

## NOTES

### EXTRATERRITORIAL JURISDICTION UNDER THE PROPOSED FEDERAL CRIMINAL CODES: SENATE BILL 1630 AND HOUSE BILL 1647

#### A. Introduction

Movement once again is underway to reform the United States criminal code.<sup>1</sup> Current legislative efforts in this area include Senate Bill 1630 (S. 1630),<sup>2</sup> which recently won approval by the Senate Committee on the Judiciary,<sup>3</sup> and House Bill 1647 (H.R. 1647).<sup>4</sup> This Note will analyze the extraterritorial jurisdictional provisions of these proposed federal criminal codes, and the theoretical bases supporting this exercise of jurisdiction.<sup>5</sup>

Extraterritorial jurisdiction, the right of the domestic court of a State to try an individual for criminal activity that occurred outside the sovereign territory of that State,<sup>6</sup> is justified by, and classified into, four major principles: 1) territorial jurisdiction, or the right of a nation to apply its laws to activities that occur in its sovereign territory<sup>7</sup>; 2) the protective principle of jurisdiction, or the right of a nation to punish criminal activities that occur outside its territory but which threaten or harm its governmental processes<sup>8</sup>; 3) the nationality principle, or the application of a nation's law to activities either perpetrated by or against its nationals<sup>9</sup>; and 4) the universal principle, which gives all nations

---

<sup>1</sup> 18 U.S.C. (1976 & Supp. IV 1980).

<sup>2</sup> S. 1630, 97th Cong., 1st Sess. (1981).

<sup>3</sup> 127 CONG. REC. S13686 (daily ed. Nov. 19, 1981).

<sup>4</sup> H.R. 1647, 97th Cong., 1st Sess. (1981).

<sup>5</sup> Other questions presented in this analysis are whether the legislature is competent to expand jurisdiction beyond the United States borders, and whether the legislation will infringe upon the constitutional rights of individuals tried under the extraterritorial jurisdiction of the United States as established by the proposed criminal codes.

See generally Epstein, *The Extraterritorial Reach of the Proposed Criminal Justice Reform Act of 1975—S.1*, 4 AM. J. CRIM. L. 275 (1976); Feinberg, *Extraterritorial Jurisdiction and the Proposed Federal Criminal Code*, 72 J. CRIM. L. & CRIMINOLOGY 385 (1981).

<sup>6</sup> For an excellent, general discussion of extraterritorial jurisdiction see Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145 (1972-1973).

<sup>7</sup> Territorial jurisdiction provides the justification for the exercise of jurisdiction by a State over its ships on the high seas and over crimes committed only partly within the prosecuting state. This latter exercise of jurisdiction is termed "objective territorial." See I. BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 300-02 (3d ed. 1979).

<sup>8</sup> *Id.* at 303-04.

<sup>9</sup> *Id.* at 303.

the right to try certain internationally condemned crimes no matter where or by whom they are committed.<sup>10</sup>

Originally relying primarily on the territorial principle,<sup>11</sup> the United States has expanded its jurisdiction over activities committed outside its sovereign territory through the protective principle,<sup>12</sup> the nationality principle,<sup>13</sup> and the objective territorial principle.<sup>14</sup> Most decisions that apply United States law extraterritorially are based upon an inferred legislative intent that the applicable law was designed to apply outside the sovereign territory of the United States.<sup>15</sup> Very few federal criminal statutes currently in force deal expressly with extraterritorial application. In contrast, the proposed criminal legislation expressly states when extraterritorial jurisdiction exists over a particular offense. Although the new legislation expands this jurisdiction in some areas, it generally codifies existing United States case law dealing with extraterritorial jurisdiction and eliminates the need for the federal courts to infer legislative intent.<sup>16</sup>

The proposed criminal codes represent improvements in other areas as well. The present criminal code is comprised of a "jumble" of "piecemeal" legislation<sup>17</sup> enacted over a period of time on an *ad hoc* basis by different groups to deal with diverse problems.<sup>18</sup> Present law is characterized by complexity,<sup>19</sup> uneven application,<sup>20</sup>

---

<sup>10</sup> *Id.* at 304.

<sup>11</sup> See 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 94-95 (1968).

<sup>12</sup> See, e.g., *United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2d Cir. 1968); *United States v. Layton*, 509 F. Supp. 212, 216 (N.D. Cal. 1981).

<sup>13</sup> See, e.g., *Steele v. Bulova Watch Co., Inc.*, 344 U.S. 280 (1952); *Blackmer v. United States*, 284 U.S. 421 (1932).

<sup>14</sup> See, e.g., *United States v. Postal*, 589 F.2d 862, 885-86 (5th Cir. 1979); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

<sup>15</sup> See 1 THE NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 72 (1970) [hereinafter cited as WORKING PAPERS].

<sup>16</sup> *Feinberg*, *supra* note 5, at 386-87.

<sup>17</sup> *Reform of the Federal Criminal Laws: Hearings on S. 1630 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 12168 (1981) (staff memorandum) [hereinafter cited as *Senate Hearings*].

<sup>18</sup> HOUSE COMM. ON THE JUDICIARY, CRIMINAL CODE REVISION ACT OF 1980, H.R. REP. NO. 1396, 96th Cong., 2d Sess. 3 (1980) [hereinafter cited as H.R. REP. NO. 1396]; *Senate Hearings*, *supra* note 17, at 12167 (staff memorandum).

<sup>19</sup> *Senate Hearings*, *supra* note 17, at 12169 (staff memorandum). See H.R. REP. NO. 1396, *supra* note 18, at 4.

<sup>20</sup> "Because particular constitutional grounds for prohibiting conduct have been used for each offense, in order to satisfy the needs perceived at the time of enactment, the present approach also leaves irrational gaps and inconsistencies in the application of Federal criminal laws." H.R. REP. NO. 1396, *supra* note 18, at 4.

differing judicial interpretations,<sup>21</sup> and inaccessibility.<sup>22</sup> Proposed reform bills completely overhaul the existing system, setting forth the law in a clear, comprehensive manner.<sup>23</sup> Uniform grading of offenses, uniform sentencing, consolidation of offenses, and consistent language are the hallmarks of current legislative efforts.<sup>24</sup>

Federal criminal law reform began with the establishment of the National Commission on Reform of Federal Criminal Laws (The Brown Commission) in 1966.<sup>25</sup> In 1971, the Brown Commission issued its Final Report in the form of a recommended, comprehensive codification of the federal criminal law.<sup>26</sup> Proposed codes based upon the work of the Brown Commission were introduced at the 92d Congress and successive legislative sessions,<sup>27</sup> but none have become law, due primarily to a perceived unwarranted expansion of federal criminal law into the province of the individual states.<sup>28</sup> With fifteen years of legislative development behind it, however, and an

---

<sup>21</sup> "[T]olling the statute of limitations by fleeing the jurisdiction requires an intent to avoid prosecution in the First, Second, and Fifth Circuits. It does not in the Fourth, Eighth, and District of Columbia Circuits." *Id.* at 3.

<sup>22</sup> *Senate Hearings*, *supra* note 17, at 12169 (staff memorandum).

<sup>23</sup> *Id.* at 12167 (staff memorandum).

<sup>24</sup> Although H.R. 1647 and S. 1630 share these attributes, there are differences in the scope of the two bills. The House bill is more limited in scope than the Senate bill. The former is restricted to a reform of the substantive criminal law and sentencing procedures. The House Subcommittee on Criminal Justice decided not to revise and reform crimes defined outside of title 18. The Subcommittee also decided to maintain the scope of federal criminal jurisdiction at the present level absent a showing of "compelling need." H.R. REP. NO. 1396, *supra* note 18, at 9. *See also id.* at 11.

The Senate bill is more comprehensive in scope. "The only major areas of criminal law not directly incorporated within the new Code are the judicially-developed laws concerning generally applicable defenses to criminal conduct and the numerous regulatory statutes that carry low levels of criminal penalties." *Senate Hearings*, *supra* note 17, at 12171-72 (staff memorandum).

<sup>25</sup> *Senate Hearings*, *supra* note 17, at 12169.

<sup>26</sup> *Id.*; Kennedy, *Federal Criminal Code: An Overview*, 47 GEO. WASH. L. REV. 451, 452 (1979).

<sup>27</sup> *See* H.R. REP. NO. 1396, *supra* note 18, at 7-9. The most success to date by a federal criminal code bill was in the 95th Congress, where S. 1437 was passed by the Senate by a vote of 72-15. Congress adjourned before further action could be taken. *See id.* at 8.

<sup>28</sup> Compare Quigley, *The Federal Criminal Code Revision Plan: An Epitaph for the Well-Buried Dead*, 47 GEO. WASH. L. REV. 459 (1979) (an analysis of jurisdiction under S. 1437, *supra* note 27) with Pauley, *An Analysis of Some Aspects of Jurisdiction under S. 1437, the Proposed Federal Criminal Code*, 47 GEO. WASH. L. REV. 475 (1979) (a reply to Quigley).

Opposition was so strong in the House of Representatives during the 95th Congress that the House Subcommittee on Criminal Justice recommended against a comprehensive code and suggested that reform be carried out through an "incremental" approach. *See* H.R. REP. NO. 1396, *supra* note 18, at 8.

*See also* 127 CONG. REC. S13659-61 (daily ed. Nov. 18, 1981) (statement of Sen. Helms, incorporating an analysis by Nicholas E. Calio, Litigation Counsel, Washington Legal Foundation) (argues S. 1630 relaxes standard and penalties for violent crimes).

early start in both Houses, federal criminal code reform finally may be at hand.<sup>29</sup>

## B. Analysis

### 1. Introduction

The four jurisdictional theories noted earlier all can be applied logically to cover activity very remote from the nation asserting jurisdiction. States are prevented from claiming jurisdiction over activity with which they have little or no connection by customary international law and international political realities.<sup>30</sup> Every exercise of extraterritorial jurisdiction by one state infringes in one way or another on the sovereignty of another state. Therefore, extraterritorial jurisdiction often is asserted by governments only after consideration of notions of international comity.<sup>31</sup> Comity requires any extraterritorial application of domestic law to be based upon an important domestic interest.<sup>32</sup> The four jurisdictional theories illustrate this point. The protective theory is based upon the protection of governmental operations; the territorial principle concerns a nation's power over its sovereign territory; the nationality principle derives from a state's power to protect and control its nationals; and the universality principle stems from the universal condemnation of certain crimes. Considerations of comity involve the balancing of these important state interests with the competing jurisdictional interests of the state whose sovereignty will be infringed by the assertion of extraterritorial jurisdiction.<sup>33</sup> Any broad expansion of United States extraterritorial jurisdiction could draw much international criticism, and resistance from States protesting unnecessary violations of their sovereignty.<sup>34</sup>

### 2. Basic Jurisdictional Framework

Under the present federal criminal code, jurisdiction is a major element of each offense. This tends to cast more attention upon the

---

<sup>29</sup> See *Senate Hearings*, *supra* note 17, at 12171 (staff memorandum). For an extensive analysis of the proposed federal criminal code, see *Symposium on the Policies and Legal Theories Underlying the Proposed Federal Criminal Code*, 72 J. CRIM. L. & CRIMINOLOGY 381 (1981). A bibliography is included. *A Legal Bibliography on the Proposed Federal Criminal Code*, 72 J. CRIM. L. & CRIMINOLOGY 631 (1981).

