, it is important to first set the parameters of the conduct. The rationale and

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world, these tribunals have never considered business crimes, the crimes that are the subject of this Article. *See generally* EDWARD M. WISE & ELLEN S. PODGOR, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 516-708 (2000) (discussing international tribunals).

[7] For a discussion of what is included within the term "business crimes," *see infra* notes 10-19 and accompanying text.

[8] *See infra* notes 20-68 and accompanying text.

[9] *See infra* notes 82-113 and accompanying text.

importance of distinguishing business crimes from other types of criminal acts is discussed later.[10]

Business crimes are not a distinct category of crime found in the Bureau of Justice Statistics.[11] But then again, white collar crime, a more accepted term with strong sociological roots,[12] is also not a designated category in the statistical databases used by the government.[13] The term "business crimes," as used here, is meant to encompass criminal activity where the perpetrator of the activity is directly related to the operation of a legitimate business.[14] It is also limited to non-violent criminal acts.

Business crimes are distinguished from white collar crime in that white collar activity encompasses a broader category of criminality.[15] For example, an individual who commits perjury or makes a false statement may be engaged in white collar criminal activity. This individual, however, would not necessarily be engaged in a business crime if the activity had no connection to a particular business entity.

Business crimes are therefore a subset, albeit a large subset, of what may be encompassed within white collar crime. Business crimes, however, are a larger subset than what might be included in corporate criminal activity. In contrast to corporate criminal activity, business crimes as used in this Article, includes partnerships and other legitimate associations that operate without a

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[10] *See infra* notes 69-81 and accompanying text.

[11] *See* Bureau of Justice Statistics, *Crime Characteristics*, *at* http://www.ojp.usdoj.gov/bjs/cvict_c.htm (last visited Oct. 10, 2002).

[12] The term white collar crime originates from a speech given by Edwin Sutherland to the American Sociological Society in 1939. Edwin H. Sutherland, Thirty-fourth Annual Presidential Address to the American Sociological Society (Dec. 27, 1939), *in* Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1 (1940).

[13] *See* Bureau of Justice Statistics, *supra* note 11.

[14] Business crimes, as the term is used in this Article, focuses on the perpetrator as opposed to the victim of the criminal conduct. Although the perpetrator of the crime is related to a business entity, there is no limit to the victims of business crimes. Business crimes can be against other entities, individuals, or against the government.

[15] Although a variety of definitions have been attributed to white collar crime, all encompass more than just the activities of legitimate businesses. *See* EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 7 (1983) (defining white collar crime as "a crime committed by a person of respectability and high social status in the course of his occupation"); David T. Johnson & Richard A. Leo, Book Note, *The Yale White-Collar Crime Project: A Review and Critique*, 18 LAW & SOC. INQUIRY 63, 64-72 (1993) (discussing different definitions of white collar crime); JEROLD H. ISRAEL ET AL., WHITE COLLAR CRIME: LAW AND PRACTICE 1-11 (1996) (discussing the sociological origins of white collar crime and the legal definitions offered today).

legal veil. It encompasses the legitimate organizations found in the Federal Sentencing Guidelines for Organizations, without including those that might be wholly illegitimate.[16] An example of a wholly illegitimate organization is an illegal gambling entity.[17]

Looking at what is not a business crime should assist in delineating what the category of business crimes does include. When the essence of the organization is to participate in illegal conduct, with no relation to legitimate activities, then it is not a business for the purposes of this Article. These activities have no redeeming qualities and require separate consideration in determining who will have authority to prosecute the extraterritorial criminal conduct. Therefore, crimes such as drug trafficking, money laundering related to drug activity,[18] and terrorist activity are not business crimes as defined here.

Although it is conceded that in some cases, the line between legitimate business activity and wholly illegitimate activities may be open to question, the ends of the spectrum present clear distinctions. A corporation that engages in overseas bribery is not functionally comparable to Al Qaeda. The legitimacy of the entity of a corporation that serves a public demand but also engages in Foreign Corrupt Practices Act violations is functionally opposite Al Qaeda's mission of engaging in activities such as "blasting and destroying the embassies and attacking vital economic centers" and "assassinating enemy personnel as well as foreign tourists."[19] Obviously, the non-violence versus violence dichotomy distinguishes a legitimate organization from an illegitimate organization such as Al Qaeda. But even absent a non-violent purpose, an illegitimate organization still has no legitimate business function.

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[16] The Federal Sentencing Guidelines Manual defines an "organization" as a "person other than an individual." An organization "includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations." UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 8A1.1 (2000).

[17] Internet gambling that operates in the United States is a recent concern of prosecutors. *See* Bruce Zagaris, *Two Persons Plead Guilty in International Internet Sports Wagering*, 18 INT'L ENFORCEMENT L. REP. 55 (2002) (describing the prosecution of two individuals associated with Gold Medal Sports, "an online sports book that operates out of Curacao, Netherlands Antilles").

[18] Money laundering is no longer a crime limited to drug activity, but has been added in cases involving white collar offenses. *See* Teresa Adams, Note, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What are the Courts Doing?*, 17 GA. ST. U. L. REV. 531, 558-66 (2000) (discussing the use of money laundering charges in white collar crime cases).

[19] Al Qaeda Training Manual, 13 (unpublished manuscript), *available at* http://www.usdoj.gov/ag/manualpart1_1.pdf) (last modified Oct. 8, 2002) (listing the missions of Al Qaeda).

III. FUNDAMENTAL ANALYSIS OF EXTRATERRITORIAL JURISDICTION

Two variables that influence how extraterritorial jurisdiction questions are resolved are (1) the country examining the issue and (2) the conduct that is being examined. Many issues accompany each of these factors. The following looks first at extraterritorial jurisdiction from a United States perspective and then examines how the conduct that is involved can effect the outcome of extraterritorial jurisdiction questions. Both variables are initially viewed in the abstract without reflection of how these issues would be resolved in the context of business crimes. Although there is discussion in this section of why it is necessary to distinguish different types of conduct such as business crimes, the contextual discussion of how extraterritoriality is applied specifically to business crimes is covered in Part IV.

A. Extraterritorial Jurisdiction from a U.S. Perspective

The focus here is on the first variable in that answers to jurisdiction questions can vary depending upon the country handling the matter. Although there are international norms that provide a semblance of order to questions of jurisdiction,[20] countries do not always respond to extraterritorial jurisdiction questions with the same answers. This Article provides a national perspective on how the United States resolves the boundaries of extraterritoriality.

In the United States, there are four dimensions to questions of extraterritorial jurisdiction. The three branches of government and the functions of these branches comprise three of these dimensions. Thus, the legislative language or intent in drafting the statute, the executive decision to prosecute activity, and the judicial interpretation of whether the statute should have an extraterritorial application form basic considerations in whether there is extraterritorial jurisdiction. Another dimension, international law, also can influence all three of the government branches in their decisions of whether to permit an extraterritorial application. The judiciary often uses international law in resolving extraterritorial issues.

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[20] *See generally* WISE & PODGOR, *supra* note 6, at 28-71 (discussing general principles related to extraterritorial jurisdiction).

1. Executive

The initial decision of whether to proceed with an extraterritorial prosecution is within the province of the executive branch. Prosecutors have the discretion to decide who they will prosecute and for what crimes.[21] Although bound by legislative constraints, and later judicial review, prosecutors have enormous discretion in making these decisions.[22] The ethical mandates merely provide that "[t]he prosecutor in a criminal case shall: refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[23] American Bar Association standards provide factors for consideration by a prosecutor in exercising his or her discretion, but these only offer guiding principles, and with respect to conduct outside the prosecutor's jurisdiction, merely state that a "prosecutor may properly consider" the "availability and likelihood of prosecution by another jurisdiction."[24] As such, there is no real outside guidance offered to prosecutors on the propriety of bringing prosecutions for extraterritorial crimes.

