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EXTRATERRITORIAL JURISDICTION AND THE PROPOSED FEDERAL CRIMINAL CODE

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I. INTRODUCTION

As the proposed federal criminal code slowly continues its labyrinthine journey through Congress,[1] the center of debate remains the more emotional, visible issues—reform of the criminal sentencing process, the impact of the code on civil liberties and the effect the code will have on business practices. Indeed, even when critical attention is directed at the important issue of federal criminal jurisdiction, the primary focus is on traditional questions of federalism, the role the federal as opposed to state government should play in the enforcement of the criminal law.[2] Issues concerning the plenary power of the federal government to enforce the criminal law in certain areas,[3] ancillary jurisdiction,[4]

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[1] The debate concerning comprehensive reform of the federal criminal law has continued unabated for more than 15 years, and the literature is extensive. *See, e.g., Symposium on Sentencing (Pt. I & II)*, 7 HOFSTRA L. REV. 1, 243 (1979); *Symposium: Reform of the Federal Criminal Code*, 47 GEO. WASH. L. REV. 451 (1979). *See generally* Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 AM. CRIM. L. REV. 123 (1980); *Legislation to Revise and Recodify Federal Criminal Laws, Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1980); *Reform of the Federal Criminal Laws, Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st-94th Cong. (1971-75). During the Ninety-Sixth Congress, federal criminal code reform legislation finally reached the floor of both the Senate and House but was not enacted into law. A renewed effort is likely to be made in the Ninety-Seventh Congress to complete the task.

[2] *See* S. 1722, 96th Cong., 1st Sess. § 201 (1979) [hereinafter cited as S. 1722]; H.R. 6915, 96th Cong., 2d Sess. §§ 111(a)-(b) (1980) [hereinafter cited as H.R. 6915]; Pauley, *An Analysis of Some Aspects of Jurisdiction Under S. 1437, The Proposed Federal Criminal Code*, 47 GEO WASH. L. REV. 475 (1979).

[3] *See* S. 1722, *supra* note 2, § 201; H.R. 6915, *supra* note 2, § 111.

[4] Pauley, *supra* note 2; *Reform of the Federal Criminal Laws, Hearings on S. 1722 and S. 1723 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (pt. XIV) 927-34, 944-52, 1166-78,

prosecutorial discretion to invoke federal jurisdiction,[5] and matters of proof pertaining to jurisdiction[6] have occupied the time of code drafters and critics alike.

But the impact of the proposed code on the extraterritorial application of the federal criminal law has largely been ignored. Few witnesses before Congress have addressed the issue,[7] undoubtedly due to the technical complexities of the subject and the relatively noncontroversial nature of the particular provisions. Some are obviously reluctant to discuss under what circumstances the federal criminal law should be applied to conduct committed at least in part outside of the United States when more visible and exciting issues occupy public attention.

This lack of attention is unfortunate. Although code sections relating to extraterritorial jurisdiction largely track existing caselaw, both the Senate and House bills would for the first time codify such judicially created principles.[8] Few other provisions in either S. 1722 or H.R. 6915 better exemplify the potential impact comprehensive codification can have on criminal law enforcement. What is important about the Senate and House bills in this area is not creation of new legal principles pertaining to extraterritoriality, but rather that statutory codification of these time-honored principles and the rules for their application are likely to result in changes in the nature and scope of extraterritorial jurisdiction.

I am not criticizing the changes; indeed, the changes are for the most part salutary and long overdue. But the decision of the drafters to codify for the first time the principles governing extraterritorial jurisdiction should be discussed and debated. Important, far-reaching results may result from codification.[9] For example, judicial determinations of when the federal criminal law should be given extraterritorial application, determinations now made on a case-by-case basis, are replaced in the Senate bill by a general, comprehensive provision delineating the

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3030-34, 3328-61, 6013 (1979) [hereinafter cited as *Hearings on S. 1722*]. *See also* Note, *Piggyback Jurisdiction in the Proposed Federal Criminal Code*, 81 YALE L.J. 1209 (1972).