<sup>30</sup> See G. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 90-119 (5th ed. 1967).

<sup>31</sup> See J. BRIERLY, *THE LAW OF NATIONS* 243 (6th ed. 1963).

<sup>32</sup> See *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976); BROWNLIE, *supra* note 7, at 301-03.

<sup>33</sup> See *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976); BROWNLIE, *supra* note 7, at 301-03.

<sup>34</sup> See, e.g., Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151 (1980).

jurisdictional question than the underlying criminal conduct.<sup>35</sup> For example, robbery might be defined as the taking of another's possessions without his consent with force or a threat thereof with the intent to cross state lines. A crime would not exist under federal law unless there was a robbery committed "with intent to cross state lines."<sup>36</sup> Defining offenses in this manner on an *ad hoc* basis often leads to a multiplicity of penal provisions, all dealing with the same basic criminal conduct.<sup>37</sup> One theft offense might require a crossing of state lines.<sup>38</sup> Another might require a tampering with the mails,<sup>39</sup> and another might involve taking money from a bank insured by the federal government.<sup>40</sup> If one crime was committed that involved all three of these offenses, the actor could be prosecuted for three different crimes.

The proposed codes depart from the practice of incorporating a jurisdictional element into each offense. The new legislation breaks each offense into two principle subsections: 1) the definition of the criminal conduct; and 2) a description of the allegations necessary to bring the offense within the jurisdiction of the federal courts. The jurisdictional requirements still must be proved to a judge or jury,<sup>41</sup> but they are distinct from the underlying criminal conduct. This method provides for a consolidation of offenses into one section with several alternative jurisdictional bases.<sup>42</sup> The result is clarity and simplicity in this previously troublesome area of federal criminal law.<sup>43</sup>

Most significantly, the new legislation states explicitly when federal criminal law is intended to be exercised extraterritorially,<sup>44</sup>

---

<sup>35</sup> *Senate Hearings, supra* note 17, at 12174 (staff memorandum).

<sup>36</sup> "[S]everal foreign nations have refused to extradite criminals when the peculiar American definition of such offenses comes to their attention." *Id.* at 12175 (staff memorandum).

<sup>37</sup> *See id.*

<sup>38</sup> 18 U.S.C. § 2314 (1976) (transportation of stolen goods).

<sup>39</sup> 18 U.S.C. § 2114 (1976).

<sup>40</sup> 18 U.S.C. § 2113 (1976).

<sup>41</sup> The decision to try the jurisdictional issue to a judge or jury is the defendant's option. *Senate Hearings, supra* note 17, at 12175 (staff memorandum).

<sup>42</sup> A section in the Senate bill is illustrative. Section 201(b) of S. 1630 provides that "Federal jurisdiction may be alleged as resting on more than one of such circumstances, but proof of any such circumstance is sufficient to establish the existence of Federal jurisdiction over the offense. Proof of more than one of such circumstances does not increase the number of offenses that may be found to have been committed." S. 1630, 97th Cong., 1st Sess. (1981).

<sup>43</sup> *Senate Hearings, supra* note 17, at 12175 (staff memorandum).

<sup>44</sup> WORKING PAPERS, *supra* note 15, at 72. "Most foreign penal codes state explicitly when citizens may be punished for acts which they commit abroad, when resident aliens may be punished for activity done while they are temporarily outside the forum state and when nonresident aliens may be punished for acts done in their own country or in a third country." George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 610-11 (1966).

thus alleviating the courts' often difficult task of determining, from the definition of the offense itself, the extent of extraterritorial jurisdiction intended by Congress.<sup>45</sup> Under the proposed code, extraterritorial application of the federal criminal laws becomes more a question of congressional power than one of judicial interpretation.<sup>46</sup>

As used in the proposed codes, federal jurisdiction refers to the nature, extent, and exercise of the power of the federal government to make and enforce laws.<sup>47</sup> Both House Bill 1647 and Senate Bill 1630 divide federal jurisdiction into three categories:<sup>48</sup> the general federal jurisdiction, which consists of offenses committed within the United States that meet federal jurisdictional requirements;<sup>49</sup> the special federal jurisdiction which includes (1) real property reserved or acquired for the use of the United States,<sup>50</sup> (2) special maritime jurisdiction,<sup>51</sup> and (3) special aircraft jurisdiction;<sup>52</sup> and the extraterritorial federal jurisdiction. The proposed codes deal with the general and special federal jurisdiction similarly, but they differ as to extraterritorial jurisdiction.

Senate Bill 1630 lists in one section all situations in which federal criminal law will be given extraterritorial effect.<sup>53</sup> Section 204 of Senate Bill 1630 outlines the jurisdictional requirements for extraterritorial application of the federal criminal law. Section 204 governs extraterritoriality whether or not any of the requirements for the exercise of general federal jurisdiction have been met.<sup>54</sup>

<sup>45</sup> WORKING PAPERS, *supra* note 15, at 72. *United States v. Bowman*, 260 U.S. 94 (1922) (creates exception to usual presumption of territoriality in cases involving the protection of governmental interests); *Stegeman v. United States*, 425 F.2d 984 (9th Cir. 1970) (bankruptcy statutes serve important government interests and are an exception to the presumption of territoriality of statutes); *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981) (murder of Congressman in Guyana within extraterritorial jurisdiction).

<sup>46</sup> A discussion of the extent of Congressional power to provide for extraterritorial jurisdiction follows *infra* at notes 194-244.

<sup>47</sup> H.R. REP. NO. 1396, *supra* note 18, at 15.

<sup>48</sup> See S. 1630 § 201(a), 97th Cong., 1st Sess. (1981); H.R. 1647 § 111, 97th Cong., 1st Sess. (1981).

<sup>49</sup> See S. 1630 § 202, 97th Cong., 1st Sess. (1981). In each offense there is a separate subsection that lists the circumstances required for federal jurisdiction. S. 1630 § 201(b)(1), 97th Cong., 1st Sess. (1981).

<sup>50</sup> S. 1630 § 203(a)(1), 97th Cong., 1st Sess. (1981). The special jurisdiction also includes places "purchased or otherwise acquired by the United States with the consent of the legislature of the State in which such place is located for the construction of a building or other facility." *Id.* See also H.R. 1647 § 113, 97th Cong., 1st Sess. (1981), which contains similar provisions.

<sup>51</sup> S. 1630 § 203(b), 97th Cong., 1st Sess. (1981); H.R. 1647 § 113(c), 97th Cong., 1st Sess. (1981).

<sup>52</sup> S. 1630 § 203(c), 97th Cong., 1st Sess. (1981); H.R. 1647 § 113(d), 97th Cong., 1st Sess. (1981).

<sup>53</sup> See S. 1630 § 204, 97th Cong., 1st Sess. (1981).

<sup>54</sup>

IF, in a section describing an offense, there is a separate subsection in which

House Bill 1647, on the other hand, takes a two-step approach to extraterritoriality. One section of the House bill lists independent bases for the exercise of extraterritorial jurisdiction much like section 204 of Senate Bill 1630,<sup>55</sup> but it is much narrower than its counterpart in the Senate Bill. The principle method of determining extraterritoriality in House Bill 1647 lies in the description of each offense, with the circumstances generating such jurisdiction listed in a separate subsection of each description.<sup>56</sup> By using this method instead of a catch-all section as is used in Senate Bill 1630, the House bill offers increased clarification and, as will be seen, a more limited, definable boundary governing extraterritorial application of the federal penal laws.

Several practical difficulties immediately arise in the exercise of extraterritorial jurisdiction. Among these are questions concerning how to bring the accused before the courts, which court is the proper one to try the case, and whether ordinary time limitations apply to offenses committed outside the territorial jurisdiction of the United States where there is no immediate power of enforcement. Both proposed codes deal with these problems similarly.

For offenses committed within the extraterritorial jurisdiction of the United States, venue lies in the district where the defendant is arrested or is brought first after his arrest.<sup>57</sup> If the defendant is not arrested, an indictment may be filed in the district of the last known residence of the defendant<sup>58</sup> or, if such residence is unknown, in the District of Columbia.<sup>59</sup> Under Senate Bill 1630, the time limitation on prosecution will not run while the alleged offender is "absent from the United States or is a fugitive."<sup>60</sup> House

---

one or more circumstances are specified as giving rise to federal jurisdiction over the offense, there is federal jurisdiction over the offense . . . whether or not such a circumstance exists or has occurred if the offense is committed within the extraterritorial jurisdiction of the United States to the extent applicable under section 204.

S. 1630 § 201(b)(1)(B), 97th Cong., 1st Sess. (1981).

<sup>55</sup> H.R. 1647 §§ 111(c)(2)-(4), 97th Cong., 1st Sess. (1981).

<sup>56</sup> For example, § 1744 describes the offense of making false statements about emergencies to a government agency. Subsection (b)(2) of § 1744 provides that there is extraterritorial jurisdiction over this offense if the actor is a United States national and the organization or government agency is a federal organization or government agency. H.R. 1647 § 1744, 97th Cong., 1st Sess. (1981).

<sup>57</sup> S. 1630 § 3312(a)(2), 97th Cong., 1st Sess. (1981); H.R. 1647 § 5904, 97th Cong., 1st Sess. (1981).