Department of Justice guidelines, however, do provide instructions to United States Attorneys who are considering a prosecution of conduct that occurs outside the United States.[25] For example, the guidelines provide that authorization is required to prosecute a case under the Foreign Corrupt Practices Act.[26] Also, some cases warrant consultation with the Criminal Division Office prior to prosecution.[27] These guidelines, however, are not legally enforceable.[28]

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[21] *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

[22] *See* Wayte v. United States, 470 U.S. 598, 607 (1985) (prosecutors have broad discretion in their decisions to prosecute).

[23] MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2002).

[24] Standards Relating to the Administration of Criminal Justice Standard 3.9(b)-(c) (1974).

[25] The United States Attorney Manual offers guidelines that operate to assist United States Attorneys in their decisions. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-47.00 (1997).

[26] *Id.* at § 9-47.00 ("No investigation or prosecution of cases involving alleged violations of Section 103 and 104, and related violations of Section 102, of the Foreign Corrupt Practices Act (FCPA) of 1977 . . . shall be instituted without the express authorization of the Criminal Division.").

[27] Prior approvals or consultation with the Office of International Affairs is required in some cases. *See id.* at § 9-2.400 (2000).

[28] The U.S. Attorney's Manual specifically provides that it is an "internal" document and that

A prosecutor's decision to proceed against individuals for extraterritorial crimes is rarely found to be improper by the courts. One of the few instances where a U.S. Court reversed a conviction for an alleged crime committed outside the United States is found in the case of *United States v. Boots*.[29] In this case, the First Circuit reversed a wire fraud conviction finding that the prosecution had as "its sole object the violation of Canadian revenue laws."[30] The court found the scheme "beyond the parameters of the frauds cognizable under section 1343," the wire fraud statute.[31] Although the court's decision rested on the boundaries of the term "fraud," the extraterritorial aspect did not go unnoticed. The court expressed concern with interference in "the legislative and executive branches' exercise of their foreign policymaking powers."[32] A Second Circuit case with a similar factual setting, however, refused to follow the position taken in *Boots*.[33] The Second Circuit, in *Trapilo*, found that, "[t]he simple fact that the scheme to defraud involves a foreign sovereign's revenue laws does not draw our inquiry into forbidden waters reserved exclusively to the legislative and the executive branches of our government."[34]

There are few limits on a prosecutor's discretion. Prosecutions premised on "impermissible classification[s]" such as race will not be tolerated.[35] Even then, the defense has the burden to show that the prosecutor proceeded with a "discriminatory purpose."[36] Discretionary decisions, such as the decision to prosecute an extraterritorial crime, are left to the executive branch with little,

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"[i]t is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." *Id.* at § 1-1.100. *See also* United States v. Caceres, 440 U.S. 741, 742 (1979) (providing that courts will not enforce failures to comply with the internal guidelines for the Department of Justice when an individual's constitutional rights are not violated).

[29] United States v. Boots, 80 F.3d 580 (1st Cir. 1996).

[30] *Id.* at 587.

[31] *Id.* at 586.

[32] *Id.* at 587-88. The First Circuit also noted that 18 U.S.C. § 546 (1994) prohibited smuggling goods into foreign countries only if the other country has a reciprocal law. *Id.* The court stated, "[p]rosecutors, who operate within the executive branch, might of course be expected not to pursue wire fraud prosecutions based on smuggling schemes aimed at blatantly hostile countries, but whether conduct is criminal cannot be a determination left solely to prosecutorial discretion." *Id.* at 588.

[33] *See* United States v. Trapilo, 130 F.3d 547, 549 (2d Cir. 1997) (permitting a wire fraud prosecution premised upon a scheme to defraud a foreign government of tax revenue).

[34] *Id.* at 553.

[35] WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 1.8(c) (2d ed. 1999).

[36] *See* McClesky v. Kemp, 481 U.S. 279, 292 (1987).

if any, outside monitoring. This discretion is particularly noteworthy because Congress seldom places limits within a statute on extraterritorial prosecutions.

2. Legislative

When Congress directly focuses a statute on extraterritorial conduct, the jurisdiction to prosecute activities outside the United States is clear.[37] For example, the Foreign Corrupt Practices Act permits the prosecution of individuals and businesses that engage in bribery, despite the fact that the conduct occurs extraterritorially.[38] The Act was specifically designed to stop bribery by United States businesses that occurs outside this country.[39] There is no question that prosecutors have extraterritorial jurisdiction to proceed when there is a violation of the Foreign Corrupt Practices Act, the Export Administration Act,[40] or the Arms Export Control Act,[41] because Congress enacted these statutes to stop activities occurring outside this country.

Although the focus of a statute may be to curtail criminal activity occurring outside the United States' borders, Congress may place limits on the individuals subject to prosecution under the Act. For example, the Foreign Corrupt Practices Act specifically excludes prosecution against foreign officials.[42]

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[37] Ellen S. Podgor, Essay, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325, 329 (1997) (noting several instances in which Congress specifically focused a statute on conduct outside the United States).

[38] *See* 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (2000).

[39] The Foreign Corrupt Practices Act, initially passed in 1977 and amended in 1988, had the distinct purpose of stopping the bribing of foreign government officials. *See generally* DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT (2d ed. 1999).

[40] *See* 50 U.S.C. App. §§ 2401-2420 (1994) (requiring licenses for certain goods that are shipped).

[41] *See* 22 U.S.C. §§ 2799-2 (2000) (restricting certain military items).

[42] When the Act was revised in 1998, House Report 105-802 discussed the purpose for the initial legislation, stating:

> Investigations by the Securities and Exchange Commission (SEC) in the mid-1970s revealed that over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties. Many public companies maintained cash "slush funds" from which illegal campaign contributions were being made in the United States and illegal bribes were being paid to foreign officials. Scandals involving payments by U.S. companies to public officials in Japan, Italy, and Mexico led to political repercussions within those countries and damaged the reputation of American companies throughout the world.

H.R. REP. NO. 105-802, at 9 (1998).

Courts may provide interpretation that can also limit these prosecutions, as in not permitting a prosecutor to use conspiracy as a charge to bypass the statute's restriction on indicting foreign officials.[43]

In some cases, Congress takes a generic statute and provides, within the statute, an extraterritorial provision. For example, two money laundering statutes[44] and a key perjury statute[45] have specific provisions that authorize prosecutors to proceed in certain situations with the action, even if the conduct occurs extraterritorially.

In those instances when Congress has spoken by either directly focusing a statute on extraterritorial conduct or including a provision within the statute that authorizes extraterritoriality, the intent of Congress is clear, and the extraterritorial prosecution is permitted. Obviously, if Congress were to reexamine existing statutes and determine the circumstances when extraterritoriality should or should not be permitted, then the ambiguity that causes concern here would be less problematic.[46] Such a reevaluation, however, needs to consider the issues addressed in parts IV, V, and VI of this Article.