5 S. 1722, *supra* note 2, § 205; H.R. 6915, *supra* note 2, § 115.

6 S. 1722, *supra* note 2, § 201(b)(1) and FED. R. CRIM. P. 25.1. *See also* NATIONAL COMMISSION ON THE REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT § 103(1) (1971) [hereinafter cited as FINAL REPORT].

7 The American Bar Association did address the issue in the Senate hearings. See *Hearings on S. 1722, supra* note 4, at 9982.

8 S. 1722, *supra* note 2, § 204; H.R. 6915, *supra* note 2, § 111(c). The Senate bill addresses the issue of extraterritorial jurisdiction in one comprehensive section; the House bill, while retaining a similar provision, also cites the extraterritorial basis for jurisdiction in each specific criminal provision found in the bill. This distinction between the two bills has important ramifications. *See* notes 48, 78 *infra*.

9 *See* text accompanying notes 77-87 *infra*.

nature and scope of such jurisdiction.[10] Because the proposed code expressly states for the first time congressional intent as to when and under what circumstances the federal criminal law should be given extraterritorial effect, it obviates, in large part, the need for courts to glean such intent by implication. In addition, the Senate bill, by specifically prohibiting the litigability of the government's decision to invoke extraterritorial jurisdiction,[11] runs counter to recent trends in analogous areas of the law limiting the application of such jurisdiction.[12]

II. GENERAL PRINCIPLES

In analyzing those provisions of the proposed code pertaining to extraterritorial jurisdiction, a critical distinction must be made between jurisdictional *competence* (the power and authority of a state to prescribe a rule of law) and jurisdictional *enforcement* (the decision of the state, in its discretion, to apply such prescriptions in an individual case).[13] The primary criticism directed at the proposed code's approach to extraterritorial jurisdiction involves the latter principle, and raises questions concerning when and under what circumstances the federal government should invoke such jurisdiction when it admittedly has the authority to do so.

The general principles underlying extraterritorial jurisdictional competence are outlined below, with a further review of the reasons critics reserve their chief arguments for the provisions of the code governing the discretionary exercise of such jurisdictions.

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[10] *See* S. 1722, *supra* note 2, § 204.

[11] *See id.* § 205(e). *See also* text accompanying note 82 *infra*.

[12] Judicial review of the appropriate extraterritorial scope of the domestic antitrust laws has, in particular, resulted in heated debate. The problem centers around the impact of the so-called "effects doctrine," in which the United States claims subject matter jurisdiction over business activity occurring outside of United States territory if United States courts find a direct, foreseeable effect in such territory or an effect on United States commerce. This doctrine has been slow to evolve. *See, e.g.*, American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (doctrine of strict territoriality); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (extraterritorial application of antitrust laws based on finding of specific intent to violate law plus substantial effect on American commerce); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1979) (jurisdictional rule of reason test: specific intent to violate law or substantial impact on American commerce plus judicial weighing of foreign nation interests and considerations of comity); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (*Timberlane* modified; de minimus intent to violate law or de minimus effect sufficient to invoke extraterritoriality); *In re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980) (*Timberlane* eviscerated; *Timberlane* analysis replaced by other factors: complexity of the case, seriousness of the alleged antitrust violation and recalcitrance of the defendant). A serious amount of international friction between the United States and its allies has arisen from judicial interpretation of the "effects doctrine." *See also* note 35 *infra*.

[13] *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 18, 40 (1965) [hereinafter cited as RESTATEMENT].

A. PRINCIPLES GOVERNING JURISDICTIONAL COMPETENCE

The bases for the power of a state to invoke its extraterritorial jurisdiction have been categorized as territorial, nationality, protective, passive personality, and universal.

Territorial

Every nation is considered to possess an absolute and exclusive power to regulate within its territorial boundaries.[14] The implications of this principle for extraterritorial jurisdiction are twofold: first, such a principle may be invoked even though the effect of the conduct engaged in is not felt within the state;[15] second, the objective territorial theory of jurisdiction extends this principle to all acts affecting a state regardless of where the acts occur.[16] Thus, the United States can prescribe a criminal penalty for homicide if someone plants a bomb on a plane leaving the United States even if the bomb does not explode until the plane has landed in France. Because the United States endorses the objective territorial theory of jurisdiction, it recognizes the French government's concurrent right to assume criminal jurisdiction over the matter as well.[17] This latter principle of objective territorial jurisdiction is of major significance in the proposed code; the appropriate exercise of jurisdiction based on this principle has in particular been the focus of much attention.