<sup>58</sup> The indictment or information also may be filed in the district of the last known residence of any one of two or more joint offenders. H.R. 1647 § 5904, 97th Cong., 1st Sess. (1981); S. 1630 § 3312(a)(2), 97th Cong., 1st Sess. (1981).

<sup>59</sup> H.R. 1647 § 5904, 97th Cong., 1st Sess. (1981); S. 1630 § 3312(a)(2), 97th Cong., 1st Sess. (1981).

<sup>60</sup> S. 1630 § 511(g), 97th Cong., 1st Sess. (1981).

Bill 1647 suspends the period of limitation if the defendant is a "fugitive from justice."<sup>61</sup> Under either bill, simply remaining outside the United States for five years<sup>62</sup> after the commission of an offense within the extraterritorial jurisdiction of the United States will not bar prosecution by the federal government. Both bills also revamp the existing extradition statutes,<sup>63</sup> and contain provisions dealing both with the extradition of offenders who have fled to the United States and the receipt of offenders from foreign nations.<sup>64</sup>

### 3. Jurisdiction Based Upon the Territorial and Objective Territorial Principles.

Traditionally, the United States has based its criminal jurisdiction upon the territorial principle,<sup>65</sup> the idea that a state has jurisdiction over crimes alleged to have been committed within its sovereign territory.<sup>66</sup> All federal criminal statutes are inherently territorial. The territorial principle in its present form is well recognized in international law,<sup>67</sup> and is the most frequently invoked ground for the assertion of a nation's jurisdiction.<sup>68</sup> The territorial principle, however, gradually has been expanded over the years. It is now deemed to justify the exercise of jurisdiction over crimes committed within a nation's "floating territory,"<sup>69</sup> crimes committed only partly within the territory of the prosecuting

<sup>61</sup> "The running of a time period set by law as a bar to prosecution shall not continue while the alleged offender is a fugitive from justice." H.R. 1647 § 703(b), 97th Cong., 1st Sess. (1981). The House bill suffers from some uncertainty on this issue. The Code does not state whether an alleged offender must be a fugitive from "justice" generally or whether he just must be a fugitive from United States "justice" in order to suspend the running of the time limitation.

<sup>62</sup> Five years is the general time limit for prosecution of felonies and misdemeanors under both Codes. Interestingly, the House bill explicitly exempts prosecutions for murder from this limitation, while the Senate version exempts the prosecution of espionage. H.R. 1647 § 703, 97th Cong., 1st Sess. (1981); S. 1630 § 511, 97th Cong., 1st Sess. (1981).

<sup>63</sup> See H.R. 1647, §§ 5501-5515, 97th Cong., 1st Sess. (1981); S. 1630, §§ 3211-3218, 97th Cong., 1st Sess. (1981).

<sup>64</sup> "The statutes permitting the extradition to foreign nations of criminals who have fled to the United States are materially modernized and simplified." *Sen. Hearings, supra* note 17, at 12191 (staff memorandum).

<sup>65</sup> 6 M. WHITEMAN, *supra* note 11, at 94-95.

<sup>66</sup> Akehurst, *supra* note 6, at 152 n.1. If it is stated that a State has jurisdiction over crimes actually committed in its territory, the guilt of the accused is prejudged. *Id.*

<sup>67</sup> See S. S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J., ser. A., No. 9 (Judgment of Sept. 7).

<sup>68</sup> Akehurst, *supra* note 6, at 152.

<sup>69</sup> "A state has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character." *Codification of International Law (pt. 2: Jurisdiction With Respect to Crime)*, 29 AM. J. INT'L L. 435, 439, art. 4 (Supp. 1935) [commonly referred to and hereinafter cited as *Harvard Research*]. The term "floating territory" apparently was coined because this type of jurisdiction originally applied to ships.



nation,<sup>70</sup> and crimes that have an "effect" within the territory of the prosecuting nation.<sup>71</sup>

The "special jurisdiction" of the United States stated in section 203 of Senate Bill 1630 and section 113 of House Bill 1647 represents an extension of territorial jurisdiction beyond the real property and airspace located within the boundaries of the United States, to ships registered with the United States on the high seas or elsewhere<sup>72</sup> and aircraft belonging in whole or in part to the United States.<sup>73</sup> This exercise of jurisdiction derives from a rationalization that any object flying the United States flag is subject to its laws and therefore is considered a "floating" piece of United States territory.<sup>74</sup> The same principle can be applied to provisions in the proposed code that confer extraterritorial jurisdiction over offenses such as the possession of an explosive in a building in which the United States has an interest,<sup>75</sup> the destruction<sup>76</sup> or theft<sup>77</sup> of property under the care, custody, or control of the United States, or escape from<sup>78</sup> or rioting in<sup>79</sup> a federal detention facility.<sup>80</sup> In one respect, the exercise of jurisdiction in all of the above situations is not *extra-territorial* at all. The exercise of jurisdiction is predicated upon the location of the offense, the crucial location being property owned by, or under the control of, the United States.

The objective territorial principle of jurisdiction, an extension of the territorial principle beyond the concept of "floating" territory, although possibly logically consistent with territoriality, loses

<sup>70</sup> Akehurst, *supra* note 6, at 152. One formulation of this type of territorial jurisdiction requires the state asserting jurisdiction to prove that a constituent element of the offense occurred in its territory. *Id.* at 152-53.

<sup>71</sup> *Id.* at 153-54. *Strasheim v. Daily*, 221 U.S. 280, 285 (1911); *United States v. Fernandez*, 496 F.2d 1294, 1296 (5th Cir. 1974).

<sup>72</sup> The principle is termed the "Special Maritime Jurisdiction" in both bills. S. 1630 § 203(b), 97th Cong., 1st Sess. (1981); H.R. 1647 § 113(c), 97th Cong., 1st Sess. (1981). This principle is exercised by the United States and has been recognized by case law. *See United States v. Flores*, 289 U.S. 137 (1933). The House bill takes no chances in this area and specially provides for extraterritorial jurisdiction over the offense of commandeering a vessel, if the vessel is of United States registry. H.R. 1647 § 2538, 97th Cong., 1st Sess. (1981).

<sup>73</sup> This principle is termed the "Special Aircraft Jurisdiction" in both. S. 1630 § 203(c), 97th Cong., 1st Sess. (1981); H.R. 1647 § 113(d), 97th Cong., 1st Sess. (1981).

<sup>74</sup> *See United States v. Flores*, 289 U.S. 137 (1933).

<sup>75</sup> H.R. 1647 § 2721, 97th Cong., 1st Sess. (1981).

<sup>76</sup> H.R. 1647 §§ 2501-2503, 97th Cong., 1st Sess. (1981).

<sup>77</sup> H.R. 1647 § 2531, 97th Cong., 1st Sess. (1981).

<sup>78</sup> H.R. 1647 § 1716, 97th Cong., 1st Sess. (1981).

<sup>79</sup> H.R. 1647 § 2733, 97th Cong., 1st Sess. (1981).

<sup>80</sup> The territorial principle was one of the bases of jurisdiction relied upon by the Fourth Circuit in holding that United States jurisdiction covered a murder committed by United States Embassy personnel on the grounds of the United States Embassy located in the New Republic of Equatorial Guinea. *United States v. Erdos*, 474 F.2d 157, 159 (4th Cir. 1973).

some of that principle's facial validity.<sup>81</sup> The exercise of extraterritorial jurisdiction by the United States over crimes that either occur only partly with the United States or have an effect within it<sup>82</sup> has evoked controversy and sometimes anger from nations deploring the exportation of United States law.<sup>83</sup> The controversy centers not so much upon the theory underlying the exercise of jurisdiction (the theory actually is fairly well established<sup>84</sup>), but rather the absence of an outer limit in the United States application of that theory.<sup>85</sup> The principle concern is that jurisdiction based upon effects within a territory amounts to an undefinable assertion of jurisdiction in that jurisdiction over an act spatially and temporally distant from its effects may be claimed, even though the effects may be indirect and inconsequential.<sup>86</sup> This possibility has led several writers to support limitations on the objective principle. The suggestions range from allowing jurisdiction only by the territory that experiences the primary effects of the offense<sup>87</sup> to restricting jurisdiction to the nations in which a constituent element of the offense has occurred.<sup>88</sup> A thorough discussion of these limitations is beyond the scope of this Note; but whatever the future of the objective theory in international law, the United States courts definitively have recognized its validity,<sup>89</sup> and it is firmly entrenched

---

<sup>81</sup> See generally Akehurst, *supra* note 6, at 153-54.

<sup>82</sup> *Id.* at 152, 153. These two situations could overlap.

<sup>83</sup> See Gordon, *supra* note 34 (British statutory reaction to the extraterritorial application of United States antitrust law). The grandfather of the expansion of federal antitrust law outside the territorial jurisdiction based upon effects within the United States is Judge Hand's opinion in *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

Making telephone calls and sending mail to the United States has been deemed sufficient to constitute conduct within the United States for purposes of jurisdiction. *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972). The Second Circuit has taken the position that the "detrimental effects" constitute an element of the offense. *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968).

For an overview of United States antitrust law and the development of its extraterritorial application see Joelson, *Challenges to United States Foreign Trade and Investment: Antitrust Law Perspectives*, 14 INT'L LAW. 103 (1980).

<sup>84</sup> See, e.g., Akehurst, *supra* note 6, at 152-54.

<sup>85</sup> See Comment, *Aspects of Extraterritorial Criminal Jurisdiction in Anglo-American Practice*, 11 INT'L LAW. 555, 564 (1977).

<sup>86</sup> See Akehurst, *supra* note 6, at 153-54.

<sup>87</sup> *Id.* at 154.

<sup>88</sup> See *id.* at 152-53. Under the Harvard Research Draft Convention, territorial jurisdiction would extend to: "(a) Any participation outside its territory in a crime committed in whole or in part within its territory; and (b) Any attempt outside its territory to commit a crime in whole or in part within its territory." *Harvard Research*, *supra* note 69, at 439, art. 3.

<sup>89</sup> See *Strassheim v. Daily*, 221 U.S. 280 (1911); *Steele v. Bulova Watch Co., Inc.*, 334 U.S. 280 (1952); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Bd.*, 479 F.2d 912 (D.C. Cir. 1973); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) [hereinafter cited as REST. (2d)].

in some sections of the proposed federal criminal codes.