3. International Norms

Reference can also be made to international law to resolve issues concerning the propriety of extraterritorial jurisdiction. The five generally accepted

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[43] In *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991), the Fifth Circuit refused to permit prosecutors to proceed against two Canadian officials who had been charged with conspiracy under the general conspiracy statute, 18 U.S.C. § 371 (2000), for their alleged conspiring to violate the Foreign Corrupt Practices Act. The court did not allow prosecutors to circumvent the language of the Foreign Corrupt Practices Act by using a charge of conspiracy. The statute did not include foreign officials, and the court found that the congressional intent was to preclude this application. 925 F.2d at 832-36.

[44] Both 18 U.S.C. §§ 1956 and 1957 (2000), two money laundering statutes, include extraterritorial provisions. These provisions, however, provide clear guidance as to when they apply. For example, 18 U.S.C. § 1956(f) (2000) provides:

> There is extraterritorial jurisdiction over the conduct prohibited by this section if—
> (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and
> (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

[45] 18 U.S.C. § 1621 (2000) (providing that "[t]his section is applicable whether the statement or subscription is made within or without the United States").

[46] *See* Podgor, *supra* note 37, at 344-46.

bases of international jurisdiction are territoriality, nationality, passive personality, protective principle, and universality.[47]

Territorial jurisdiction refers to acts that occur within the territory. Such acts do not raise the jurisdictional questions considered in this article since the focus here is on extraterritorial conduct. In recent years, however, territoriality has been subdivided to include both territoriality and "objective territoriality." It is this latter distinction that raises the concerns addressed here. "Objective territoriality" includes "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it."[48] Activities, such as drug trafficking, that occur outside the United States are often prosecuted under this "objective territorial" principle, as the conduct can "affect" the United States.[49]

Another basis of jurisdiction, nationality, looks at the nationality of the perpetrator of the crime.[50] In contrast, passive personality focuses on the nationality of the victim.[51] Both the nationality and passive personality principles have been used on occasion to prosecute conduct outside the United States.[52] United States prosecutors have also used the protective principle as

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[47] *See* Dickinson, *supra* note 1.

[48] Strassheim v. Daily, 221 U.S. 280, 285 (1911) (holding that when a person completes a material act toward committing a crime within a state, yet completes the crime outside of that state, he or she becomes a fugitive of justice for extradition purposes). Justice Holmes, the author of the *Strassheim* decision, had written two years prior that "[t]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). *See also* J. Thomas Coffin, *The Extraterritorial Application of the Economic Espionage Act of 1996*, 23 HASTINGS INT'L & COMP. L. REV. 527, 539-40 (2000) (discussing the effects test and different opinions issued by Justice Holmes on this issue).

[49] *See* Chua Han Mow v. United States, 730 F.2d 1308, 1311-12 (9th Cir. 1984) (using the objective territorial principle and also finding the extraterritorial application justified under the protective principle).

[50] *See generally* Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41 (1992) (discussing nationality as a basis for jurisdiction in criminal cases).

[51] *See generally* Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1 (1993) (discussing the passive personality principle as a basis for jurisdiction in the United States).

[52] *See, e.g.*, United States v. Roberts, 1 F. Supp. 2d 601, 606-08 (E.D. La. 1998) (using the passive personality principle); United States v. Walczak, 783 F.2d 852, 854 (9th Cir. 1986) (using a nationality principle where a United States citizen was accused of making a false statement on a customs form).

a basis for an extraterritorial prosecution.[53] This principle is premised upon national security or a threat to the United States by the perpetrator's conduct.[54]

Universality jurisdiction, often seen as being premised on crimes against humanity, lends itself well to finding jurisdiction for a prosecution by international tribunals.[55] Recently, the International Court of Justice ruled that Belgium could not try the Minister of Foreign Affairs of the Democratic Republic of Congo for alleged war crimes.[56] The International Court of Justice found that immunity protected former and present world leaders from prosecution by a country other than their own.[57] Although universality was not the focus of this decision, Belgium had initiated the action and used universal jurisdiction based upon the prosecution of conduct alleged to be in violation of human rights.[58]

Countries can also authorize jurisdiction through international agreements. Treaties that allow for extradition and prosecution in the United States may assist in providing an easier process for an extraterritorial application.[59] In cases where countries enter into treaties to resolve possible extraterritorial issues, the parties can agree to a mutually beneficial resolution of a disputed question.

4. Judiciary

When Congress clearly provides for jurisdiction by focusing the statute on acts outside this country or by an extraterritorial provision within the statute, there is no question that the United States has a basis for proceeding with the prosecution. When Congress does not mention extraterritoriality in the statute, as is the case in the majority of criminal statutes, courts are left to resolve the issue of whether the extraterritorial application should be allowed. Courts

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[53] *See, e.g.*, United States v. Birch, 470 F.2d 808, 811-12 (4th Cir. 1972) (finding the protective principle applicable where there is a falsification of documents).

[54] *See generally* IAIN CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION (1994).

[55] *See generally* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988) (discussing the realm of universal jurisdiction).

[56] *See* Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belg.), 2002 I.C.J. 121, at 21-22 (Feb. 14), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF.

[57] *See id.*

[58] *See id.* at 17.

[59] *See* WISE & PODGOR, *supra* note 6, at 2-4.

approach this issue by trying to discern the intent of Congress,[60] looking to whether jurisdiction is authorized under the international bases of jurisdiction,[61] or by using an approach that combines an examination of congressional intent and international law.[62]

Courts have also referenced the Restatement (Third) of Foreign Relations Law section 402, which provides principles for jurisdiction to prescribe,[63] and also section 403, which speaks to limits on the jurisdiction to prescribe.[64] It is in the latter provision that one finds factors for determining whether the

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[60] *See, e.g.*, United States v. Kim, 246 F.3d 186, 189 (2d Cir. 2001) (finding Congress intended the wire fraud statute to be applied extraterritorially); United States v. Plummer, 221 F.3d 1298, 13034 (11th Cir. 2000) (finding Congress intended that the crime of attempted smuggling under 18 U.S.C. § 545 should be applied extraterritorially); United States v. Larsen, 952 F.2d 1099, 1100-01 (9th Cir. 1991) (discussing whether Congress intended the crime of knowing and intentional possession with intent to distribute marijuana to apply extraterritorially); United States v. Ricardo, 619 F.2d 1124, 1128-29 (5th Cir. 1980) (looking at whether Congress intended drug conspiracy statutes to apply extraterritorially).

[61] *See, e.g.*, United States v. Best, 172 F. Supp. 2d 656, 660 (D.V.I. 2001) (discussing international bases of jurisdiction that courts look to in deciding the extraterritorial application of a statute); Chua Han Mow v. United States, 730 F.2d 1308, 1311-12 (9th Cir. 1984) (finding the protective and territorial principles applied).

[62] *See, e.g.*, United States v. Velasquez-Mercado, 697 F. Supp. 292, 294 (S.D. Tex. 1988) (looking first at congressional intent and then at international bases of jurisdiction).

[63] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) provides:

> Subject to § 403, a state has jurisdiction to prescribe law with respect to
> (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
> (b) the status of persons, or interests in things, present within its territory;
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

[64] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987) states:

> (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

extraterritorial application would be unreasonable.[65] Concerns of comity,[66] that is respect for the laws of other countries, can factor into whether a Court will allow an extraterritorial application.[67]

Although guidance for resolving these issues is provided to courts, the reality is that few prosecutions of extraterritorial criminal conduct will be turned aside as falling outside the boundaries of international law. The bases

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[65] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987) states:

> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
> (e) the importance of the regulation to the international political, legal, or economic system;
> (f) the extent to which the regulation is consistent with the traditions of the international system;
> (g) the extent to which another state may have an interest in regulating the activity; and
> (h) the likelihood of conflict with regulation by another state.