Nationality

A state may also punish acts, wherever committed, by nationals of such state.[18] This principle rests upon a personal base and is part of the

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[14] *See, e.g.*, the opinion of Justice Holmes in American Banana Co. v. United Fruit Co., 213 U.S. 347. *See also* Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812); RESTATEMENT, *supra* note 13, §§ 11-25.

[15] RESTATEMENT, *supra* note 13, § 17(a).

[16] RESTATEMENT, *supra* note 13, § 18 reads:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the laws of states that have reasonably developed legal systems, or
>
> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

[17] *Id.*

[18] *See generally* Skiriotes v. Florida, 313 U.S. 69 (1941); Blackmer v. United States, 284 U.S. 421 (1932); *In re* Ross, 140 U.S. 453 (1891). *See also* J. BRIERLY, THE LAW OF NATIONS 223 (5th ed. 1955); RESTATEMENT, *supra* note 13, §§ 26-30. Nationality as a basis for invoking extraterritorial jurisdiction can raise interesting problems in the area of corporate respon-

United States system of international law.[19] A state may not, however, "direct a national to engage in activities without regard to harmful consequences to another state."[20]

Protective

This basis of jurisdiction concerns perceived injuries to national interests. It permits a nation to prescribe conduct, wherever committed and even if committed by a non-national, if such conduct is directed against the safety or the functioning of the government of the state. The limits of this principle remain unclear; it is aimed primarily at conduct which occurs outside of a nation's territory and which "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."[21]

Passive Personality

This theory of jurisdiction permits a nation to prescribe conduct based on the nationality of the victim, and is designed to allow a nation to protect its citizens anywhere in the world. The principle has an uncertain status in international law and has been challenged by the United States.[22] The most famous case involving the passive personality principle was the *S.S. "Lotus,"*[23] in which the Permanent Court of International Justice upheld a Turkish court's conviction of a French officer of a French merchant vessel which had collided with a Turkish ship, killing many Turkish nationals. France challenged the conviction as a violation of international law. Rather than pass on the validity of the Turkish argument that the nationality of the victims entitled it to assume jurisdiction the court upheld Turkish jurisdiction on other

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sibility. For example, which nation's law controls the activities of a foreign subsidiary, the state of incorporation or the state where the controlling interest of the affiliate can be found? How much control is necessary for a state to assert such jurisdiction? Finally, to which nation do corporate directors owe their allegiance, the state of incorporation or the state of control? *See, e.g.*, British Nylon Spinners, Ltd. v. Imperial Chemical Industries, [1953] 1 Ch. 19 (C.A. 1952), *interlocutory injunction made permanent*, [1955] 1 Ch. 37.

19 RESTATEMENT, *supra* note 13, § 30.

20 *Id.* Comment a, Illustration 1b.

21 *Id.* § 33(1). Certain provisions of existing federal criminal law rest upon a protective base. *See, e.g.*, 22 U.S.C. § 1203 (1976) and 18 U.S.C. § 1546 (1976) (concerning perjury, or false statements committed by an alien in applying for a visa before an American consular officer in a foreign country). *See also* United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960), *aff'd sub nom.* Rocha v. United States, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

22 *See generally* J. MOORE, A DIGEST OF INTERNATIONAL LAW 231 (1906); J. SCOTT & W. JAEGER, CASES ON INTERNATIONAL LAW 384-91 (1937).