Section 204(g) of Senate Bill 1630 provides for extraterritorial jurisdiction over an offense if it "causes or threatens harm, of the type sought to be prevented by the statute describing the offense within the United States. . . ."<sup>90</sup> The House Bill contains a similar grant of jurisdiction,<sup>91</sup> which covers offenses "committed" at least partly within the United States but in which the accused participates outside the country.<sup>92</sup> Section 204(g) of the Senate Bill is a direct endorsement of the controversial "effects" doctrine. The House version appears to limit extraterritorial application of the code with the constituent element rationale alluded to above.<sup>93</sup> These grants of objective territorial jurisdiction place a burden on the judiciary, which will be saddled with the responsibility of marking an outer boundary for this expansive jurisdictional concept.<sup>94</sup>

Both proposed codes contain sections explicitly granting extraterritorial jurisdiction over offenses involving the smuggling of illegal drugs into the United States.<sup>95</sup> The provisions, while eliminating some gaps in current statutory law,<sup>96</sup> generally codify existing practice and case law.<sup>97</sup> Jurisdiction over drug smugglers most often is justified by the objective territorial principle,<sup>98</sup> and is not likely to be challenged by other nations as the trade is condoned by very few countries.<sup>99</sup>

Closely related to, and often involved in, the drug importation

<sup>90</sup> S. 1630 § 204(g)(1), 97th Cong., 1st Sess. (1981).

<sup>91</sup> H.R. 1647 § 111(c)(4)(B) provides for extraterritorial jurisdiction if the offense "is committed in whole or in part within the United States and the accused participates outside the United States; and there is a substantial Federal interest in the investigation or prosecution."

<sup>92</sup> *Id.*

<sup>93</sup> The Second Circuit has applied this type of interpretation. *See United States v. Pizarusso*, 388 F.2d 8, 10 (2d Cir. 1968).

<sup>94</sup> The courts already have begun to place some limits on the United States application of the objective territorial principle. *See Bersh v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975) (no jurisdiction under Securities and Exchange Commission's regulation 10(b)-5 because no intention that securities be offered for sale in the United States and because a general adverse effect on United States securities prices not a direct enough impact. The rule was not intended to apply to this situation.); *Securities and Exchange Comm'n v. Kasser*, 391 F. Supp. 1167, 1175 (D. N.J. 1975) ("Congress did not intend to confer jurisdiction on the federal courts over an essentially foreign transaction . . .").

<sup>95</sup> S. 1630 § 204(d), 97th Cong., 1st Sess. (1981); H.R. 1647 §§ 2711, 2712, 97th Cong., 1st Sess. (1981).

<sup>96</sup> The courts will not have to imply extraterritorial application from a general prohibition against importation of drugs. *See United States v. Postal*, 589 F.2d 862 (5th Cir. 1979).

<sup>97</sup> *See id.*; *United States v. Petrulla*, 457 F. Supp. 1367 (M.D. Fla. 1978).

<sup>98</sup> Drug smuggling is analogous to the "bullet fired across the border" hypothetical, which is a major illustration of the objective territorial principle. *See Akehurst, supra* note 6, at 152.

<sup>99</sup> Drug smuggling sometimes is classed as an internationally condemned crime thereby falling within the parameters of the universal principle. *Id.* at 161.

offenses are conspiracy offenses, brought forward in section 204 of Senate Bill 1630 and section 111(c)(4)(A) of House Bill 1647. Providing for extraterritorial jurisdiction over attempts or conspiracies to commit a federal offense within the United States, these sections base their jurisdictional claim upon overt acts committed by a co-conspirator within the United States and the intended impact of the conspiracy in United States territory. In doing so, the sections are amply supported by federal case law.<sup>100</sup> The federal antitrust laws have been held to reach an entire conspiracy and all the participants, "regardless of the position of any single conspirator."<sup>101</sup> Further, a conspiracy does not have to succeed for there to be criminal liability.<sup>102</sup> Presumably, under the new codes conspirators are within the extraterritorial jurisdiction of the United States if they conspire to commit a crime in the United States and any one of them engages in any act in furtherance of the intended crime.<sup>103</sup>

#### 4. Provisions Based Upon the Protective Principle

The bulk of the extraterritorial application of the federal criminal law under the proposed codes is devoted to the protection of the security of the United States and the protection of its governmental functions.<sup>104</sup> Originating in continental Europe,<sup>105</sup> the exercise of extraterritorial jurisdiction to protect governmental interests has garnered substantial support in international law.<sup>106</sup> Justice

---

<sup>100</sup> "[N]o doubt that the object of the conspiracy was to violate the narcotics laws of the United States; that the conspiracy was carried on partly in and partly out of this country; and that overt acts were committed within the United States by co-conspirators." *Rivard v. United States*, 375 F.2d 882, 886 (5th Cir. 1967).

The mailing of a sample packet of cocaine to Chicago was found to be an overt act committed within the United States so as to give the United States jurisdiction over a conspiracy, in *United States v. Schmucker-Bula*, 609 F.2d 399, 402 (7th Cir. 1980).

<sup>101</sup> *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1161, 1186-87 (E.D. Pa. 1980).

<sup>102</sup> *United States v. Schmucker-Bula*, 609 F.2d 399, 401 (7th Cir. 1980).

<sup>103</sup>

Except as otherwise provided by law, if 2 or more persons, with intent that a crime (other than an attempt) be committed, knowingly agree to engage in the conduct that is required for the crime so intended, and any one of those persons so agreeing intentionally engages in any conduct in furtherance of the intended crime, each such person commits an offense one class next below the most serious crime so intended.

H.R. 1647 § 1102(a), 97th Cong., 1st Sess. (1981). Senate bill 1630 § 1002, 97th Cong., 1st Sess. (1981), is similar.

<sup>104</sup> Akehurst, *supra* note 6, at 158. *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968).

<sup>105</sup> Akehurst, *supra* note 6, at 157.

<sup>106</sup> The Harvard Research Draft Convention on Jurisdiction With Respect to Crime described the protective principle of jurisdiction. Article 7 of the Draft Convention provides: A State has jurisdiction with respect to any crime committed outside its ter-

Marshall recognized the importance of protecting governmental activity from criminal conduct abroad in 1804: "The authority of a nation, within its own territory, is absolute and exclusive. . . . But its power to secure itself from injury may certainly be exercised beyond the limits of its territory."<sup>107</sup>

The general rule that statutes are to be applied territorially in the absence of a contrary legislative intent has been abandoned by the federal courts when they have been confronted with an attempted governmental exercise of extraterritorial jurisdiction based upon the protective principle:

[T]he same [territorially restrictive] rule of interpretation should not be applied to criminal statutes . . . enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents . . . . [Some statutes] are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home.<sup>108</sup>

The development of the proposed criminal codes with their stress on the protection of federal governmental interests abroad, combined with federal case law<sup>109</sup> and supporting language in the Restatement (Second) of United States Foreign Relations Law,<sup>110</sup> demonstrates United States acceptance of the validity of the protective principle of jurisdiction and

ritory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.

*Harvard Research, supra* note 69, at 440, art. 7.

See also 6 M. WHITEMAN, *supra* note 11, at 94-95.

<sup>107</sup> Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804).

<sup>108</sup> United States v. Bowman, 260 U.S. 94, 98 (1922).

<sup>109</sup> "[A] country's legislature is competent to enact laws and, assuming physical power over the defendant, its courts have jurisdiction to enforce criminal laws wherever and by whomever the act is performed that threatens the country's security or directly interferes with its governmental operations." United States v. Columba-Colella, 604 F.2d 356, 358 (5th Cir. 1979).

<sup>110</sup>

(1) A State has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.

REST. (2d) § 33, *supra* note 89, at 92.

Section 402 of the tentative draft of the Restatement of United States Foreign Relations Law (Revised) provides that a state may exercise its jurisdiction over "(3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or certain state interests." RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 402 at 98 (Tent. Draft No. 2, 1981) [hereinafter cited as REST. (Rev.)].

the intent to use this principle to give United States laws extraterritorial effect.

Section 204 of Senate Bill 1630 provides for extraterritorial jurisdiction over an offense if:

- (a) the offense is a crime of violence and the victim or intended victim is—
  - (1) a United States official;
  - (2) a federal public servant outside the United States for the purpose of performing his official duties; or
  - (3) a national of the United States, or an invitee of a national of the United States, on the premises of a United States embassy or consulate.<sup>111</sup>

Present statutory law is silent regarding jurisdiction over crimes committed against government officials abroad.<sup>112</sup> A federal district court, however, has extended existing statutes to cover the murder of a United States congressman in Guyana, despite the absence of any supporting statutory language.<sup>113</sup> Section 204(a) makes extraterritorial jurisdiction explicit in these types of crimes and applies to all persons, including aliens.<sup>114</sup> Although section 204(a) arguably could be based upon the passive personality principle of jurisdiction,<sup>115</sup> its history indicates that it is rooted in the perceived need for protection of governmental officers or servants abroad, not United States citizens in general.<sup>116</sup>

The exercise of jurisdiction under section 204(a)(3), which deals with crimes of violence committed against certain persons on the grounds of a United States embassy or consulate, may be justified by either the protective principle or the territorial principle as defined in section 203(a).<sup>117</sup> Section 203<sup>118</sup> cites "real property . . . reserved or acquired for the use of the United States" as being

<sup>111</sup> S. 1630 § 204(a), 97th Cong., 1st Sess. (1981).

<sup>112</sup> WORKING PAPERS, *supra* note 15, at 73.

<sup>113</sup> *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981).

<sup>114</sup> WORKING PAPERS, *supra* note 15, at 74.

<sup>115</sup> The passive personality principle is based upon the power of a state to protect its nationals. Under this principle, jurisdiction is extended over all crimes that injure nationals of the State asserting such jurisdiction. See Shachor-Landau, *Extra-Territorial Penal Jurisdiction and Extradition*, 29 INT'L & COMP. L. Q. 274, 283 (1980) and discussion *infra* at notes 169-93. Israel recently has asserted such jurisdiction in response to Arab terrorist activities directed against Israelis outside of Israel. See Meron, *Non-Extradition of Israeli Nationals and Extraterritorial Jurisdiction: Reflections on Bill No. 1306*, 13 ISRAEL L. REV. 215, 219 (1978).

<sup>116</sup> WORKING PAPERS, *supra* note 15, at 74.