[66] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(3) (1987) provides:

> (3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, including those set out in Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

[67] It should be noted that comity is described here in its most basic sense. In reality, there are a myriad of different definitions attributed to the concept of comity. *See generally* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991) (discussing different definitions and approaches to comity from its classical doctrine to its present applications); Michael D. Ramsey, *Escaping "International Comity"*, 83 IOWA L. REV. 893 (1998) (discussing the need to use more precise language than the term "international comity").

of jurisdiction leave ample room for courts to find support for permitting the prosecution to proceed with cases premised on extraterritorial acts.[68]

B. The Importance of Factoring in Conduct in Analyzing the Extraterritorial Jurisdiction of Business Crimes

In situations where Congress has considered the extraterritorial application of the statute and also spoken clearly by designating whether the statute could be applied to conduct outside the United States, courts need not reflect on whether the conduct merits an extraterritorial application. The issue has been resolved and judicial interpretation that might differ from the language of the statute would be improper. In most cases, however, courts must discern the intent of Congress in order to determine whether international rules permit an extraterritorial application. It is in these instances that a key ingredient to the discussion needs to be an examination of the particular criminal conduct in question.

We might end the judicial inquiry after making a determination as to whether Congress intended an extraterritorial application. After all, should we consider beyond what Congress says or implies in a statute? Is there any basis for distinguishing different types of conduct when examining questions of extraterritoriality?[69] Prior to reflecting on the specific contextual setting of whether business crimes should be allowed an extraterritorial application, the basis for distinguishing this type of activity merits discussion.

1. The Need for a Multidimensional Approach to Extraterritorial Jurisdiction

A unified statutory approach to extraterritoriality for all federal crimes was suggested in a proposal of the National Commission on Reform of the Federal

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[68] For example, courts have held that the term "foreign commerce" implies that foreign commerce can be protected when the acts in furtherance of it are performed either inside or outside the United States. *See, e.g.*, United States v. Ross, 1999 WL 782749, 8-9 (S.D.N.Y. 1999) (finding sufficient subject matter jurisdiction to deny a motion to dismiss); United States v. Braverman, 376 F.2d 249, 251 (2d Cir. 1967) (discussing ability to protect foreign commerce both inside and outside the United States).

[69] In *United States v. Bowman*, 260 U.S. 94, 97-98 (1922), the Supreme Court, in looking at the extraterritoriality of crimes, noted that "[t]he necessary *locus*, when not specifically defined, depends upon the purpose of Congress as evinced by the description and *nature of the crime* and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations" (emphasis added).

Criminal Laws.[70] This proposal, however, was not accepted.[71] The proposed statute did not apply extraterritoriality across the board to all federal crimes, but instead designated specific types of conduct that could form the basis of an extraterritorial prosecution.[72] The proposal also noted that treaties could provide a basis for extraterritorial application.[73]

A basic fault of an approach that considers extraterritoriality abstractly, without taking into account the specific conduct of the case, is that it places courts in a position of discerning congressional intent with no real basis for truly ascertaining what, if anything, Congress really intended in the statute. The policy considerations that form the congressional intent need to encompass the conduct and the purpose for which this particular conduct was selected for punishment. It is for this reason that a multidimensional approach, an approach that allows for the possibility of adjusting extraterritoriality for different types of criminal conduct, is warranted.

The type of conduct involved should factor into whether the extraterritorial application should be allowed. For example, war crimes present different considerations than business crimes and should not be handled in an equivalent manner. The United States could have prosecuted under international principles, most clearly the universality principle, the individuals in the Nuremberg Trial, but the use of an international military tribunal that included the governments of the United Kingdom, the United States, the Union of Soviet Socialist Republics, as well as the provisional Government of the French Republic, was clearly a more systematic and unified way to handle the prosecution of these crimes.[74] Thus, although extraterritorial jurisdiction might be allowed under international or national norms, Congress may not

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[70] NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS § 208 (1971) (suggesting that a general statute regarding extraterritoriality be included in a proposal to reform federal criminal law).

[71] *See generally* Kenneth R. Feinberg, *Extraterritorial Jurisdiction and the Proposed Federal Criminal Code*, 72 J. CRIM. L. & CRIMINOLOGY 385 (1981) (discussing the proposed federal criminal code's provision of extraterritoriality).

[72] The proposed federal statute had various forms of conduct that would receive extraterritorial jurisdiction. Examples of conduct that would have extraterritorial jurisdiction, even though it was not expressly stated in the substantive portion of the statute, included "the offense of treason" and an offense "involving entry of persons or property into the United States." NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS § 208 (1971).

[73] The proposal provided extraterritorial jurisdiction where "such jurisdiction is provided by treaty." *Id.*

[74] *See* ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 85-95 (2d impression rev. 1962).

have intended to apply extraterritoriality to certain acts or conduct when the specific conduct is examined by a court.

Likewise, terrorism may require an international response, while other crimes may be better handled through a multinational or national response. New developing areas that might have no geographic boundaries present complex considerations in determining extraterritoriality. For example, computer crimes can raise a host of issues depending upon how the computer is used in relation to the criminal activity.[75] If it is used as the medium to commit the crime, and the crime is a fraud, one resolution might be better served than when the computer is used as the "target"[76] of the crime, and the crime is to infiltrate a government defense system.

2. Distinguishing Business Crimes

The reason for the emphasis on business crimes is because it is argued that this type of criminality has unique characteristics that warrant a different application from some other crimes with respect to whether an extraterritorial prosecution should be permitted. Three pertinent differences that can arise in comparing business crime with typical forms of domestic criminality are the fact that business crimes can be related to a legitimate entity, businesses today often operation in a global economy, and business crimes can have both a civil and criminal dimension to the conduct.

Despite the illegality in which business entities may be engaged, it can be important to preserve the legitimate business functions and to protect innocent employees, stockholders, and the public. One does not often find this consideration in non-business related crimes. Although third parties might suffer as a result of an individual's criminal conduct, the ramifications to innocent parties who wish to continue to engage in business is also an important consideration, especially when a legitimate organization has a "rogue" individual or individuals engaging in the criminal activity. For

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[75] *See generally* Ellen S. Podgor, *International Computer Fraud: A Paradigm for Limiting National Jurisdiction*, 35 U.C. DAVIS L. REV. 267 (2002) (discussing the need to distinguish computer fraud acts from other types of computer crimes in determining the appropriate approach for national jurisdiction).

[76] *See* Scott Charney & Kent Alexander, *Computer Crime*, 45 EMORY L.J. 931, 934 (1996) (discussing how computers can be the "target of the offense," "tool of the offense," or "incidental to the offense"); *see also* Ellen S. Podgor, *Computer Crime*, *in* ENCYCLOPEDIA OF CRIME & JUSTICE 221, 221-28 (Joshua Dressler ed., 2d ed. 2002); Joe D. Whitley & William H. Jordan, *Computer Crime*, ABA WHITE COLLAR CRIME INST. § 1.01[1], at 1.01[1] (2003) (describing the different ways that computers can be used to commit crimes).

example, when legitimate businesses are taken over by the government pursuant to the Racketeer Influenced and Corrupt Organization (RICO) Act,[77] the government may assume control of the business to maintain its legitimate structure and eliminate the improprieties occurring within the legitimate business environment.[78]

Globalization can also play a factor in approaching this particular type of crime differently from some other classes of criminality. Business crimes, especially those related to international business, can include an international dimension to the conduct. One does not find this international feature when looking at many domestic crimes. For example, there is seldom an international aspect to a state homicide, rape, burglary or theft charge. Although each of these crimes can occur outside United States territory and be prosecuted by the United States, it is seldom a function of the fact that a legitimate entity is operating in a global society.

