APPLICATION OF THE MAIL AND WIRE FRAUD STATUTES TO INTERNATIONAL BRIBERY: QUESTIONABLE PROSECUTIONS OF QUESTIONABLE PAYMENTS

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I. INTRODUCTION

The shame of Richard Nixon and his men poses a grim study in the corruptive uses of power that are alien to democratic principles.1 However classic a formulation the Watergate scandal presented for political scientists and historians, it was devoid at its highest levels of the element of profiteering that has come to be commonplace in the mainstream of corruption cases prosecuted in state and federal courts. Nevertheless, Watergate's corruptive effect even absent the pervasiveness of the profit motive cannot be ignored. It broke down traditional beliefs concerning the sanctity of governmental institutions,2 and at the same time verified a competing, long-held but simplistic belief that all politicians are "crooked," and that those who support them with money and other things of value are likewise dishonest.

Once the dam burst, there flowed from Watergate a host of investigations and public inquiries which unfortunately tended to confirm even the basest suspicions held by the American public. These new revelations demonstrated that the profit motive in corrupt activities was alive and flourishing. As they unfolded, the impetus to ferret out even more corruption was fully ventilating. Thus, within a relatively brief period of time, this country witnessed the deposition of a President of the United States,3 his

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1 Indeed, Watergate reaffirmed Lord Acton's observation that "power corrupts, and absolute power corrupts absolutely." Letter from Lord Acton to Bishop Mandell Creighton (April 5, 1887).


Vice President," two Governors," and exposure of the existence of a coordinated foreign governmental effort to corrupt members of Congress."

Public cognizance of these acts of corruption fit conventional thinking and appeal to the cynicism which naturally existed after the spectacular Watergate debacle. Each of these acts of corruption was met with vigorous criminal prosecution rooted in often-used and well-understood criminal statutes. The United States public learned that such acts of misconduct were prosecutable under the federal conspiracy laws, the Internal Revenue Code, the obstruction of justice statute, and the mail and wire fraud statutes. The principal reason underlying public acceptance of these types of criminal prosecutions is that the illegalities that they expose are readily identifiable as violative of the public sense of morality. This identity of illegality with immorality has received vigorous judicial endorsement in recent years.

It is also the case that American companies doing business abroad have made payments to foreign government officials in


8 I.R.C. § 162.


situations that have been euphemistically characterized as "questionable." However comfortable the public temperament appears to be with respect to prosecutions under the federal mail and wire fraud laws (to say nothing of the commentators dealing with the same subject), substantial questions of law and policy are posed where these statutes are used as the basis for criminal prosecutions of the executives of United States companies for payments made to foreign government officials. It is to this newly-emergent form of criminal prosecution that this paper will direct its analysis.

II. BASIS FOR MAIL AND WIRE FRAUD PROSECUTION: THE WILLIAMS FORMULATION

It is undisputed that United States companies doing business abroad have frequently made payments to foreign government officials for the purpose of obtaining or retaining business in a given country. It is also certain that if such practices had been carried out with United States government officials, prosecutions for bribery would abound.

On December 19, 1977, President Carter signed into law the Foreign Corrupt Practices Act which proscribes bribery of foreign government officials. However, the Department of Justice has embarked upon a policy of prosecuting payments to foreign government officials which occurred prior to the passage of the Act, charging corporations and their responsible officials with violations of the mail and wire fraud statutes of the United States. The typical information, to which all companies charged to date have entered pleas of nolo contendere, indicates the concept which has formed the basis for the Justice Department pro-

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17 As part of the plea agreement, the companies waived grand jury indictment and the Government proceeded by criminal information.
secutions. It alleges in pertinent part that the company devised a scheme:

... to defraud the citizens of a certain foreign nation of their right to the honest and loyal services of their government officials in the performance of their duties free from bribery, corruption and dishonesty by the payments of sums of money to induce, unlawfully, favorable action by the responsible government officials ... .

Prior to the disposition of United States v. The Williams Companies on March 24, 1978, there were no criminal prosecutions that embodied these allegations, hence hereinafter this concept will be referred to as the "Williams formulation."