23 [1927] P.C.I.J., ser. A, No. 10.

grounds.[24] The passive personality theory is asserted to protect individual citizens and is, therefore, distinguishable from the protective theory of extraterritorial jurisdiction, which is aimed at upholding governmental interests. Although many commentators disapprove of this principle of jurisdiction,[25] it has not entirely been rejected. For example, the Tokyo Convention, governing offenses committed on aircraft, is grounded in this theory.[26] Under it, a state may assume jurisdiction over offenses committed against a national or a permanent resident of the state.[27]

Universal

The final principle of extraterritorial jurisdiction is a catchall. It is not based on nationality or territoriality but, rather, solely upon a nation's custody of the offender.[28] The theoretical basis of universality is straightforward: certain offenses are so dangerous or heinous that any state having custody of an offender may assume criminal jurisdiction. Crimes subject to the universal theory of jurisdiction are theoretically dependent upon "the law of nations" for their definition.[29] Such crimes are recognized as punishable by any state that apprehends the criminal, regardless of the situs of the acts, the identity of the victims, or the injured interests of the state. The United States recognizes piracy,[30] collision or salvage service on the high seas,[31] and fisheries conservation[32] as justifying universal jurisdiction. Recently, this principle has been extended to violations of human rights as well.[33]

B. PRINCIPLES OF ENFORCEMENT

Once it is determined that a nation may exercise extraterritorial jurisdiction, the question becomes whether such jurisdiction should be exercised in a particular case. A state may enforce any rule of law which

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[24] *Id.* at 21.

[25] *See, e.g.*, RESTATEMENT, *supra* note 13, § 30.

[26] *See, e.g.*, Convention on Aviation: Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6788, 704 U.N.T.S. 219 (effective Dec. 4, 1969).

[27] *Id.*

[28] *See, e.g.*, J. BRIERLY. *supra* note 18, at 232.

[29] The crime of piracy is the best example. *See, e.g.*, United States v. Holmes, 18 U.S. (5 Wheat.) 412 (1820); United States v. Pirates, 18 U.S. (5 Wheat.) 184 (1820); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820).

[30] *See id.* See also RESTATEMENT, *supra* note 13, § 34 and Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 (effective Dec. 30, 1962).

[31] RESTATEMENT, *supra* note 13, § 35.

[32] *Id.* § 36. Enforcement of the rules pertaining to fisheries conservation is governed by various international agreements. *See, e.g.*, Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849 (effective Nov. 10, 1948); Convention for the Northwest Atlantic Fisheries, Feb. 8, 1949, 1 U.S.T. & O.I.A. 477, T.I.A.S. No. 2089.

[33] *See* Filartiga v. Pena-Irala, 630 F.2d 676 (2d Cir. 1980).

it has validly prescribed;[34] but, because situations involving the exercise of concurrent jurisdiction among different nations may arise, such nations frequently must decide whether the exercise of jurisdiction is appropriate.[35]

Determining the appropriate discretionary exercise of extraterritorial jurisdiction gives rise to current problems. Today, no general federal statute spells out when Congress intends that a federal criminal law be given extraterritorial application; indeed, specific criminal provisions are usually silent as well.[36] Instead, courts are faced with the unenviable task of attempting to glean legislative intent from the individual criminal provisions.

In *United States v. Bowman*,[37] the Supreme Court, in validating a prosecution for defrauding a government corporation through acts committed on the high seas and in a foreign country, stated the governing principle for when federal criminal law should be given extraterritorial effect. The Court stated that, absent specific language in the statute itself, one must determine from the nature of the offense whether Con-

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[34] RESTATEMENT, *supra* note 13, § 20.