In contrast to individual crimes that occur outside a business setting, business crimes can sometimes be remedied and curtailed through existing civil remedies.[79] Hence, prosecution may not be the sole consideration in deciding how best to deter, rehabilitate or provide retribution for the conduct.[80] Collateral consequences, such as debarment or the loss of a license, need to be factored into the prosecutor's decision of whether criminal action should be taken.[81]

Business crimes, therefore, may have distinct attributes that distinguish them from more traditional domestic crimes, especially those involving violence. The three factors discussed here, that business crimes are encircled

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[77] *See* 18 U.S.C. §§ 1961-1968 (2000).

[78] *See* United States v. Local 30, United Slate, Tile and Composition Roofers, 871 F.2d 401, 405-09 (3d Cir. 1989) (government takeover of union); *see also* Raymond P. Green, *The Application of RICO to Labor-Management and Employment Disputes*, 7 ST. THOMAS L. REV. 309 (1995). *See generally* United States v. International Brotherhood of Teamsters, 941 F.2d 1292 (2d Cir. 1991) (discussing issues resulting from government control of a local union).

[79] Both the government and individuals have the option of bringing civil actions. Although this can be true for both business and non-business crimes, the victims of business crimes may have more avenues for pursuing remedies. For example, the Racketeer Influenced and Corrupt Organizations Act (RICO) gives third parties the option of bringing a civil action for wrongs committed against them. *See* 18 U.S.C. § 1964. This statute has also been used for extraterritorial crimes. *See* Concern Sojuzneshtrans v. Buyanovski, 80 F. Supp. 2d 273, 277-78 (D.N.J. 1999) (finding jurisdiction for alleged extraterritorial activities in a RICO case when the action was brought by a Russian corporation against a New Jersey corporation and individuals associated with the corporation for alleged extraterritorial activities).

[80] For example, many business improprieties may be pursued by the government through civil action, such as a civil RICO action. *See* 18 U.S.C. § 1964.

[81] *See* ISRAEL ET AL., *supra* note 15, at 803-17.

by a legitimate structure, that the entity may be routinely operating globally, and that civil remedies may factor into whether a criminal prosecution will be necessary, provide the basis for saying that these types of crimes need to be examined separately when considering issues of extraterritoriality. Clearly, there will be some crimes that may manifest some or all of these factors. But the very fact that so many different types of criminal conduct do not exhibit these characteristics supports treatment of extraterritoriality in a multi-dimensional manner. The necessity of separating the variations in types of conduct, especially business crimes, is evidenced below.

IV. CONTEXTUAL ANALYSIS—EXTRATERRITORIALITY OF BUSINESS CRIMES

Looking generally at the conduct involved requires that one first look at how extraterritoriality is approached in criminal actions. The specific contextual setting of business crimes is then examined. It becomes apparent here that the attributes of business crimes do not correlate well with existing international norms applicable to extraterritoriality. Therefore, international norms should be modernized to reflect how businesses currently operate.

A. Criminal Law

Criminal law traditionally used a standard for determining whether extraterritoriality is appropriate that differed from the approach used in civil law. Where minimum contacts may allow for an extraterritorial application in a civil action,[82] extraterritorial actions in the criminal area historically required a more restrained approach. Historically, territorial jurisdiction was a necessary ingredient for a criminal prosecution. This standard was relaxed, however, with the Supreme Court decision in *United States v. Bowman*.[83]

Bowman involved an alleged "conspiracy . . . to defraud the Fleet Corporation, in which the United States was a stockholder."[84] The jurisdiction for the first count was "on the high seas, out of the jurisdiction of any particular State, and out of the jurisdiction of any district of the United States, but within the admiralty and maritime jurisdiction of the United States."[85] Jurisdiction for the second count was premised "on the high seas and at the

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[82] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 315-20 (1945) (requiring sufficient contacts beyond casual presence before establishing a corporation's personal jurisdiction); Pennoyer v. Neff, 95 U.S. 714, 723-34 (1877).

[83] United States v. Bowman, 260 U.S. 94 (1922).

[84] *Id.* at 96.

[85] *Id.*

port of Rio Janeiro, as well as in the city."[86] Count three's jurisdiction was described as in the city of Rio Janeiro, the fourth count was in the harbor of Rio Janeiro, the fifth count in the city, and the sixth count at both the port and in the city.[87] The district court found no jurisdiction in count one and "sustained the demurrer" as to the other counts.[88] This lower court found no statement in the statute permitting jurisdiction for this offense when "committed on the high seas or in a foreign country."[89] This position was in keeping with the traditional view that absent a clear congressional statement, courts would not permit extraterritorial jurisdiction in criminal cases.[90] The Supreme Court reversed, finding that "[t]he necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations."[91]

Bowman designates two classes of crimes in its analysis. First are those crimes "against private individuals or their property."[92] Absent a clear congressional statement, these require prosecution within the territorial jurisdiction of the act.[93] The second category includes "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 agents."[94] Crimes that fall within

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[86] *Id.*

[87] *Id.*

[88] *Id.* at 97.

[89] *Id.*

[90] The court concluded that, because jurisdiction of criminal offenses must be conferred upon United States courts and could not be inferred, and because section 35, like all other sections of chapter 4 (Comp. St. §§ 10191-10252), contains no reference to the high seas as a part of the locus of the offense defined by it, as the sections in chapters 11 and 12 of the Criminal Code (Comp. St §§ 10445-10483a) do, section 35 must be construed not to extend to acts committed on the high seas. *Id.*

[91] *Id.* at 97-98.

[92] *Id.* at 98. *Bowman* uses as examples for this class of crime, "assaults, murder, burglary, larceny, robbery, arson, embezzlement, and fraud of all kinds, which affect the peace and good order of the community." *Id.*

[93] The Court in *Bowman* stated, "[i]f punishment of them is to be extended to include those committed out side 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." *Id.* at 98.

[94] *Id.* The Court in *Bowman* stated 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

this category are deemed acceptable to be considered for extraterritorial application.

It is important to note from the above that the conduct ("nature of the crime") involved was a consideration used by the *Bowman* court in determining the appropriate "*locus*."[95] It is also significant to see that extraterritoriality is permitted in cases when the government is the victim of the crime.[96] These two factors will play a prominent role in the analysis used in Part V of this Article.

Since 1922, the year the *Bowman* case was decided, many courts have permitted extraterritoriality in cases involving criminal conduct. Cases since *Bowman* have interpreted this decision broadly to allow for an extraterritorial application in almost all cases in which prosecutors have decided to proceed on the extraterritorial conduct.[97] Even when the conduct is not directly targeted against the United States government, extraterritoriality has been permitted.[98]

B. Business Crimes

The most noticeable business crimes area with cases extending jurisdiction beyond the borders of the United States is in the area of antitrust.[99] In *United*

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countries as at home." *Id.*

[95] *Id.* at 97-98.

[96] The Court stated as the second category, "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 agents." *Id.* at 98 (emphasis added).

[97] In *United States v. Plummer*, the Eleventh Circuit held that "courts in this Circuit and elsewhere have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm." 221 F.3d 1298, 1305 (11th Cir. 2000) (listing numerous cases that permitted extraterritorial jurisdiction for alleged criminal acts).