The seminal document setting forth the government's position regarding "the questionable payments problem," is a letter from then-Secretary of Commerce Elliot Richardson to Senator Proxmire in which Secretary Richardson made only passing reference to the deterrence of future improper payments by United States firms abroad through criminal sanctions under the mail and wire fraud statutes. Since foreign bribery prior to the passage of the Foreign Corrupt Practices Act was recognized as not being prohibited under "present federal law," the sustainability of these innovative fraud prosecutions in a contested proceeding becomes a substantial issue.

The essential premise underlying prosecutions based on the Williams formulation is a presumption that citizens of another country have been deprived of the honest services of their public officials. This presumption continues even where payment practices are part of the customs and usages of that society, notwithstanding existence of statutes purportedly forbidding bribery. For example, in Saudi Arabia, the governmental response to United States public furor over sensitive payments made to government officials in that country resulted not in a

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19 "In conjunction with violations in all of the foregoing areas [securities laws, tax laws, antitrust laws, false statement laws], depending on the facts of a particular case, additional charges may be appropriate for conspiracy, ... mail fraud, ... or fraud by wire ...." Richardson Letter, supra note 12, at 13. See also Coffee, supra note 12, at 1157-1158, nn. 208-211; Note, supra note 12, at 234.
20 Richardson Letter, supra note 12, at 10.
21 Note, supra note 12, at 235, n. 26, 236.
spate of bribery prosecutions of officials who were the recipients of these payments, but rather in the issuance of a decree which regulated for the first time the maximum allowable fee payable to a commissioned agent of a non-Saudi company. The immediate effect was not to eliminate the agent but rather resulted in the announcement to United States companies doing business there that the agent's commission rates, which were previously lower than the ceiling set by the decree, would now be increased to that ceiling figure. Further, despite United States condemnation of foreign sensitive payments, it is difficult to ignore grumblings in the international business community to the effect that the United States government itself has recognized the customary practice of payments to foreign government officials in order to obtain or retain business.

The fact that these practices go essentially unchallenged in most of the countries whose names are repeatedly involved in payments disclosures, and further that there is no treaty or other international agreement binding its signatories to a campaign against foreign corrupt practices, suggests the lack of a consensus as to which of these practices is illegal and how to deal effectively with the problem. The basis, then, upon which the Justice Department proceeds—that the actions which it condemns in the name of the United States are viewed similarly as wrongful by the citizens of that certain foreign country who allegedly have been defrauded—must be called into question.

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23 In a letter addressed to Philip Heymann, Chief, Criminal Division, United States Department of Justice, Alexander Hehmeyer, Esq., stated that in a State Department briefing session in connection with the first U.S. Trade Mission to the Middle East, of which he was a member, the Mission was told:

"Yes, appropriate payments to the right government officials are customary and expected. . . ." Such payments . . . were probably best handled through a properly connected agent and were especially expected in Saudi Arabia. In other words, we were specifically advised that the making of "appropriate" payments to foreign government officials in this part of the world was a "reality" of doing business there . . . . Our government officials . . . advised the businessmen going on this trade mission of the existence of an "under-the-table" payment custom and culture in the Middle East and briefed us accordingly.

24 See Stevenson, note 12 supra, at 57, for notable exceptions, such as Honduras and Peru.
III. OTHER ENFORCEMENT MECHANISMS

Current enforcement activity by affected United States Departments and agencies reveals a program whose vigorous enforcement holds the promise of an effective deterrent against unlawful payment practices. The thrust of the Foreign Corrupt Practices Act is clear and unmistakable. It serves as effective notice to United States companies that corrupt foreign payments will no longer be tolerated.\(^{26}\)

In addition to the vigorous criminal enforcement activity of the Department of Justice,\(^{27}\) the Securities and Exchange Commission (SEC) has long been involved in enforcing the antifraud provisions and the reporting requirements of the securities laws in an effort to combat corrupt corporate practices abroad. As a result of its enforcement activities, the SEC has undertaken investigations of both a civil and a criminal nature,\(^{28}\) and has sought civil injunctive

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\(^{26}\) President Carter has recognized the deterrent effect of the Foreign Corrupt Practices Act, as well as its impeding characteristics. Accordingly, he announced on September 27, 1978, that he has directed the Department of Justice to "provide guidance to the business community concerning its enforcement priorities under the recently enacted anti-bribery statute." President's Statement on United States Export Policy, 14 WEEKLY COMP. OF PRES. DOC. 1633 (Sept. 26, 1978). It is interesting to note that the Justice Department has resisted the formulation of such guidance, stating "all they [businessmen] want to know is who they can bribe and who they can't. Well, we're not going to tell them—we'll go down kicking and screaming on this one." Wash. Post, Oct. 10, 1978, § D, at 7.