<sup>117</sup> The universally recognized principle of territorial jurisdiction rests on the premise that a state has jurisdiction over all crimes committed within its territory. Akehurst, *supra* note 6, at 152 n. 1.

<sup>118</sup> S. 1630 § 203(a)(1), 97th Cong., 1st Sess. (1981).

within the special jurisdiction of the United States.<sup>119</sup> This logical extension of the territorial principle seems to justify the exercise of jurisdiction in these situations more appropriately, for the exercise of jurisdiction over a crime of violence committed by an alien in which the victim is an alien invitee on the grounds of a United States embassy could have, in some situations, a very tenuous relationship to the protection of any legitimate federal governmental interests.<sup>120</sup> Section 204(a)(3) may be somewhat superfluous, but is doubtless intended to end any speculation concerning federal jurisdiction over these crimes by providing an alternative justification for the extraterritorial application of the federal criminal law.<sup>121</sup>

Treason, sabotage, and espionage are three crimes that by definition are related closely to the protection of governmental activities. Extraterritorial jurisdiction over acts of treason, based as much upon the nationality principle<sup>122</sup> as the protective theory of jurisdiction,<sup>123</sup> has long been exercised by the United States.<sup>124</sup> Indeed, treason is another of the exceptions recognized by United States courts to the usual presumption that criminal statutes only apply territorially in the absence of legislative intent to the contrary.<sup>125</sup> Section 204(b) of Senate Bill 1630 codifies existing case law in the area in its provision for jurisdiction over acts of treason against the United States committed abroad.

The exercise of extraterritorial jurisdiction over acts of sabotage committed abroad by an alien, however, has not been exercised commonly by the United States.<sup>126</sup> While the Brown Commission

---

<sup>119</sup> The Fourth Circuit has followed this reasoning in a 1973 case involving the murder of a United States Embassy employee in the New Republic of Equatorial Guinea by the embassy's charge d'affairs. Both men were United States citizens and the murder occurred on embassy grounds. The court characterized the embassy as United States territory and within the special jurisdiction of the United States as set out in 18 U.S.C. § 7(3). The court extended jurisdiction on these grounds. *United States v. Erdos*, 474 F.2d 157, 159-60 (4th Cir. 1973).

<sup>120</sup> A possible governmental interest would be the maintenance of order on embassy grounds.

<sup>121</sup> The new Code is seen as eliminating a gap in current jurisdiction "with regard to diplomatic personnel who have immunity in the host country and yet cannot be prosecuted in the United States for acts abroad . . . [W]hen the crime involves only Americans, the host nation may be reluctant to take action against the perpetrator." Strausberg, *Erdos v. United States: Expansion of Extraterritoriality and Revival of Extraterritoriality*, 3 GA. J. INT'L & COMP. L. 257, 266 (1973).

<sup>122</sup> WORKING PAPERS, *supra* note 15, at 74. See *infra* notes 169-193 for a discussion of the nationality principle.

<sup>123</sup> WORKING PAPERS, *supra* note 15, at 74.

<sup>124</sup> *Id.*

<sup>125</sup> "Aside from the intention of Congress expressed in the statute we are of the opinion that the usual presumption against extraterritorial application of the criminal law does not apply to treason." *Gillars v. United States*, 182 F.2d 962, 979 (D.C. Cir. 1950).

<sup>126</sup> WORKING PAPERS, *supra* note 15, at 74.

was hesitant to extend jurisdiction over this crime when committed by an alien abroad,<sup>127</sup> section 204(b) of Senate Bill 1630 provides for extraterritorial jurisdiction over acts of sabotage regardless of the nationality of the perpetrator.<sup>128</sup>

The Senate bill does not provide for extraterritorial jurisdiction under section 204 as to acts of espionage committed by aliens outside the United States. Section 204(c)(7) provides for jurisdiction over crimes that obstruct or impair a federal government function, but only if they are committed by a national or resident of the United States.<sup>129</sup> This is somewhat perplexing, as espionage, like treason and sabotage, is certainly a crime aimed directly at injuring the United States government, and is an offense the foreign nation may have no interest in prosecuting.<sup>130</sup> Although it is possible that jurisdiction over acts of espionage committed abroad by aliens could be inferred from other subsections of section 204,<sup>131</sup> jurisdiction over this crime probably will continue to be conferred by the extraterritorial application of present statutory law.<sup>132</sup> The drafters of Senate Bill 1630 apparently believed that current statutory law was adequate in this regard.<sup>133</sup>

Other offenses relating to the protection of federal governmental functions included in section 204 of Senate Bill 1630 include: counterfeiting or forgery of currency, passports, or other public documents that purport to be issued by the United States;<sup>134</sup> bribery

<sup>127</sup> *Id.*

<sup>128</sup> S. 1630 § 204(b), 97th Cong., 1st Sess. (1981). Acts of sabotage also may infringe upon the special jurisdiction of the United States. See S. 1630 § 203(a)(1), 97th Cong., 1st Sess. (1981).

<sup>129</sup> S. 1630 § 204(c)(7), 97th Cong., 1st Sess. (1981).

<sup>130</sup> WORKING PAPERS, *supra* note 15, at 74.

<sup>131</sup> Section 204(g)(1) of S. 1630 provides for extraterritorial jurisdiction over an offense that causes or threatens the type of harm sought to be prevented by the statute within the United States. An act of espionage committed abroad certainly would have some effect within the United States. Conceivably, however, causing *harm* within the United States is different from simply causing an effect or intending to cause an effect within the United States. The former appears to require a more direct relationship than the latter. See S. 1630 § 204(g)(1), 97th Cong., 1st Sess. (1981).

<sup>132</sup> See 18 U.S.C. §§ 793, 794 (1976); *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980) (espionage conviction); Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973).

<sup>133</sup> § 1121. Espionage

(a) Offense.—A person commits an offense if he violates—

(1) section 201 of the Espionage and Sabotage Act of 1954 (relating to gathering or delivering defense information to aid a foreign government), as amended by section 182 of the Criminal Code Reform Act of 1981 (50 U.S.C. \_\_\_\_); or

(2) section 224(a) or 225 of the Atomic Energy Act of 1954 (42 U.S.C. 2274(a) or 2275) (relating to communication and receipt of restricted data with intent to injure the United States or to secure an advantage to a foreign nation). . . .

S. 1630 § 1121(a), 97th Cong., 1st Sess. (1981).

<sup>134</sup> S. 1630 § 204(c)(1), 97th Cong., 1st Sess. (1981).



or graft involving a federal public servant;<sup>135</sup> impersonation of a federal public servant;<sup>136</sup> and fraud against the United States or theft of property in which the federal government has an interest.<sup>137</sup> Most of these provisions are supported by United States case law<sup>138</sup> and general international law.<sup>139</sup> The extension of federal jurisdiction over acts of bribery committed abroad by aliens, however, "could raise difficult questions with respect to nations in which unauthorized payments to public officials is a societal characteristic."<sup>140</sup>

Section 204(c) of Senate Bill 1630 also provides for extraterritorial jurisdiction over crimes of perjury or false swearing in a federal official proceeding<sup>141</sup> and making a false statement in a federal government matter or record,<sup>142</sup> even if committed by an alien. Subsection (7) asserts jurisdiction over any obstruction of a federal government function if committed by a national or resident of the United States.<sup>143</sup> By limiting jurisdiction over offenses committed by aliens abroad to those that seriously impair official governmental proceedings, the drafters of Senate Bill 1630 exhibit a deference to aliens who may not be familiar with our laws relating to offenses such as "hindering law enforcement," and refrain from unnecessarily stretching extraterritorial jurisdiction to cover offenses having an indirect effect, at best, on governmental functions.<sup>144</sup>

A preoccupation with the protection of federal government activities abroad is also evident in House Bill 1647. Paralleling section 204(a) of Senate Bill 1630, the House bill extends extraterritorial jurisdiction over particular acts or threats of violence<sup>145</sup>

---

<sup>135</sup> S. 1630 § 204(c)(4), 97th Cong., 1st Sess. (1981).

<sup>136</sup> S. 1630 § 204(c)(6), 97th Cong., 1st Sess. (1981).

<sup>137</sup> S. 1630 § 204(c)(5), 97th Cong., 1st Sess. (1981). See *United States v. Cotten*, 471 F.2d 744 (9th Cir. 1973) where the court justified jurisdiction with the nationality, objective, and protective principles over a United States citizen who had stolen federal government property in Viet Nam.

<sup>138</sup> *United States v. Cotten*, 471 F.2d 744 (9th Cir. 1973). The Constitution provides explicitly for the punishment of counterfeiting. U.S. CONST. art. I, § 8, cl. 10.

<sup>139</sup> *Harvard Research*, *supra* note 69, at 440, arts. 7, 8.

<sup>140</sup> WORKING PAPERS, *supra* note 15, at 75. See also Note, *The Foreign Corrupt Practices Act: Problems of Extraterritorial Application*, 12 VAND. J. TRANSNAT'L L. 689 (1979).

<sup>141</sup> S. 1630 § 204(c)(2), 97th Cong., 1st Sess. (1981).

<sup>142</sup> S. 1630 § 204(c)(3), 97th Cong., 1st Sess. (1981).

<sup>143</sup> S. 1630 § 204(c)(7), 97th Cong., 1st Sess. (1981).

<sup>144</sup> See Akehurst, *supra* note 6, at 158, for examples of abuse possible when the protective principle is expanded to cover action having an indirect effect on governmental functions.

<sup>145</sup> These acts include: murder, § 2301; maiming, § 2311; kidnapping, § 2321; terrorizing, § 2315; robbery, § 2521; and extortion, § 2522. Jurisdiction is extended over terrorizing, robbery, and extortion only if the person against whom the acts are directed is a federally

directed against certain United States elected officials<sup>146</sup> or persons deemed "federally protected foreign individuals."<sup>147</sup> A host of sections devoted to protecting federal government functions carry a grant of extraterritorial jurisdiction regardless of the nationality of the offender. This group of offenses includes: fraudulent use of citizenship<sup>148</sup> or passports,<sup>149</sup> counterfeiting,<sup>150</sup> forgery,<sup>151</sup> fraudulent identification,<sup>152</sup> making false statements to the United States government,<sup>153</sup> tampering with federal government records,<sup>154</sup> and

---

protected foreign individual. *See* §§ 2315, 2521, and 2522. H.R. 1647, 97th Cong., 1st Sess. (1981).