[98] *See, e.g.*, United States v. Vasquez-Velasco, 15 F.3d 833, 837, 840 (9th Cir. 1994) (using *Bowman* as precedent for permitting extraterritoriality in a case under 18 U.S.C. § 1959 involving the commission of "violent crimes in aid of a racketeering enterprise"); Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984) (citing *Bowman* and finding that drug offenses could have an extraterritorial application).

[99] Prosecutions of business crimes have not been limited to the antitrust area. In some cases, the charges are against those outside the United States, while in other cases United States businesses have been indicted for extraterritorial conduct. *See China Government Corporation Waives Sovereign Immunity, Pleads Guilty to Export Violation, Fined $1 Million*, CORP. CRIME REP., May 21 2001, at 1 (describing how a government owned corporation of the People's Republic of China pled non contendere "to a felony violation of the Export Administration Act"); Bruce Zagaris, *SEC and IBM Settle Argentine Bribery Case*, 17 INT'L ENFORCEMENT L. REP. 86, 86 (2001) (discussing agreement between SEC and IBM in which IBM "agreed to pay

States v Nippon,[100] a foreign corporation was indicted under the Sherman Act despite the fact "that the price-fixing activities took place entirely in Japan."[101] Although the district court dismissed the case, appellate review reversed this dismissal. Certiorari was not granted by the Supreme Court, so the decision of the First Circuit, in this case of first impression, remains the final word in the case.[102]

In *Nippon*, the First Circuit found that since there was a Supreme Court decision in the civil context, that allowed an extraterritorial application in cases brought under the Sherman Act,[103] the issue was settled. The *Nippon* court found no basis to distinguish a civil extraterritorial holding under the Sherman Act from one brought as a criminal charge.[104] The court found that "common sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil."[105]

In *Nippon*, the First Circuit Court of Appeals rejected an array of arguments focused on why criminal cases should be treated differently than civil actions.[106] In rejecting comity-based arguments the court stated, "[w]e live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale."[107] Obviously concerned with the ramifications of a decision opposite of

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$300,000 to settle charges related to allegations that its subsidiary in Argentina paid bribes to secure a contract in the mid-1990's").

[100] United States v. Nippon Paper Indus. Co., 109 F.3d 1 (1st Cir. 1997).

[101] *Id.* at 2.

[102] *See generally* Leigh Robin Lamendola, Note, *The Continuing Transformation of International Antitrust Law and Policy: Criminal Extraterritorial Application of the Sherman Act in* United States v. Nippon Paper Industries, 22 SUFFOLK TRANSNAT'L L. REV. 663 (1999) (discussing the extraterritorial application used in the *Nippon* case); Elliot Sulcove, *The Extraterritorial Reach of the Criminal Provisions of U.S. Antitrust Laws: The Impact of* United States v. Nippon Paper Industries, 19 U. PA. J. INT'L ECON. L. 1067 (1998) (advocating a return to a reasonableness approach in extraterritorial antitrust prosecutions).

[103] *See* Hartford Fire Ins. v. California, 509 U.S. 764, 794-98 (1993). Prior to *Hartfield*, courts had often used a "balancing" approach. *See* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613-15 (9th Cir. 1976); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979) (listing ten considerations of whether to permit extraterritorial jurisdiction).

[104] *Nippon*, 109 F.3d at 4.

[105] *Id.*

[106] For example, the court rejected an argument regarding the language in the Restatement (Third) of Foreign Relations Law that specifically references criminal conduct as separate from civil conduct. *Id.* at 7. The court also rejected defendant's argument that the rule of lenity should be used to resolve any ambiguity in favor of the defendant. *Id.* at 7-8.

[107] *Id.* at 8.

that which was issued, the court remarked, "a ruling in NPI's favor would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect."[108]

The majority opinion does not focus on whether, in this context, "objective territoriality" is an appropriate basis for jurisdiction. The opinion takes for granted that extraterritorial conduct that substantially effects the United States can be prosecuted in this country. In contrast, a concurring opinion reflects on "whether this construction of Section One's criminal reach conforms with principles of international law."[109] Although permitting the extraterritorial application, the concurring opinion found that the United States had "a strong interest in protecting United States consumers, who were affected by the increase in prices."[110]

Nippon has been followed by other investigations[111] and indictments. Companies outside the United States have been prosecuted by this country for antitrust business crimes and United States companies have been prosecuted for extraterritorial acts.[112] In some cases, the United States may be a victim of

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[108] *Id.*

[109] *Id.* at 9.

[110] *Id.* at 12. Circuit Judge Lynch, in his concurrence, also stated that:

> The only factor counseling against finding that the United States' antitrust laws apply to this conduct is the fact that the situs of the conduct was Japan and that the principles were Japanese corporations. This consideration is inherent in the nature of jurisdiction based on effects of conduct, where the situs of the conduct is, by definition, always a foreign country. This does not tip the balance against jurisdiction.

Id. at 12-13.

[111] *See Baker Hughes Says It Is Offering to Settle SEC Charges on Improper Overseas Payments*, CORP. CRIME REP., July 16, 2001, at 3 (describing offer to settle for SEC allegations of improper payments in Indonesia, India and Brazil); *Justice Department Begins Investigation into Price Fixing by Five Paint Companies Law, Paper Reports*, CORP. CRIME REP., June 11, 2001, at 5 (describing the investigation of companies, including some outside the United States, in a "criminal probe into alleged price fixing in the automotive-refinishing industry").

[112] *See Three International Companies to Plead Guilty in Food Flavoring Cartel, Will Pay More than $9 Million in Criminal Fines*, CORP. CRIME REP., Sept. 3, 2001, at 3 (describing two Japanese corporations and one Korean corporation agreeing to plead guilty "for participating in a worldwide conspiracy to fix the prices of, and allocate customers for nucleotides, a food flavor enhancer"); *Mitsubishi Corporation Fined $134 Million for its Role in International Price-Fixing Cartel*, CORP. CRIME REP., May 14, 2001, at 3 (describing the prosecutions of United States and foreign companies for their role in international graphite electrodes price-fixing); *In First, Japanese Exec Agrees to Face Jail for Violating U.S. Antitrust Law*, CORP. CRIME REP., Feb. 26, 2001, at 5 ("U.S. subsidiary of a Japanese manufacturer of isostatic graphite" plead guilty "for participating in an international cartel to fix the price of isostatic graphite."); *Two German Firms and Two U.S. Corporations to Plead Guilty to Participating in International*

the alleged illegality.[113] Other cases, however, are instances where the United States is not a party to the alleged criminality and the conduct is being prosecuted merely because it is found to have a substantial effect on the United States.

V. "OBJECTIVE TERRITORIALITY"

"Objective territoriality" is the most common base for permitting extraterritorial jurisdiction. Although the roots of this doctrine are from a case involving conduct between two states,[114] courts have not hesitated to apply this principle in international criminal cases. This is particularly true as society becomes more globalized. Merely requiring that the conduct have an effect on the country, even if it has to be a substantial effect, permits the prosecution of a wide range of conduct.

The ramifications of continuing to use "objective territoriality" as a jurisdictional base warrants reconsideration for several reasons. Globalization changes the dynamic of what was once a realistic and restrained approach to determining whether extraterritorial conduct would be subject to prosecution. Using a test based upon whether the conduct has an effect on the United States results in an expansive viewpoint, with few, if any, limits. It allows unrestrained prosecutorial discretion. It also alters the historical presumption against extraterritorial applications in those instances when Congress fails to specifically authorize an extraterritorial application.