\(^{27}\) In both the Williams Companies and Control Data cases, the defendants were charged with violations of the Currency Regulations, 31 U.S.C. § 1059 (1970), 31 C.F.R. §§ 103.23(a) and 103.25(b) (1974). In those cases, payments in excess of $5,000 were made in cash transported out of the United States in violation of federal currency laws and regulations. Recently, the Westinghouse Electric Corporation was charged in an information with violations of 18 U.S.C. § 1001 (1976), for making false, fictitious and fraudulent material statements and representations of fact concerning matters within the jurisdiction of the Export-Import Bank of the United States and the Agency for International Development. These charges grew out of allegations of payments made to a foreign government official that were not disclosed on forms submitted to those government agencies. United States v. Westinghouse Electric Corp., Crim. No. 78-566 (D.D.C., filed Oct. 23, 1978). It should be noted that the negotiated disposition of the case through a plea of nolo contendere provided also that the foreign official and his country not be identified in any of the papers filed with the court. The District Judge, to whom the disposition was presented, rejected the plea on the grounds that the secrecy provisions prevented the court from knowing more about the identity of the foreign official and the country he represented, as well as the circumstances of the payments. In addition, the court objected to the fact that the proposed fines were in an amount less than the amount of the corrupt payments. Wash. Star, Oct. 24, 1978, § A at 11.

\(^{28}\) A natural concomitant of these investigations is, of course, the shareholder derivative suit, in which a shareholder seeks remedies against the company and its personnel for conduct which is the very subject of the SEC enforcement actions. See FED. R. CIV. P. 23.1.
actions and other appropriate ancillary relief. The SEC possesses a capability of instituting administrative disciplinary proceedings, and can refer matters to the grand jury for investigation and subsequent criminal prosecutions. In addition, the SEC has assigned some of its lawyers to the Justice Department to assist in the criminal investigation of the very conduct which is also the subject of the SEC's civil investigation, thus presenting companies with two governmental institutions with which to cope, one enforcing requirements for the fullest material disclosure, the other recognizing that individuals under investigation have the constitutional right to remain silent.

The most significant undertaking by the SEC in this area began with the implementation of its Voluntary Disclosure Program. Pursuant to that program, some public companies disclosed payment practices in their international transactions. Although they purportedly volunteered to make such disclosures, doing so did not immunize them from the risks of shareholder suits, SEC enforcement actions which provided ancillary relief in the form of requiring costly investigations, the initiation of actions by other regulatory authorities, actions against corporate officials, nor from criminal prosecutions.

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29 See, e.g., Section 20(b) of the Securities Act of 1933, 15 U.S.C. §§ 77l(b) et seq. (1970), and Section 21(e) and (c) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78u(d) and (e) et seq. (1970).
32 See Securities & Exchange Comm. v. Dresser Industries, Inc., Misc. No. 78-141 (D.D.C. June 30, 1978) at 3 (Memorandum Opinion and Order), in which the court observed: The court has been assured that the attorneys assigned to the Justice Department are not involved in the SEC's civil investigation. The court, however, will remind the SEC that strict ethical standards should be maintained in order to avoid the appearance of impropriety. See also Securities & Exchange Comm. v. Katy Industries, Inc., Civ. No. 78C-3476 (N.D. Ill. E. Div., filed Aug. 30, 1978) (Final Judgment of Permanent Injunction and Other Equitable Relief), in which the Commission obtained a consent decree wherein the company was enjoined from further violation of the Foreign Corrupt Practices Act. At this writing, it is an open question as to whether the Justice Department will initiate a criminal prosecution against the company and certain of its officers and directors. Boycott Law Bulletin, Middle East Monthly, Vol. II, Number IX, at 219 (Sept. 1978).
33 The procedures for the Voluntary Disclosure Program are discussed in the SEC Report, supra note 13.
34 It is interesting to note the different policy of the Justice Department's Antitrust Division. Four corporations and five individuals were indicted for price fixing of titanium mill products in United States v. RMI Co., Crim. No. 78-225 (W.D. Pa., filed Sept. 28, 1978). Titanium Metals Corporation of America was not indicted, because it apparently had
Recently, the Federal Trade Commission also entered the field. Three major United States corporations signed consent decrees in which they agreed, inter alia, to cease making payments in violation of the Foreign Corrupt Practices Act that attempt to unfairly procure sales for those corporations and thereby eliminate from competition other United States companies seeking award of those same sales contracts.\textsuperscript{35}