[35] *Id.* § 40. Nowhere are the problems surrounding the discretionary exercise of extraterritorial jurisdiction more acute than in the area of the domestic antitrust laws. *See* cases cited in note 12 *supra*. Recent legislation introduced in the United States Congress would exacerbate, rather than alleviate, the problem. *See, e.g.*, S. 1246, 96th Cong., 1st Sess. (1979) (Oil Windfall Profits Act of 1979), which, for a ten-year period, prohibits the eighteen largest United States domestic oil corporations from purchasing certain companies. The bill expressly applies to foreign subsidiaries or affiliates under the "control" of a domestic parent. As introduced, and subsequently changed, S. 1246 would have made all foreign affiliates of domestic oil companies—even those not controlled by a domestic parent—subject to United States jurisdiction; H.R. 4661, 96th Cong., 1st Sess. (1979) (Cartel Restriction Act of 1979), which requires that any United States person or company—or any foreign subsidiary of a United States company—file a report with the Federal Trade Commission and Department of Justice whenever (1) it engages with a foreign competitor in specified restrictive business activity or activity "which may be construed to" relate to such restrictive business activity; (2) is required or requested by a foreign state to engage in such activity; or (3) knows that a foreign joint venture partner is engaged in such activity with its competitors. As drafted, H.R. 4661 requires reporting which may be triggered by foreign conduct having no connection with, or effect on, any United States interest. The failure of federal courts to take into account considerations of comity can lead to retaliation on the part of dissatisfied foreign nations. *See, e.g.*, Foreign Proceedings (Prohibition of Certain Evidence), 1976 Austl. Acts No. 121, § 5; Uranium Information Security Regulations, STAT. O. & R. 76-644 (Canada, 1976); Resolution by Forty-one British Commonwealth Nations, encouraging all members of the Commonwealth to pass legislation curtailing the extraterritorial application of United States antitrust laws, [1980] ANTITRUST & TRADE REG. REP. (BNA) No. 963, A-10 (Barbados Conference May 1980); Protection of Trading Interests Act of March 20, 1980, [1980] ANTITRUST & TRADE REG. REP. (BNA), No. 959, F-1 (United Kingdom). *See also* Comment, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2 NW. J. INT'L & BUS. L. 476 (1980).

[36] There are exceptions. *See, e.g.*, 18 U.S.C. 2381 (1976) (treason), which provides that the offense may be committed "within the United States *or elsewhere*" (emphasis added).

[37] 260 U.S. 94 (1922).

gress intended that extraterritorial jurisdiction should apply.[38] The Court went on expressly to point out that, unless Congress specifies otherwise, statutes punishing crimes against the person or property are presumed to have territorial impact only.[39] In other cases, however, broader extraterritorial impact may be inferred.[40]

Using the *Bowman* test, courts sanctioned extraterritorial application of federal criminal laws aimed at securities violations,[41] concealment of assets by bankrupts,[42] conspiracies to import marijuana[43] and heroin[44] into the United States, forgery of military passes,[45] and the making of false statements on visa applications.[46]

But *Bowman* and subsequent caselaw point out the problems surrounding extraterritorial enforcement under current federal criminal law. Whether a federal criminal statute is to be given extraterritorial application depends on a judicial interpretation of congressional intent. Such intent may be murky or vague. Current federal law lacks a general statutory provision that specifies when and under what circumstances the exercise of extraterritorial jurisdiction is appropriate.

For the first time, however, provisions of the proposed code list in one place those federal crimes to be given extraterritorial effect and also create rules of construction for applying the principle of extraterritoriality in particular cases. Supporters and critics alike agree that the new code could have a pronounced impact on the way our federal courts decide whether a federal criminal law should be subject to extraterritorial jurisdiction.

III. Extraterritorial Jurisdiction and the Proposed Federal Criminal Code

Both the Senate and House bills codifying the federal criminal law directly confront the problem of extraterritorial jurisdiction. The Sen-

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38 *Id.* at 97-98.

39 *Id.*

40 *Id.*

41 This is another area of the law where courts have had difficulty in establishing the precise extraterritorial application of the regulations. The Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78hh-1 (1970) offers little guidance. *See also* Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

42 Stegemen v. United States, 425 F.2d 984, 985-86 (9th Cir.), *cert. denied*, 400 U.S. 837 (1970) (18 U.S.C. § 153 (1976)).

43 United States v. Winter, 509 F.2d 975, 981 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975) (Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1031, 21 U.S.C. § 963).

44 Rivard v. United States, 375 F.2d 882 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967) (Narcotic Drugs Import and Export Act, § 2(c), (f), 21 U.S.C. § 174).

45 United States v. Birch, 470 F.2d 808, 811 (4th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) (18 U.S.C. § 499).