This doctrine supports a position of increased crime-control, since using "objective territoriality" can increase the ability to prosecute extraterritorial conduct. Yet, if other countries proceed in a like manner against individuals and businesses in the United States, the consequences can be serious. Opening the door to more extraterritorial prosecutions may influence other countries to proceed in a similar fashion. The most effective method for promoting ethical business conduct may be lost when cultural considerations are not factored into the determination of how best to control and punish criminal acts.[115]

Vitamin Cartels, CORP. CRIME REP., May 15, 2000, at 4 (describing punishment given to two German firms for antitrust violation in the vitamin industry).

[113] *See German Company Pleads Guilty to Rigging Bids on USAID Construction Contracts in Egypt*, CORP. CRIME REP., Aug. 28, 2000, at 3 (alleging that "[t]his German company committed illegal activity in Alabama that had a serious impact on U.S. funded international construction projects").

[114] *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911).

[115] *See generally* William S. Laufer & Iwao Taka, *Japan, Regulatory Compliance, and the Wisdom of Extraterritorial Social Controls*, 18 HASTINGS INT'L & COMP. L. REV. 487 (1995)

A. Limitless Prosecutorial Discretion

Premising jurisdiction on whether the conduct has an effect in the United States provides few limits on what can be prosecuted here. After all, in a global economy, what does not affect this country? As such, using an "objective territorial" principle gives enormous discretion to prosecutors to decide whether they wish to proceed with an extraterritorial prosecution.[116] These decisions of whether to charge a criminal offense are subject not only to the whims of prosecutors, but also to the political desires of a particular administration. As noted by Circuit Judge Lynch in his concurring opinion in *Nippon*, "[c]hanging economic conditions, as well as different political agendas, mean that antitrust policies may change from administration to administration."[117] Although Judge Lynch chose to permit the extraterritorial application in this case, it is hard to envision circumstances that would restrict an "objective territorial" philosophy.[118]

The United States takes a proactive approach to prosecuting extraterritorial crimes when it permits an extraterritorial application merely because the conduct has an effect in this country. Despite no specific language in the statute authorizing extraterritoriality, and despite the fact that the conduct might not be directly aimed at the government, as in *Bowman*, courts appear reluctant to deprive prosecutors of their discretion to proceed against business crimes occurring outside the United States.[119]

Using an "objective territoriality" approach shifts the decision to prosecute from a legislative decision to an executive one.[120] For the most part, the

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(discussing the need for extraterritorial control to use a methodology that "promote[s] corporate and industrial self-regulation").

[116] "Objective territoriality" has been the subject of criticism because of its breadth. *See* Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308, 1327 n.118 (1983) (describing criticism that has been lodged against using "objective territoriality"). *But see* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 79-94 (1992) (arguing for an "international law" presumption).

[117] United States v. Nippon Paper Indus. Co., 109 F.3d 1, 10 (1st Cir. 1997).

[118] One can analogize the effect doctrine used here, with that used in determining whether conduct affects interstate commerce. Prior to the Supreme Court decision in *United States v. Lopez*, 514 U.S. 549 (1995), there were few restrictions on what would in fact have an effect on interstate commerce.

[119] Many of the extraterritorial prosecutions are not for activity targeted against the United States government. Rather, the jurisdiction is premised on merely causing "domestic harm." *See* United States v. Plummer, 221 F.3d 1298, 1305 (11th Cir. 2000) (listing instances of extraterritorial prosecutions).

[120] In *Blackmer v. United States*, the Supreme Court claimed that this was a power of

decision whether to prosecute an extraterritorial business crime is left to prosecutors. Some contend that prosecutors have not proceeded extraterritorially in a significant number of cases.[121] Although internal Justice Department guidelines provide some restraint on an individual prosecutor's actions, the ultimate decision has left the hands of Congress for the arms of prosecutors.

Is it wise to leave these decisions to prosecutorial discretion? Prosecutors have no ethical mandates specifically regarding these decisions. It is also important to note that these decisions can have an enormous impact on international relations. Prosecutors, however, are within the executive branch, the nucleus for making decisions related to international relations. However, a coordinated approach between the appropriate administrative agencies in making decisions with political ramifications cannot be assured. Will prosecutors consider the best way to handle improprieties in the business world from a global perspective, or will these decisions only consider a national approach? The uncertainty in how all prosecutors will answer this question makes the enormous discretion being given to prosecutors a point of concern.

B. Realigning the Presumption of Territoriality

When Congress specifically addresses extraterritoriality within a statute, the courts have no issue to resolve regarding extraterritoriality. Likewise, prosecutors do not have the latitude to proceed outside the strict mandates of the statute. The omission of specific extraterritorial language in a statute raises issues that require court resolution. Historically, the view taken was that absent specific language for extraterritoriality, the presumption was against permitting an extraterritorial prosecution.[122] What was initially a presumption against extraterritoriality in criminal cases, however, has in fact become a reality of allowing extraterritoriality.[123]

To assume a presumption in favor of extraterritoriality when Congress has not spoken is against the historical weight that surrounds this question.[124] Only

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construction for the courts, as opposed to being a legislative power. 284 U.S. 421, 437 (1932). Yet, if the courts are interpreting instances when Congress has failed to speak, the very fact that they could have spoken or might yet speak makes it somewhat invasive of the legislative function.

[121] *See, e.g.*, Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 578 (2000) (stating that the "government uses extraterritoriality sparingly and uses comity extensively, at least as a matter of prosecutorial discretion").

[122] *See* United States v. Cotton, 471 F.2d 744, 750 (9th Cir. 1973) (noting a "presumption against extraterritorial application" unless there is evidence by Congress of "contrary intent").

[123] *See, e.g.*, *Plummer*, 221 F.3d at 1305.

[124] *See* Blackmer v. United States, 284 U.S. 421, 437 (1932) (stating that "the legislation of

recently has globalization increased the ability to prosecute extraterritorial crimes premised upon the conduct affecting this country. Obviously, one can argue that if Congress is dissatisfied with this new line being drawn on the continuum of what conduct outside the United States can be subject to prosecution, it will speak more clearly in the statutory language. One can, however, also argue the opposite here. If Congress wished for this conduct to be prosecuted, then it would have spoken originally.

In essence, what has changed here is the presumption. By using "objective territoriality" in a globalized world, the presumption of not permitting extraterritorial conduct in criminal cases has become a presumption in favor of permitting these prosecutions.

For those advocating increased crime control, this philosophical shift will seem favorable. But acceptance is less likely if other countries take a similar stance. Will the United States be ready to accept a foreign country proceeding against a United States business for alleged crimes occurring in this country that affect the foreign country? Would the United States accept this framework hospitably if the crime of the other country is legitimate conduct here within the United States?[125]

C. Other Available Remedies

Criminal actions are not the sole source for obtaining compliance with recognized standards. Prosecutions against entities outside the United States may be unnecessary in light of civil remedies available to businesses.[126] Businesses and individuals, both national and foreign, have the option of proceeding civilly against wrongdoing that affects them.[127] The United States government also has the option of proceeding with civil or administrative

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the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States").

[125] *See* Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 169 F. Supp. 2d 1181, 1183 (N.D. Cal. 2001) (granting summary judgment motion in the United States when civilian group from France sought to prohibit internet service provider from having items on the web that were prohibited under French law).

[126] In some cases the particular criminal statute may not be available for use in civil actions. *See* Israel Aircraft Indus., Ltd. v. Sanwa Bus. Credit Corp., 16 F.3d 198, 200-02 (7th Cir. 1994) (noting how the Export Administration Act does not provide a private right of action for victims of foreign boycotts).