In August 1975, the Internal Revenue Service issued guidelines\textsuperscript{36} to its field examiners for the identification of schemes used by corporations to establish slush funds and other methods to circumvent the federal tax law. In May 1976, the IRS issued further instructions which focused on illegal foreign payments.\textsuperscript{37} As well, the Internal Revenue Service is actively investigating corporations which might have taken improper tax deductions for such payments in violations of § 162(c) of the Internal Revenue Code.\textsuperscript{38}

Thus, it is clear that United States companies must answer to a broad spectrum of governmental accountability for their conduct in the area of sensitive payments policy. The number of mechanisms available for the enforcement of United States sensitive payments is more than adequate.

IV. ANALYSIS OF THE Williams FORMULATION

The legal bases for any criminal prosecutions in the United States for payments made abroad should be subjected to close scrutiny, if for no other reason than their potential negative impact on United States trade and international relations. In the disclosed voluntarily to the Justice Department’s Antitrust Division the fact that it was involved in price fixing activity. In consideration of this admission, which came prior to the government’s knowledge of this activity, Titanium Metals was merely named as an indicted co-conspirator. Assistant Attorney General John H. Shenefield acknowledged that the decision not to indict this company was the product of the “leniency” that the government would show toward a “cooperating party”. \textsuperscript{833} \textit{Antitrust & Trade Reg. Rep. (BNA), A-17 (Oct. 5, 1978)}.


\textsuperscript{36} (1977) \textit{II Internal Revenue Manual—Audit (CCH) 7451-7453 (Manual Supp. 1978)}.

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} Richardson Letter, \textit{supra} note 12, at 9.
absence of an increase in the number of criminal prosecutions against foreign government officials by their own nations, United States enforcement policy stands to affect negatively the ability of United States companies to compete for and retain business abroad, as the businessmen of other countries will be able to continue making payments with impunity, thereby gaining a clear marketing advantage. In addition, United States criminal prosecution for payments causes resentment as an unwanted imposition of United States morality on the internal affairs of foreign nations. Finally, the publicity attendant to the prosecutions may cause embarrassment to foreign governments at times when their relations with the United States are delicate or when their political stability is precarious. Such publicity may also endanger "on site" United States personnel.

Williams formulation prosecutions under the mail and wire fraud statutes bear particularly close examination since it would appear that the other enforcement mechanisms described earlier, which are more clearly legally supportable, are sufficient to serve the policy interests of the United States. In fact, the legal basis of the Williams formulation must be challenged.

A. Legislative History of the Mail and Wire Fraud Statutes

At the time of the passage of the mail fraud statute, the Congress was more concerned with punishing "dealers and pretended dealers in counterfeit money and other fraudulent devices" for using the United States mails. It should be noted that the wire fraud statute was enacted in 1952 to be a companion to the mail fraud statute and to extend its protections against the abuse of new communications technology. Section 1343 was subsequently amended in 1956 to add the words "and foreign commerce" to the prohibition of the use of wire, radio, and television communications "in interstate commerce." The amendment came in response to a California case in which the court refused to uphold a conviction under the wire fraud statute because the fraudulent scheme was carried out by telephone communication between Los

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57 Stevenson, The SEC and Foreign Bribery, supra note 12, at 57.
58 Supra note 10.
Angeles and Mexico and was thus not encompassed by the term "interstate commerce." Little doubt remains the Congress intended that the wire fraud statute should impose sanctions upon the use of all wire, radio, and television communications under federal jurisdiction to further fraudulent schemes. The mail fraud statute by its own terms applies to any use of the United States mails, within a State, among the States, or between the United States and a foreign nation.