46 United States v. Pizzarusso, 388 F.2d at 8 (18 U.S.C. § 1546).

ate bill contains a comprehensive provision delineating for the first time, and in one place, the nature and scope of extraterritorial criminal jurisdiction.[47] The House bill accomplishes the same goal, but in a somewhat different way.[48] Both bills would alter the *Bowman* principle whereby federal courts must attempt to determine congressional intent from the language and legislative history of a particular provision. Instead, both bills list the requisite circumstances to invoke such jurisdiction.[49]

Section 204 of the Senate bill states that "an offense is committed within the extraterritorial jurisdiction of the United States if it is committed outside the general or special Jurisdiction of the United States" and falls within one of the eleven specifically enumerated categories listed in the section.[50]

The first category requires that the offense committed be a crime of violence and that the victim or intended victim be a "United States official" or "federal public servant . . . performing his official duties" outside the United States.[51] This provision is based on the protective theory of jurisdiction as it prescribes conduct aimed, directly or indirectly, at undermining the government of the United States. Extraterritorial jurisdiction is deemed particularly appropriate in such cases.

The second circumstance relates specifically to the offenses of "treason or sabotage against the United States."[52] This language is consistent with existing law[53] and again is premised on the protective theory of jurisdiction.

The third situation is a comprehensive effort to safeguard the United States against those traditional offenses that can adversely affect or obstruct the operations of government. For example, section 204 reaches such offenses as "counterfeiting or forgery," "perjury . . . in a federal official proceeding," "bribery or graft involving a federal public servant," "fraud against the United States," "impersonation of a federal public servant," or "any obstruction or impairment of a federal govern-

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47 S. 1722, *supra* note 2, § 204.

48 H.R. 6915, *supra* note 2, § 111(c). The House bill supplements the general jurisdictional provision found in the Senate bill by specifying in each particular offense section of the proposed code whether or not extraterritorial jurisdiction will apply. It thus promotes greater clarity by delineating exactly under what circumstances extraterritorial jurisdiction will be permitted in a particular case. This approach seems preferable to the Senate reliance on one general, comprehensive section. *See* text accompanying note 78 *infra*.

49 See S. 1722, *supra* note 2, ¶¶ 204(a)-(k); H.R. 6915, *supra* note 3, § 111(c). *But see* note 48 *supra*.

50 S. 1722, *supra* note 2, § 204.

51 *Id.* § 204(a). The terms "crime of violence," "federal public servant," and "United States official" are all defined in § 111.

52 *Id.* § 204(b).

53 *See, e.g.*, Kawakita v. United States, 343 U.S. 717 (1952).

ment function, if committed by a national or resident of the United States."[54] This last, general clause is clearly grounded in the nationality theory of jurisdiction.

The fourth paragraph pertains to international drug trafficking, specifically "the manufacture or distribution . . . of narcotics or other drugs for import into, or eventual sale or distribution within, the United States."[55] This provision expands existing law somewhat[56] and is designed to reach illicit drug trafficking, regardless of the nature of the drug or the location of the offense, if the ultimate destination of the drugs is the United States.

The fifth provision involves "entry of persons or property into the United States."[57] This section simply reenacts existing law[58] and again reflects the protective theory of extraterritorial jurisdiction.

The sixth category reaches those offenses involving the possession of explosives "in a building owned by, or under the care, custody, or control of, the United States."[59] This provision is necessary in those rare situations where the government building is located outside the United States.[60]

The seventh circumstance occurs when the criminal conduct "constitutes an attempt, a conspiracy, or a solicitation to commit a crime within the United States."[61] This provision looks to both the protective theory of jurisdiction and the objective territorial principle for its justification. It is designed to reach those situations where criminal conduct is planned or initiated outside the United States with the understanding that the impact or result of the conduct will occur within the United States.[62]

The next paragraph invokes extraterritorial criminal jurisdiction when the criminal conduct is engaged in: (1) "by a federal public ser-

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54 S. 1722, *supra* note 2, § 204(c).

55 *Id.* § 204(b).