<sup>146</sup> The officials included are:

- a) Senators or Representatives in, or Delegates or Resident Commissioners to Congress, or persons elected to these offices;
- b) The President, President-elect, or Vice-President of the United States; or
- c) "If there is no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice-President-elect or any individual who is acting as President under the Constitution and laws of the United States." H.R. 1647 § 2301(e)(1)(B), 97th Cong., 1st Sess. (1981).

<sup>147</sup>

(12) "federally protected foreign individual" means—

(A) a chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of Cabinet rank or above a foreign government or the chief executive officer of an international organization, or any individual who has previously served in such capacity, and any member of such person's immediate family, while in the United States;

(B) a chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than such person's own country and any member of such person's immediate family accompanying such person;

(C) any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of such person's immediate family whose presence in the United States is in connection with the presence of such officer or employee;

(D) any representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon the person, freedom, or dignity of such person and any member of such person's immediate family then forming part of such person's household; or

(E) a citizen or national of a foreign country present in the United States as an official guest of the Government of the United States pursuant to designation as such by the Secretary of State. . . .

H.R. 1647 § 101(12), 97th Cong., 1st Sess. (1981).

Closely related to these provisions is H.R. 1647 § 1701(d)(2)(E), 97th Cong., 1st Sess. (1981), which provides for extraterritorial jurisdiction over any obstruction of the performance of the protective duties of Secret Service agents, whether committed by an alien or a national of the United States.

<sup>148</sup> H.R. 1647 § 1515, 97th Cong., 1st Sess. (1981).

<sup>149</sup> H.R. 1647 § 1516, 97th Cong., 1st Sess. (1981).

<sup>150</sup> H.R. 1647 § 2541, 97th Cong., 1st Sess. (1981).

<sup>151</sup> H.R. 1647 § 2542, 97th Cong., 1st Sess. (1981).

<sup>152</sup> H.R. 1647 § 2545, 97th Cong., 1st Sess. (1981).

<sup>153</sup> H.R. 1647 § 1742, 97th Cong., 1st Sess. (1981).

<sup>154</sup> H.R. 1647 § 1743, 97th Cong., 1st Sess. (1981).

obtaining government authorization by fraud.<sup>155</sup> The authority and functions of United States officials abroad also are given protection through sections granting extraterritorial jurisdiction over crimes ranging from the impersonation of a federal official<sup>156</sup> to bribery<sup>157</sup> or retaliation against a public servant.<sup>158</sup>

Chapter 17 of House Bill 1647 provides for extraterritorial jurisdiction over an extensive number of offenses relating to the federal judicial processes, regardless of the nationality of the offender. Hindering law enforcement,<sup>159</sup> misprision of a felony,<sup>160</sup> witness bribery and graft,<sup>161</sup> and tampering with witnesses<sup>162</sup> represent just a few of the many offenses related to the judiciary over which extraterritorial jurisdiction is extended.<sup>163</sup> The House bill, by failing to differentiate between offenses having more important and direct effects on the judicial process and those having only an indirect effect, goes farther in this area than the Senate version, which limits extraterritorial application to United States nationals whenever the offense affects federal governmental processes only indirectly.<sup>164</sup>

Finally, House Bill 1647 extends extraterritorial jurisdiction over many offenses involving national defense.<sup>165</sup> With the exception of sabotage<sup>166</sup> and treason,<sup>167</sup> however, extraterritorial jurisdiction over these crimes will be exercised only if the offense was committed by a national of the United States.<sup>168</sup>

## 5. Jurisdiction Based Upon Nationality

The power of a state to prosecute and punish its nationals is as widely accepted in international law as is the principle of ter-

<sup>155</sup> H.R. 1647 § 1704, 97th Cong., 1st Sess. (1981).

<sup>156</sup> H.R. 1647 § 1702, 97th Cong., 1st Sess. (1981).

<sup>157</sup> H.R. 1647 § 1751, 97th Cong., 1st Sess. (1981). Other sections deal with graft, § 1752; trading in special influence, § 1754; trading in public office, § 1755; and speculating on official action or information. *See generally* materials cited *supra* note 140.

<sup>158</sup> H.R. 1647 § 1758, 97th Cong., 1st Sess. (1981).

<sup>159</sup> H.R. 1647 § 1711, 97th Cong., 1st Sess. (1981).

<sup>160</sup> H.R. 1647 § 1712, 97th Cong., 1st Sess. (1981).

<sup>161</sup> H.R. 1647 § 1721, 97th Cong., 1st Sess. (1981).

<sup>162</sup> H.R. 1647 § 1723, 97th Cong., 1st Sess. (1981).

<sup>163</sup> Some other offenses included are: false implication of another, § 1714; informant bribery, § 1722; disobeying judicial orders, § 1735; refusing to produce information, § 1733; refusing to testify, § 1734; perjury, § 1741; failing to appear as a witness, § 1732. H.R. 1647, 97th Cong., 1st Sess. (1981).

<sup>164</sup> *See supra* notes 134-144 and accompanying text.

<sup>165</sup> *See* H.R. 1647 §§ 1311-1319, 97th Cong., 1st Sess. (1981). Most of these sections deal with service obligations, mutiny, or desertion.

<sup>166</sup> H.R. 1647 § 1311, 97th Cong., 1st Sess. (1981).

<sup>167</sup> H.R. 1647 § 1301, 97th Cong., 1st Sess. (1981).

<sup>168</sup> H.R. 1647 §§ 1311, 1315-1319, 97th Cong., 1st Sess. (1981).

ritorial jurisdiction.<sup>169</sup> Extraterritorial jurisdiction over nationals is exercised in varying degrees by the countries of the world; common law countries claim jurisdiction over a comparatively small number of offenses while some continental European countries assert jurisdiction over a very large number.<sup>170</sup> Jurisdiction based upon nationality has been broken down into two different theories: jurisdiction based upon the nationality of the perpetrator, which is commonly called the active personality principle;<sup>171</sup> and the passive personality principle, or jurisdiction based upon the nationality of the victim.<sup>172</sup> The exercise of jurisdiction based upon the active personality principle is rooted in the allegiance owed by nationals to their sovereign,<sup>173</sup> and is virtually unlimited so long as there is no infringement of the rights of other nations or their nationals.<sup>174</sup> The validity of the passive personality principle, however, has not been established firmly in international law.<sup>175</sup> The United States has long exercised jurisdiction over its nationals abroad,<sup>176</sup> but has done so selectively, refusing to assert jurisdiction over every criminal act committed by them.<sup>177</sup>

As stated earlier,<sup>178</sup> under the proposed codes the protection of federal governmental functions abroad is the main justification for extraterritorial jurisdiction over certain crimes even when committed by aliens. In addition to these specific offenses, both codes

<sup>169</sup> See Akehurst, *supra* note 6, at 156. Article 5 of the Draft Convention on Jurisdiction provides:

A State has jurisdiction with respect to any crime committed outside its territory,

(a) By a natural person who was a national of that State when the crime was committed or who is a national of that State when prosecuted or punished; or

(b) By a corporation or other juristic person which had the national character of that State when the crime was committed.

*Harvard Research*, *supra* note 69, at 440, art. 5.

<sup>170</sup> Akehurst, *supra* note 6, at 156. Israel recently has extended its jurisdiction over virtually all crimes committed abroad by an Israeli national or resident. See Merron, *supra* note 115; Shachor-Landau, *supra* note 115.

<sup>171</sup> See, e.g., Shachor-Landau, *supra* note 115, at 284.

<sup>172</sup> *Id.* at 283.

<sup>173</sup> *Id.*; Comment, *supra* note 85, at 557.

<sup>174</sup> *Steele v. Bulova Watch Co., Inc.*, 344 U.S. 280, 285-86 (1952) (quoting *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941)).

<sup>175</sup> WORKING PAPERS, *supra* note 15, at 74.

<sup>176</sup> See *Blackmer v. United States*, 284 U.S. 421 (1932) (service of subpoena on United States citizen residing in Paris); *United States v. Lansky*, 496 F.2d 1063 (5th Cir. 1974) (service of subpoena on United States citizen residing abroad).

<sup>177</sup> See Akehurst, *supra* note 6, at 156; *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

<sup>178</sup> See *supra* notes 104-110 and accompanying discussion.

contain sections that generally proscribe the obstruction of United States governmental functions and extend extraterritorial jurisdiction over these offenses if they are committed by a national.<sup>179</sup> House Bill 1647 also specifically provides for extraterritorial jurisdiction over United States nationals in a number of offenses involving national defense.<sup>180</sup> The nationality principle serves as a justification for the extension of extraterritorial jurisdiction, by both proposed codes, to cover crimes committed by federal public servants or members of their households residing abroad because of the public servant's official duties.<sup>181</sup>

The proposed codes also confer extraterritorial jurisdiction over offenses committed by or against a national of the United States at a place outside the jurisdiction of any nation.<sup>182</sup> Based upon both the active and passive personality theories,<sup>183</sup> the provisions are unlikely to be controversial given the need for jurisdiction to cover crimes in these areas<sup>184</sup> and the fact that such jurisdiction does not in any way infringe upon the territorial sovereignty of other nations. Provisions in the new codes that provide for extraterritorial jurisdiction over offenses involving murder or other violent acts committed against federal officials were dealt with earlier as an exercise of the protective principle of jurisdiction but also could be justified by the concept of passive personality.<sup>185</sup> The Brown Commission chose to base this exercise of jurisdiction on the protective principle, however, because it believed the passive personality principle was of questionable validity.<sup>186</sup>

Senate Bill 1630 contains a surprising grant of extraterritorial jurisdiction in section 204(g)(2) that is based upon the same theory

---

<sup>179</sup> Senate Bill 1630 § 204(c)(7) and H.R. 1647 § 1701 deal with the general obstruction of government functions. The House bill also extends extraterritorial jurisdiction over nationals under § 1744 (false statements about emergencies). S. 1630, 97th Cong., 1st Sess. (1981); H.R. 1647, 97th Cong., 1st Sess. (1981).

<sup>180</sup> H.R. 1647 §§ 1313, 1315-1319, 97th Cong., 1st Sess. (1981).

<sup>181</sup> S. 1630 § 204(i), 97th Cong., 1st Sess. (1981); H.R. 1647 § 111(c)(3), 97th Cong., 1st Sess. (1981). Both provisions exclude from their coverage members of the armed forces subject to court martial jurisdiction, and include persons accompanying the military forces of the United States. These provisions eliminate several gaps in current law. See *United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973); *supra* note 121.