The fact that Congress may have intended the mail and wire fraud statutes to reach transactions which crossed the borders of the United States, does not necessarily show that Congress intended to provide the means for a Williams formulation prosecution. The relevant question with regard to the Williams formulation goes a step further. It is whether the intent of Congress was to cover payments to foreign officials in fraud of the citizenry of their country.

B. Judicial Interpretation of the Mail and Wire Fraud Statutes

The courts have construed both the mail and wire fraud statutes to reach a wide variety of schemes to defraud. While it is axiomatic that penal statutes are to be construed strictly, the doctrine of strict construction of the federal fraud statutes has been the exception rather than the rule. The majority of courts have recognized that the fraud statutes embody "a broad proscription of behavior for the purpose of protecting society." "A broad proscription" is an understatement. The fraud statutes are said to proscribe "all attempts to defraud by any form of misrepresentation," and "conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society," as well as any "... acts done in furtherance of a scheme that

43 Smith v. United States, 360 U.S. 1, 9 (1959); United States v. McNeive, 536 F.2d 1245, 1248 (8th Cir. 1976).
46 United States v. McNeive, 536 F.2d 1245, 1247 (8th Cir. 1976).
47 Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (quoting Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958)).
it [the government] regards as contrary to public policy." 49 Perhaps most importantly, the Supreme Court has indicated that it views these statutes as sufficiently flexible to reach "new" frauds and to act as a stopgap measure against such conduct until appropriate legislation can be enacted to proscribe it. 50

In light of the judicial attitude toward the flexibility and scope of the federal fraud statutes, it comes as no surprise that courts have sustained fraud prosecutions which are premised upon the deprivation of the citizenry of the honest and loyal services of their government officials. After all, that is conduct which clearly strikes at the heart of the public interest and is truly reflective of the moral uprightness of United States society. The real question, however, is whether these judicial pronouncements form a sufficient basis in law to support Williams-type fraud allegations.

In every reported case of mail fraud involving a public official, the official was also a defendant. His fraud was that he held himself out to be loyal to his constituency, but in fact was acting in his own interest and thereby was dishonest and untruthful. 51 Under the Williams formulation, the public official involved is not a defendant, for the obvious reason that he is not a state or federal official of the United States. Thus, if the Williams formulation is used, the government’s burden is substantially increased. It must prove in the first instance (a) that a fraud has occurred against an unknown constituency in a place other than the United States; (b) that the fraud was perpetrated by a person owing a duty of loyalty and honesty (as those terms have come to be understood in the United States) 52 to that foreign constituency; (c) that he materially misrepresented and actively concealed his fraud; 53 and (d) that the defendant at bar, although incapable of perpetrating the fraud himself, acted in furtherance of it.

The laws of the United States are designed to protect its citizens. Thus, the question becomes, in the absence of a citizen victim, how can the judicial extension of these statutes to protect

51 United States v. Bryza, 522 F.2d 414, 422 (7th Cir. 1975); United States v. Bush, 522 F.2d 641, 648 (7th Cir. 1975) ("We believe that the Mayor, the City, and most importantly, the citizens, were deprived of those [honest and faithful] services.").
52 United States v. Dixon, 536 F.2d 1388, 1398-1399 (2d Cir. 1976); United States v. Isaacs, 493 F.2d 1124, 1149-1150 (7th Cir. 1974).
the citizens of other countries be justified? The absence of any allegations of harm to United States nationals, United States business interests, or the public confidence of the citizens of the United States would appear to reduce the accusation in the Williams formulation to a moralization that is devoid of legal enforceability in United States courts.

C. Extraterritorial Application of Fraud Statutes

A criminal statute is presumed to have effect only within the territorial limits of the enacting state unless its terms explicitly provide otherwise, or unless Congress has manifested a clearly contrary intent. The principle of limited jurisdiction, however, is merely one of construction, not one of legislative power. There is no constitutional bar to the extraterritorial application of United States penal laws.

Fraud statutes have been applied to prohibit fraudulent schemes whose victims are not United States nationals. In United States v. Whiting, defendants were prosecuted for an elaborate scheme to defraud the Bank of America-International in New York and the Banco do Brasil. The court never specifically segregated criminal liability on the basis of the nationality of the banks. This leaves unclear the question of whether the case would have been brought if the Brazilian bank were the only victim. However, it is difficult to conclude that the result of the case would have been any different had those distinctions been made.