56 Compare current law, 21 U.S.C. § 959 (1976) (jurisdiction based on knowledge or intent to unlawfully import *into* United States). The new provision expressly mandates that illegal drug trafficking that may affect the United States should be cognizable regardless of where the offense was committed. *See also* RESTATEMENT, *supra* note 13, § 18.

57 S. 1722, *supra* note 2, § 204(f).

58 *See, e.g.*, Marin v. United States, 352 F.2d 174 (5th Cir. 1965); FINAL REPORT, *supra* note 6, § 208(c).

59 S. 1722, *supra* note 2, § 204(f).

60 *See, e.g.*, United States v. Erdos, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973).

61 S. 1722, *supra* note 2, § 204(h).

62 It is thus analogous to the so-called "effects doctrine," which has had such a major impact in the recent extraterritorial enforcement of the domestic antitrust laws. According to this doctrine, the United States can claim extraterritorial jurisdiction over business activity occurring outside of United States territory if United States courts find a direct, foreseeable effect within such territory or an effect on United States commerce. *See* note 12 *supra*.

vant . . . outside the United States because of his official duties; (2) by a member of a federal public servant's household who is residing abroad because of such public servant's official duties, or (3) by a person accompanying the military forces of the United States."[63] This latter basis of jurisdiction is new law, designed to deal with the problem created by Supreme Court decisions prohibiting the exercise of court martial jurisdiction over civilians in peacetime.[64] This subsection also reaches former members of the armed forces stationed abroad at the time of the offense but who are ex-servicemen living abroad at the time of the actual prosecution. The provision closes a loophole created in *Toth v. Quarles*[65] by sanctioning the prosecution of former members of the armed forces whose crimes are not discovered until after they have ceased to be subject to military court martial jurisdiction; under this subsection the exercise of extraterritorial jurisdiction by civilian courts is permitted. A prerequisite for invoking such jurisdiction, however, is the absence of appropriate court martial jurisdiction over the offense at the time of the prosecution.[66]

The next situation giving rise to extraterritorial jurisdiction is based on both the nationality and passive personality principles and exists when "the offense is committed by or against a national of the United States at a place outside the jurisdiction of any nation."[67] Rare examples of where this subsection might be invoked would include Antarctica, an unclaimed island, or outer space.[68]

An additional basis for extraterritorial jurisdiction listed in the code is a comprehensive provision allowing the exercise of such jurisdiction when "the offense is comprehended by the generic terms of . . . a treaty or other international agreement, to which the United States is a party."[69] This provision encompasses all treaty jurisdictions and renders unnecessary the specific listing in the proposed code of crimes covered by such treaties, for example, piracy[70] or terrorism.[71]

The final basis for extraterritorial jurisdiction found in the proposed code is the most important. Section 204(g) of S. 1722 provides

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63 S. 1722, *supra* note 2, § 204(i).

64 *See, e.g.*, McElroy v. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. Singleton, 361 U.S. 234 (1960).

65 350 U.S. 11 (1955).

66 To this extent, the proposed Federal Criminal Code rejects the recommendation, found in FINAL REPORT, *supra* note 6, § 208(f), that concurrent jurisdiction be permitted.

67 S. 1722, *supra* note 2, § 204(j).

68 *See* S. REP. NO. 96-553, 96th Cong., 2d Sess. 50 (1980). *See also* United States v. Escamilla, 467 F.2d 341 (4th Cir. 1972).

69 S. 1722, *supra* note 2, § 204(k).

70 *Cf., e.g.*, 18 U.S.C. § 1651 (1976) *with* S. 1722, *supra* note 2, §§ 203-04.