[127] *See* Kent Greenfield, *Ulta Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1371 (2001) (discussing foreigners suing American corporations in United States courts).

actions in many instances.[128] Additionally, the imposition of trade restrictions may ensure that improprieties occurring outside this country do not infiltrate the United States.

In addition to national remedies, there are also international mechanisms that can assist in promoting good business practices. For example, international organizations may offer assistance in curtailing improper conduct occurring abroad.[129]

The United States has been extremely successful in getting other countries to join in fighting improprieties occurring within their countries. For example, after the passage of the Foreign Corrupt Practices Act, the United States pushed to have anti-bribery provisions adopted in other countries.[130] This international cooperation approach can be fortified with additional rewards for good business practices.

VI. "DEFENSIVE TERRITORIALITY"

Continuing with an "objective territoriality" approach in assessing whether to prosecute extraterritorial business crimes raises substantial concern. What was once a relatively restrictive way to view extraterritoriality has become a limitless international principle. It is, therefore, necessary to reevaluate where the line should be drawn in order to permit some of these prosecutions, but to also place restrictions on unbridled prosecutorial discretion. The approach taken here is that of "defensive territoriality."

A. The Components of "Defensive Territoriality"

Several factors need to be examined in determining whether an extraterritorial prosecution is proper. Clearly, the conduct needs to have an effect on the United States, but in defining what type of an effect, the "defensive territoriality" standard departs from the current analysis used by courts.

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[128] *See Bell South Settles FCPA Case with SEC*, 16 CORP. CRIME REP., Jan. 21, 2002, at 1 (describing settlement between BellSouth and the SEC for alleged violations of the Foreign Corrupt Practices Act).

[129] *See European Commission Fines ADM, Five Other Companies in Sodium Gluconate Cartel*, CORP. CRIME REP., Oct. 8, 2001, at 4 (describing how the European Commission fined both United States and foreign companies for "fixing the price and sharing the market for sodium gluconate").

[130] *See* Bruce Zagaris, *Effort to Implement OECD Anti-Corruption Convention Continues*, 16 INT'L ENFORCEMENT L. REP. 753, 753 (2000); *Group Urges OECD Countries to Ban Bribe Payments to Political Parties Abroad*, CORP. CRIME REP., Oct. 30, 2000, at 5 (relating TI-s urging member states to "prohibit bribe payments to foreign political parties").

As previously stated, if Congress speaks directly to the issue of extraterritoriality in the focus of the statute or in a specific provision, than extraterritoriality is permitted without any qualifications. When Congress fails to speak directly to the issue, as in many older statutes drafted when the issue of extraterritoriality was not at the forefront of legislative minds, prosecutors and courts should maintain the historical presumption against extraterritoriality. The policy consideration of non-interference with another country's political and legal actions needs to be a prominent concern.

Several key ingredients subject an extraterritorial business crime to prosecution in the United States. They include whether the prosecution is necessary to protect this country, whether an administrative agency within the United States controls the business entity, and whether the business entity acted outside the United States for the deliberate purpose of avoiding jurisdiction.

Protection of the United States government is imperative. This is implied in using a protective principle to assess whether jurisdiction is appropriate in an extraterritorial prosecution. "Defensive territoriality" differs from the protective principle in that it is not limited to national security concerns, focuses on protection of government interests as opposed to individual citizen interests, and can include frauds perpetrated against the United States government[131] and other conduct that might not necessarily fit the contours of the protective principle.[132] Protection of the government should also be a component in the determination process governing whether conduct that effects the United States should be subject to prosecution.

The methodology one employs to ascertain whether the government in fact needs protection includes identifying whether the government is the victim of the crime, and whether the specific conduct involved affects the government. In *Bowman*, the United States government was clearly the victim of the criminal act, and the government was affected by the conduct involved.[133]

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[131] In the case of *United States v. Birch*, the protective principle was used even though national security was not the focus of the offense. 470 F.2d 808 (4th Cir. 1972). The case involved "extraterritorial forgery and false use of government documents," and the court stated that "[t]he gravamen of the offenses is the assault on the integrity of the United States and its official documents." *Id.* at 812. Using the analysis suggested in this Article, it would be unnecessary to stretch the protective principle to fit these circumstances. "Defensive territoriality" would clearly permit this prosecution since the conduct was against the United States government.

[132] *See generally* WISE & PODGOR, *supra* note 6, at 54-59 (discussing the protective principle).

[133] *See* United States v. Bowman, 260 U.S. 94, 95 (1922).

Thus, the Court's finding that extraterritorial jurisdiction existed in that case would be consistent with a standard of "defensive territoriality."

This landmark decision, however, has been followed by numerous decisions that extend the holding far beyond its origins. Courts have permitted an extraterritorial application without regard to the government being a victim and without regard to the government being affected by the conduct's criminality.[134] Restricting territoriality to "defensive territoriality," as opposed to "objective territoriality" would still provide protection to the country, while limiting aggressive prosecutions that can occur as the result of a limitless approach offered by the existing "objective territoriality" doctrine.

B. Exceptions Warranting an Extraterritorial Prosecution

Two caveats need to be recognized before discarding an "objective territoriality" approach for that of "defensive territoriality." Deliberate avoidance of jurisdiction should not be tolerated. Likewise, welcomed jurisdiction by another country needs to be supported.

Conduct of United States businesses, deliberately occurring outside the United States for the purpose of avoiding United States jurisdiction, should not be tolerated. Such deliberate actions to circumvent the limits of criminal law cannot be considered acceptable. The determination of deliberate avoidance is a factual question, but evidence of a business proceeding with activity outside this country, knowing that this activity would be subject to prosecution here, would set the stage for a justified prosecution.

Equally compelling are those situations when another country welcomes the United States into their jurisdiction for the purpose of proceeding with the prosecution. Issues of comity are not concerns when another country seeks the assistance of the United States. The strong prosecutorial abilities and the resources available for prosecution may motivate another country to seek the aid of the United States in curtailing improprieties occurring within their country. International agreements and treaties that delineate the roles of each country and permit prosecutions in another country do not impede the comity concerns that accompany the United States proceeding against extraterritorial conduct.[135] A policy of "defensive territoriality" should not restrain these

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[134] *See supra* note 60-62 and accompanying text.

[135] *See* Waller, *supra* note 121, at 572-79. *See also* Stephen J. Squeri, *Government Investigation and Enforcement: Antitrust Division and the Federal Trade Commission*, 1252 PLI/Corp 689, 831-4 (2001) (discussing antitrust cooperation agreements with foreign countries).

welcomed requests for assistance. Rather, this form of cooperative assistance needs to be fostered.

VII. CONCLUSION

When courts use "objective territorially," the range of permissible conduct that can be prosecuted is increased. Unlike terrorist acts, or those committing acts of violence against the United States, legitimate businesses may find themselves subject to United States prosecution merely because their conduct had effects that crossed the borders into the country.

Increased globalization warrants that we reconfigure our approach to extraterritorial prosecutions. The ramifications of continuing to use a jurisdictional base that operates aggressively are frightening. Cognizance of what can happen if another country should decide to reciprocate against the United States for conduct they deem criminal or improper within their country is imperative. "Defensive territoriality" offers a less aggressive posture to resolving extraterritorial disputes. It advocates instituting deflectors so that illegal conduct does not penetrate this country. More importantly, it maintains the historical significance of the international base of jurisdiction known as territoriality, while readjusting the "objective territorial" base to fit the globalized world.