In United States v. Conte, defendants engaged in a telephonic fraud concerning the sale of bonds between Toronto and Cleveland. The court held that it had jurisdiction over this matter, as the scheme was devised in the United States, the wires were used between the United States and Canada, and the victim was in the United States. It is not clear from the opinion, however, whether the court deemed these factors necessary to establish jurisdiction.

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55 United States v. Blackmer, 284 U.S. 421, 437 (1932); United States v. King, 552 F.2d 833, 850 (9th Cir. 1976).
57 Id.
58 349 F.2d 304 (6th Cir. 1965), cert. denied, 382 U.S. 926 (1965).
Whiting and Conte provide an inviting opportunity upon which to justify criminal prosecutions in the Williams formulation. However, there are distinguishing factors which may yield a substantively different result than the holdings of these two cases. In each case, there was an identifiable victim which was either an United States national or subject to the laws of the United States. In each of these cases, the nature of the fraud in question operated to deprive the victims of property and other things of value and not of the “honest and loyal services” of a government official. This distinction gains support in light of United States v. Dixon, which drew a clear line between mail fraud violations and securities laws violations. In that case, the court sustained counts against the defendant charging him with violation of the federal securities laws and at the same time struck down substantive mail fraud counts involving the same transactions. The court rejected the government’s theory that a proxy violation in that case constituted a mail fraud because it denied information to shareholders and deprived them of the honest and faithful services of their fiduciary and that further, the SEC was obstructed in its work. In construing “honest and faithful services” in the fraud context, the court relied on United States v. Isaacs, and found that this concept would “fit the situation in which a public official avails himself of his public position to enhance his private advantage, often by taking bribes.”

There is an essential difference in the gravamen of the Whiting and Conte prosecutions—on the one hand, the victimization of identifiable persons, wherever they may be, through a scheme designed to inflict a pecuniary loss upon them, and on the other hand, the violation of the public trust by fiduciaries.

The Williams formulation appears at first to be a hybrid of these theories; on closer examination, it is not. A Williams-type “scheme” is neither purely a fraud upon an identifiable person nor a violation of the United States public’s trust. As a result, it is impossible to equate the Williams accusation with fraud on anyone.

536 F.2d 1401 (2d Cir. 1976).
493 F.2d 1124 (7th Cir. 1974).
in the United States or subject to its laws or to equate or to apply United States concepts of the public trust at work in its democracy to the interests of another government in another society. Thus, it would appear that nothing in the case law interpreting these rationales for prosecution provides sufficient guidance respecting the legal basis for a criminal prosecution pursuant to the Williams formulation.

D. Extraterritorial Application of Other Anti-bribery Enforcement Mechanisms

The securities laws have been applied to factual situations which have occurred entirely outside the United States, but such enforcement is justified because of the substantial impact that that conduct has on the United States securities market and on United States investors. It is clearly contemplated, therefore, that the protection of these potential victims justifies the extraterritorial application of these laws. Indeed, authorities have urged that the use of the United States mails or facilities of interstate commerce confers automatic jurisdiction in these securities cases because such use sufficiently establishes "conduct" in the United States. The key to this rationale is that some kind of impact resulting from the transaction which has occurred outside the United States is felt within the United States by interests which are specifically protected by the securities laws; hence, the courts take jurisdiction. Similarly, the antitrust laws have been applied to conduct occurring abroad where it has been shown that there is an anticompetitive effect on interstate commerce in a close, direct, substantial and reasonably foreseeable way. However, if one were to apply the impact analysis underlying theories supporting extraterritorial application of the securities and an-

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63 Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968), rev'd on rehearing on other grounds, 405 F.2d 215 (2d Cir. 1968), cert. denied sub nom., Manley v. Schoenbaum, 395 U.S. 906 (1969) (Congress intended securities acts to apply extraterritorially to protect U.S. investors trading on national exchanges as well as to protect U.S. securities markets from effects of improper foreign transactions).