<sup>182</sup> S. 1630 § 204(j), 97th Cong., 1st Sess. (1981); H.R. 1647 § 111(c)(2), 97th Cong., 1st Sess. (1981).

<sup>183</sup> WORKING PAPERS, *supra* note 15, at 76.

<sup>184</sup> One example is Antarctica. *Id.*

<sup>185</sup> See *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981) (murder of United States Congressman in Guyana).

<sup>186</sup> WORKING PAPERS, *supra* note 15, at 74.

the Brown Commission was hesitant to accept fully: passive personality.<sup>187</sup> This section provides for extraterritorial jurisdiction if:

- (g) the offense causes or threatens harm, of the type sought to be prevented by the statute describing the offense— . . .
  - (2) outside the United States to—
    - (A) an individual who is a citizen, national, or resident of the United States;
    - (B) an organization established under the laws of a State or having its principle place of business in the United States; or
    - (C) the United States.<sup>188</sup>

Aside from an ambiguous provision in section 205(b),<sup>189</sup> Senate Bill 1630 apparently contains no limitations on this broad grant of jurisdiction. The exact meaning of section 204(g)(2), however, is unclear. A specific example may help to illustrate the problem.

Section 1721(a) of Senate Bill 1630 describes the offense of robbery as taking the "property of another from the person or presence of another by force and violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury." The section then lists the circumstances required in order for there to be *federal* jurisdiction over this offense.<sup>190</sup> Assuming none of the circumstances that give rise to federal jurisdiction as provided by section 1721(c) exists, the question is whether an armed robbery committed by a Mexican within Mexico against United States citizens who are tourists there would be within the extraterritorial jurisdiction of the United States as outlined in section 204(g)(2).

According to section 201(b)(1)(B) of Senate Bill 1630, the federal jurisdiction requirements of section 1721(c) do not have to be present in this situation. All that is necessary is a specific grant of extraterritorial jurisdiction in section 204.<sup>191</sup> Following the underlying jurisdictional framework of Senate Bill 1630,<sup>192</sup> that of a separa-

<sup>187</sup> The Restatement (Second) of United States Foreign Relations Law rejected this principle explicitly: "A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals." REST. (2d) § 30(2), *supra* note 89, at 86.

<sup>188</sup> S. 1630 § 204(g)(2), 97th Cong., 1st Sess. (1981).

<sup>189</sup> S. 1630 § 205 deals with the exercise of concurrent federal jurisdiction. S. 1630, 97th Cong., 1st Sess. (1981). See *infra* notes 231, 232 and accompanying text.

<sup>190</sup> S. 1630 § 1721(c), 97th Cong., 1st Sess. (1981).

<sup>191</sup> The pertinent portion of S. 1630 § 201(b)(1)(B) is set out *supra* note 54. S. 1630, 97th Cong., 1st Sess. (1981).

<sup>192</sup> See *supra* notes 35-46 and accompanying text.

tion of the primary offensive conduct from the circumstances giving rise to federal jurisdiction, the type of injury sought to be prevented by section 1721 would not seem to include the federal jurisdictional requirements of section 204(g)(2), as the scenario presents a citizen of the United States who, outside the United States, has suffered an injury of the type sought to be prevented by section 1721, armed robbery. If this analysis is correct, section 204(g)(2) represents an expansive grant of jurisdiction that has little historical support in Anglo-American law<sup>193</sup> and could create serious tensions if exercised without limitation.

### C. Limitations

To this point, the focus of this analysis of the proposed codes has been their specific grants of extraterritorial jurisdiction and the jurisdictional principles of international law that support these grants. Underlying this analysis is the premise that the exercise of extraterritorial jurisdiction by the United States must be in accord with international law; that international law provides limitations upon the extent to which a nation can exercise its jurisdiction. It remains to be seen whether a domestic court would invalidate any of the provisions in the new codes on the ground that they violate international law. Although none of the provisions facially appear to violate international law, broad, indiscriminate application of some of the jurisdictional grants could raise serious questions as to their validity in particular situations.<sup>194</sup>

The general power of the federal government to legislate extraterritorially has not, as yet, been supported concretely by any specific provisions of the Constitution.<sup>195</sup> The Constitution does contain some grants of power that can have extraterritorial application, namely: the punishment of counterfeiting the securities and current coin of the United States,<sup>196</sup> the definition and punishment of piracies and felonies on the high seas and offenses against the law of nations,<sup>197</sup> the prosecution of offenses within federal enclaves,<sup>198</sup> and the punishment of treason.<sup>199</sup> These specific provi-

---

<sup>193</sup> This provision does find some support in the tentative draft of the Restatement (Third) of United States Foreign Relations Law. Section 402 grants jurisdiction over "the conduct, status, interests or relations of [a nation's] nationals outside its territory . . ." REST. (REV.) § 402(2), *supra* note 110, at 98.

<sup>194</sup> See, e.g., Akehurst, *supra* note 6, at 158-59.

<sup>195</sup> WORKING PAPERS, *supra* note 15, at 69.

<sup>196</sup> U.S. CONST. art. I, § 8, cl. 6.

<sup>197</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>198</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>199</sup> U.S. CONST. art. III, § 3, cl. 2. See H.R. REP. NO. 1396, *supra* note 18, at 15.

sions, however, do not support all the situations in which the United States has asserted extraterritorial jurisdiction.<sup>200</sup> The same can be said of other sources of federal power, such as the right of the United States as a sovereign nation to exercise authority over its territories<sup>201</sup> or the power of the federal government to regulate mail and commerce.<sup>202</sup>

The Brown Commission took the position that the question of jurisdiction was linked closely to the power of the federal government to deal with the subject matter.<sup>203</sup>

[T]he question of power to reach extraterritorial crime could be resolved as incident to the power to deal with the general subject matter without need to specify further because the Constitution speaks in terms of subject matter jurisdiction which may be asserted.<sup>204</sup>

Case law appears to support this view. Without the competing interest of federalism involved, the courts have found few circumstances that justify overriding congressional or executive policy-making in the area of foreign affairs.<sup>205</sup>

The federal courts have acknowledged explicitly the power of Congress to legislate concerning crimes that occur or have an effect within the United States,<sup>206</sup> crimes involving the protection of the federal government,<sup>207</sup> and the actions and duties of citizens abroad.<sup>208</sup> Although in practically every instance in which extraterritorial jurisdiction is challenged the courts seek to justify its exercise by reliance upon general international law principles,<sup>209</sup> this practice is a by-product of the fact that extraterritorial jurisdiction seldom is conferred expressly by current law.<sup>210</sup> Generally, the courts will not infer extraterritorial jurisdiction, unless such

<sup>200</sup> Antitrust cases are a notable example. See Joelson, *supra* note 83. The constitutional provision authorizing Congress to designate places for trials of crimes committed outside any State also has been cited as a justification for extraterritorial jurisdiction. U.S. CONST. art. III, § 2, cl. 3; WORKING PAPERS, *supra* note 15, at 69.

<sup>201</sup> H.R. REP. NO. 1396, *supra* note 18, at 15.

<sup>202</sup> *Id.*

<sup>203</sup> WORKING PAPERS, *supra* note 15, at 70.

<sup>204</sup> *Id.*; accord, Feller, *Jurisdiction Over Offenses With a Foreign Element* in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 9-10 (M. Bassiouni and V. Nanda eds. 1973).

<sup>205</sup> For an overview on this subject see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 15-28 (1972).

<sup>206</sup> Rivard v. United States, 375 F.2d 882 (5th Cir. 1967).

<sup>207</sup> United States v. Bowman, 260 U.S. 94 (1922).

<sup>208</sup> Blackmur v. United States, 284 U.S. 421, 437 (1932).

<sup>209</sup> See, e.g., United States v. Petrulla, 457 F. Supp. 1367, 1372 (M.D. Fla. 1978) (drug smuggling).

<sup>210</sup> See, e.g., Steele v. Bulova Watch Co., Inc., 344 U.S. 280, 285 (1952); *supra* note 15 and accompanying text.



jurisdiction can be supported by international law and it is found that the effectiveness of the statute involved would be hampered severely if limited to territorial application.<sup>211</sup> The proposed codes contain express grants of extraterritorial jurisdiction, thereby eliminating the need to justify the inference of such jurisdiction.

Generally, inconsistency with international law will not have the effect of invalidating domestic legislation.<sup>212</sup> If Congress has decided to give certain laws extraterritorial application, the courts will enforce these laws unless certain Constitutional rights are violated.<sup>213</sup> Therefore, any limitations constraining Congress from legislating extraterritorially are confined to possible Constitutional due process violations,<sup>214</sup> the international political arena, or international tribunals.

Limitations on the exercise of extraterritorial jurisdiction have been delineated judicially due to the lack of express congressional intent regarding extraterritorial jurisdiction under current law.<sup>215</sup> The federal courts, when construing legislative intent, have held that Congress did not confer jurisdiction on the courts over essentially foreign transactions,<sup>216</sup> or over situations in which the contact with the United States was very remote or inconsequential.<sup>217</sup> Some federal courts have listed factors that should be considered when determining whether to give certain statutes extraterritorial effect.<sup>218</sup> This jurisdictional conservatism and regard for comity<sup>219</sup>

<sup>211</sup> *United States v. Bowman*, 260 U.S. 94, 98 (1922).

<sup>212</sup>

[I]f Congress has expressly prescribed a rule with respect to conduct outside the United States, even one going beyond the scope recognized by foreign relations law, a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment.

*Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972); *accord*, *United States v. Firestone Tire & Rubber Co.*, 518 F. Supp. 1021, 1032 (N.D. Ohio 1981); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1161, 1178 (E.D. Pa. 1980).

<sup>213</sup> *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972).

<sup>214</sup> *Id.*

<sup>215</sup> See *supra* note 94 for cases and discussion.

<sup>216</sup> *Securities and Exchange Comm'n v. Kasser*, 391 F. Supp. 1167 (D. N.J. 1975).

<sup>217</sup> *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir. 1975); *United States v. Columba-Colella*, 604 F.2d 356 (5th Cir. 1979).