64 Mizrack, Recent Developments in Extraterritorial Application of Section 10(b) of the Securities and Exchange Act of 1934, 30 Bus. Law. 367, 380 (1975).


titrust laws of the United States, it would be difficult to find such impact upon legitimately protectable United States interests in prosecutions under the Williams formulation, since the allegation that foreign citizens were deprived of the honest and faithful services of their public employees can hardly be said to form a sufficient basis for United States jurisdiction.

E. Public Policy Arguments for the Williams Formulation

It has been urged that there is a basis in public policy which would support prosecutions in the Williams formulation. Certainly, the argument can be made that foreign bribery by United States nationals damages the image of the United States abroad, undermines the integrity of United States business, presents a threat to the interests of United States investors abroad, inhibits the ability of the United States Government to aid United States investors abroad, results in retaliation by foreign governments against United States business concerns and erodes confidence in free enterprise institutions. Of course, the counterargument to this is that United States prosecutions under the Williams formulation are another example of this government's intrusion into the domestic concerns of foreign countries, and that a Williams prosecution is nothing more than a unilateral effort to impose United States law and morality on a world whose governments have their own legal and moral systems.

It is significant that prior to the enactment of the Foreign Corrupt Practices Act of 1977, there was in fact no clear national policy on foreign payments. In the absence of a generally accepted public policy representing a clear "reflection or moral uprightness, of fundamental honesty, fair play and right dealing," a public policy rationale for using the fraud statutes to punish individuals for conduct shown neither to be universally condemned nor to have an impact on the "public" which those statutes were designed to protect becomes highly dubious.

With rare exception, the courts upholding convictions under the fraud statutes for bribery schemes on "public policy" grounds

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67 See generally Richardson Letter; the SEC Report; Stevenson, The SEC and Foreign Bribery, note 12 supra.
68 See Note, note 12 supra, at 1869.
69 Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (quoting Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958)).
70 United States v. Whiting, 308 F.2d 537 (2d Cir. 1962).
spoke strictly within the context of protecting the domestic public, and thus did not need to elaborate on the reach of the statutes. No question arose in those cases regarding the existence of a national consensus condemning bribery of public officials. No one doubted that the United States as a whole imposes on its public officials a "sacred duty" which he is sworn to uphold, or that one citizen may not deprive another of an official's loyal services.\(^7\) But that does not settle or identify what the "sacred" duties are of public officials elsewhere. Whether those precedents should be applied to situations far beyond the contemplation of the Congress or of the courts is a great unanswered question awaiting resolution by the judiciary.

V. CONCLUSION

The continuing tension between concepts of law and morality is nowhere more clearly evident than in the debate on the application of the fraud statutes of the United States to the bribery of foreign government officials. So long as clearly articulated law and policy proscribing such conduct govern United States companies and their personnel in future international transactions, and where criminal liability is accompanied by a program requiring the fullest accountability for such practices, the legitimacy of conducting criminal investigations and prosecutions under the federal mail and wire fraud statutes should be carefully scrutinized. In the absence of an undisputed basis in law and policy justifying this type of criminal prosecution, the question arises whether there is any wisdom to the governmental pursuit of the fraud approach to the foreign payments problem.

It would appear that Williams formulation prosecutions place government and business in needless antagonistic positions with one another. Instead, an approach which combines the efforts of business and government should be considered. More specifically, the United States government should exercise its powers of moral suasion, which it is so ready to impose upon domestic business, to urge countries to enter into a treaty or other form of international agreement in which signatories are pledged to the elimination of corruption in international business transactions. This symbolic international commitment would be supplemented by vigorous in-

\(^7\) United States v. Barrett, 505 F.2d 1091, 1104 (7th Cir. 1975); Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941), cert. denied, 313 U.S. 574 (1941).
tergovernmental oversight and local prosecution of violators of the anti-corruption laws of the various countries. In this way, parties to international transactions will be put on effective notice that corrupt payments are intolerable and will be prosecuted in all countries having jurisdiction. United States business, knowing that it has the backing of its government, as well as the government with which it is dealing in a particular transaction, could seize upon this international partnership to cooperate with these goals, avoid the forbidden conduct, and more importantly, bring overtures and invitations to violate the law to the attention of the appropriate authorities without compromise to its position in the marketplace of the world. If such a program of cooperation could be implemented, then a legal, if not a moral, consensus will have been formed.
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