<sup>218</sup> *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). Included in the ten factors listed by the court are: the degree of conflict with foreign law or policy; nationality of parties; importance of the alleged violation to the United States compared to that abroad; possible effect upon foreign relations; and existence of an intent to cause harm in the United States. *Id.* at 1297-98.

<sup>219</sup> International comity involves:

the body of rules which reflect the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, hav-

is by no means followed consistently in the federal courts, however.<sup>220</sup> As these limitations grew out of the interpretational theory surrounding extraterritorial jurisdiction, the proposed codes would alter the courts' power in this area. Although conceivably any grant of extraterritorial jurisdiction could be interpreted as one that was meant to be applied conservatively, the more accurate approach to the new codes and their explicit grants of jurisdiction would be that any limitations intended are set out specifically. The courts would be compelled to restrain the assertion of express extraterritorial jurisdiction only in the instances and in the manner set forth in the codes.

The need for some restraint on the extraterritorial application of federal law is fairly evident. The prosecution for bribery of a defendant whose culture accepts the activity as a part of normal governmental operations, or the application of an "ignorance of the law is no excuse" prosecution to a foreigner who knows nothing about our legal system, are examples that not only grate upon domestic notions of fairness but invite foreign criticism as well.<sup>221</sup> Also, any grant of extraterritorial jurisdiction carries with it a problem of enforcement. Broad grants of such jurisdiction may encourage government officials to abduct fugitives from other countries whenever formal extradition procedures are unavailable or otherwise considered infeasible.<sup>222</sup> Although the federal courts have held that this type of activity violates no constitutional rights and will not defeat jurisdiction,<sup>223</sup> abduction is an infringement of the sovereignty of another nation, whether they object or not. Any legislation that would encourage this activity should be supported by important governmental objectives.

Congressional, self-imposed restraints on extraterritorial jurisdiction are manifest in section 111(c)(4) of House Bill 1647. That sec-

---

ing due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Note, *supra* note 140, at 711 (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)).

<sup>220</sup> See *supra* note 83 for cases listed.

<sup>221</sup> See Note, *supra* note 140.

<sup>222</sup> Within its provisions concerning extradition, the House bill has a section setting out procedures for provisional arrests and detention within the extraterritorial jurisdiction. H.R. 1647 § 5507, 97th Cong., 1st Sess. (1981).

<sup>223</sup> See *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975); *United States v. Cotten*, 471 F.2d 744 (9th Cir. 1973). Compare with *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

This area of the law has an extensive history beginning primarily with *Frisbie v. Collins*, 342 U.S. 519 (1952).

tion gives a broad grant of objective territorial type jurisdiction if "there is a substantial Federal interest in the investigation or prosecution" of the offense.<sup>224</sup> The House Report defines a substantial federal interest as existing when an offense causes or threatens harm of the type sought to be prevented by the statute in the United States, to a citizen, national, or resident of the United States, to an organization organized in the United States or having its principal place of business there, or to the United States.<sup>225</sup> In any application of extraterritorial jurisdiction under section 111(c)(4), a federal agency would make an initial determination of whether there existed a substantial federal interest in prosecution of the crime.<sup>226</sup> If the case is prosecuted and the existence of a substantial interest is contested, the court will decide the issue based upon comity<sup>227</sup> and the importance of the interest sought to be protected by the United States.<sup>228</sup> This requirement of a substantial interest is consistent with the statutes of other nations,<sup>229</sup> and should help mollify criticism that the exercise of extraterritorial jurisdiction by the United States is insensitive to international law.

The Senate bill, on the other hand, contains no explicit limitations upon its jurisdictional grants, not even on section 204(g)(2), which represents an expansive, radical departure from past case law.<sup>230</sup> Section 205(b) of Senate Bill 1630<sup>231</sup> sets out the requirement of a substantial federal interest in a federal prosecution under the new code, but appears more concerned with federal as opposed to state jurisdiction than with federal as compared to foreign jurisdiction.<sup>232</sup> Section 205(b) makes no mention of the impact of the crime, but deals in terms of the ability of one jurisdiction or the other to prosecute it. If section 205(b) is not meant to limit section 204, the bill, through silence, has precluded considerations of international comity from the jurisdictional question and has charted rigidly the course it intends the courts to follow. Any limitations

---

<sup>224</sup> H.R. 1647 § 111(c)(4), 97th Cong., 1st Sess. (1981).

<sup>225</sup> H.R. REP. NO. 1396, *supra* note 18, at 23. This language is practically identical to the grant of jurisdiction in S. 1630 § 204(g), 97th Cong., 1st Sess. (1981).

<sup>226</sup> H.R. REP. NO. 1396, *supra* note 18, at 22.

<sup>227</sup> See *supra* notes 218-219 for discussion.

<sup>228</sup> H.R. REP. NO. 1396, *supra* note 18, at 22-23.

<sup>229</sup> See Taylor, *The Extraterritoriality of the Australian Antitrust Law*, 13 J. INT'L L. & ECON. 273, 274 (1979).

<sup>230</sup> See *supra* notes 187-193 and accompanying text.

<sup>231</sup> S. 1630 § 205, 97th Cong., 1st Sess. (1981) (deals with the exercise of concurrent jurisdiction).

<sup>232</sup> See S. 1630 §§ 205(b)(1)-(6), 97th Cong., 1st Sess. (1981); *Senate Hearings, supra* note 17, at 12176 (staff memorandum).

on the grants of extraterritorial jurisdiction under Senate Bill 1630 therefore, will be construed by the judiciary and subject to charges of judicial legislation.

The United States Constitution also may provide some limitations on extraterritorial jurisdiction. Any extraterritorial application of the federal penal laws that violates due process will be struck down by the courts.<sup>233</sup> Extraterritorial jurisdiction is constitutionally suspect in two basic areas: possible double jeopardy violations, and the lack of compulsory process.

The constitutional prohibition against twice being put in jeopardy of life and limb for the same offense<sup>234</sup> has been held not to apply to prosecutions for the same crime initiated by different sovereigns.<sup>235</sup> It seems inherently unfair, however, to assert that a defendant who has served ten years imprisonment in Mexico for attempting to smuggle drugs into the United States will be subject to similar punishment if he ever enters the United States. This harsh result may be offset at times by extradition treaties that contain double jeopardy provisions.<sup>236</sup> The House bill contains a double jeopardy provision relating to defendants transferred<sup>237</sup> to the United States from a foreign country.<sup>238</sup> Also, if the time limitations on the prosecution of an offense are not suspended while the defendant is serving time in a foreign jurisdiction, a long sentence could serve to preclude a United States court from prosecuting him again.<sup>239</sup>

The possibility that a defendant will be unable to secure compulsory process to obtain witnesses in his favor increases when the crime for which he is charged was committed extraterritorially. Although it has been held that the sixth amendment right to compulsory process can exist only where it is within the power of the government to provide it,<sup>240</sup> it is conceivable that a defendant could justify a dismissal of the charges against him because he cannot summon the witnesses he needs for his defense. The absence of

<sup>233</sup> *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972).

<sup>234</sup> U.S. CONST. amend. V.

<sup>235</sup> *United States v. Richardson*, 580 F.2d 946, 947 (9th Cir. 1978), *cert. denied*, 439 U.S. 1068. See also *Bartkus v. Illinois*, 359 U.S. 121 (1959) (deals expressly with due process clause of fourteenth amendment).

<sup>236</sup> See *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980) (extradition treaty with Italy).

<sup>237</sup> "[T]ransfer' means a transfer of an individual for the purpose of the execution in one country of a sentence imposed by the courts of another country." H.R. 1647 § 5556(9), 97th Cong., 1st Sess. (1981).

<sup>238</sup> H.R. 1647 § 5551, 97th Cong., 1st Sess. (1981).

<sup>239</sup> See H.R. 1647 § 703(b), 97th Cong., 1st Sess. (1981); discussion *supra* note 61.

<sup>240</sup> *United States v. Greco*, 298 F.2d 247, 251 (2d Cir. 1962).

the right of compulsory process alone will not result in a dismissal;<sup>241</sup> but, if its denial results in an inability to present a defense,<sup>242</sup> which lies at the very heart of the right,<sup>243</sup> notions of due process may justify bringing an end to the prosecution.<sup>244</sup>

#### D. Conclusion

The extraterritorial jurisdictional provisions in the proposed federal criminal codes represent a substantial clarification of United States law in this area. Senate Bill 1630, by using one section to list all the instances of extraterritorial application of the federal criminal law, brings some coherence to United States jurisdictional philosophy. Broad, general provisions, however, invite interpretation and clarification by the courts, creating the possibility of unanticipated extraterritorial application of the federal penal laws. House Bill 1647, on the other hand, offers certainty of application by virtue of its inclusion of jurisdictional provisions within the description of each offense. Tailoring and scattering the jurisdictional provisions in this manner, however, makes it more difficult to discern any pattern to federal law in this field. Finally, the House bill explicitly provides for considerations of comity to enter the decision whether to apply federal law extraterritorially, while the Senate version apparently locks all such discretion into its black letter statutory rules.

Although the proposed codes generally trace present case law and contain no radical departures from commonly accepted inter-

---

<sup>241</sup> *Id.*; *Johnson v. Johnson*, 375 F. Supp. 872, 876 (W.D. Mich. 1974).

<sup>242</sup> "The most important consideration is that the defendants were effectively denied the opportunity to present their only defense." *Johnson v. Johnson*, 375 F. Supp. 872, 876 (W.D. Mich. 1974).

<sup>243</sup>

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

*Washington v. Texas*, 388 U.S. 14, 19 (1967).

<sup>244</sup> "The Fourteenth Amendment's grant of a right to due process of law guarantees at a minimum a fair trial in every criminal prosecution." *Johnson v. Johnson*, 375 F. Supp. 872, 875 (W.D. Mich. 1974). This same reasoning undoubtedly would apply to fifth amendment due process as well.

The district court in *Johnson v. Johnson* did not go so far as the text suggests.

This is not to say that the defendants had a right to an outright dismissal because some of their witnesses could not be obtained. Nor did the defendants have a right to a prolonged delay. But the crucial right to present a defense as comprehended by the Sixth Amendment required something more than what was done here.

*Id.* at 876.

national law principles, they do expand the extraterritorial jurisdiction of the United States in a few areas. Whether passed or not, the codes emphasize a trend in United States law, which evidences an unwillingness to trust other nations with the punishment of crimes that affect United States interests.

*William A. Gillon*