71 OAS Convention on Terrorism, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (effective Oct. 20, 1976).

that extraterritorial jurisdiction may be invoked where "the offense is committed *in whole or in part* within the United States, the accused participates outside the United States, and there exists a substantial interest in federal investigation or prosecution."[72] This broad, general subsection merges considerations of both jurisdictional competence and principles of enforcement. Based primarily on the objective territorial principle, it is designed to encompass those situations where the impact or effect of conduct originating outside the United States occurs within the United States. It is, therefore, similar in theory to the effects doctrine, relied on frequently by courts in recent years to expand the extraterritorial scope of the federal antitrust laws.[73] The subsection is limited in scope, however, by the additional requirement that "there exists a substantial interest in federal investigation or prosecution."[74] This requirement, which, as already indicated, has no relation to jurisdictional competence, is designed to focus attention on whether or not a sufficient federal interest exists in a particular case to warrant the broad assertion of jurisdiction otherwise permitted under this subsection.[75] Although subsection (g) largely reflects traditional common law principles,[76] such caselaw has never before been codified. Concerned that the broad language of the subsection could lead to prosecutions in cases involving less than a substantial federal interest in exercising jurisdiction, the drafters expressly incorporated a substantial interest requirement into the jurisdictional provision itself.

IV. THE IMPACT OF THE CODE SECTIONS

The codification of circumstances warranting extraterritorial application of the federal criminal law in one comprehensive section[77] is the most important feature of the new code provision. No longer must the courts examine each specific criminal statute to determine congressional intent. Instead, the courts immediately examine the new code, determine whether any of the statutory jurisdictional bases have been met, and, if so, permit the exercise of extraterritorial jurisdiction in a particular case. The specific criminal statute being applied abroad need not be considered on this issue; instead, the code provides an independent basis for determining the extraterritorial application of such statute.

This approach will probably expand extraterritorial jurisdiction.

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72 S. 1722, *supra* note 2, § 204(g).

73 *See* notes 12, 35, 62 *supra*.

74 S. 1722, *supra* note 2, § 204(g).

75 The inquiry envisioned is similar to that already undertaken by the courts in conjunction with the effects doctrine. *See* cases cited in note 12 *supra*.

76 *See* RESTATEMENT, *supra* note 13, § 40. *See also* cases cited in note 13 *supra*.

77 S. 1722, *supra* note 2, § 204; H.R. 6915, *supra* note 2, § 111(c).

Because numerous criminal offenses in the proposed code may fall within the definition of any one particular extraterritorial jurisdiction subsection, courts can more easily justify the exercise of such jurisdiction.[78] The judicial inquiry will simply determine whether a substantive criminal offense falls within one of the extraterritorial jurisdictional bases found in section 204.[79]

The expansion of extraterritorial jurisdiction is also more likely because of the interrelationship of section 204 and section 201(b)(1)(B). The latter section articulates a rule of statutory construction pertaining to extraterritorial jurisdiction; it eliminates the need to prove any other jurisdictional element otherwise found in a specific criminal provision of the new code, "if the offense is committed within the extraterritorial jurisdiction of the United States to the extent applicable under section 204."[80] Such a rule could have interesting consequences. For example, reading section 204(g) and section 201(b)(1)(B) together, one can envision situations where a person outside of the United States could be prosecuted for committing an offense "in part within the United States" regardless of whether the section delineating that offense makes any reference to jurisdiction, extraterritorial or otherwise. The court need only be satisfied that the alleged criminal conduct occurred "in part" in the United States.[81]

Nor does the statute indicate that the discretionary exercise of jurisdiction in such a case would be litigable. As noted above, the code expressly provides that "an issue relating to the propriety of the exercise of . . . federal jurisdiction over an offense . . . may not be litigated."[82] This is, of course, current law; courts have a very limited function in reviewing decisions whether or not to institute a federal prosecution.[83]

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78 The differences between the Senate and the House code bills now take on added significance. Although both bills have general provisions pertaining to extraterritorial jurisdiction, the House bill refers to such jurisdiction *in each specific criminal provision where such jurisdiction is cognizable*. The Senate bill does not have such specificity. Thus, in the Senate bill, courts may construe the broader language of § 204 in such a way as to expand the number of specific criminal offenses encompassed within any subparagraph of § 204. S. 1772, *supra* note 2, § 204.

79 Ironically, the judicial inquiry will likely shift from consideration of the extraterritorial implications of a specific crime, to an examination of Congress' intent as to which federal crimes are encompassed within the general language found in a particular subparagraph of § 204. *Id.*

80 S. 1722, *supra* note 2, § 201(b)(1)(B).

81 It bears repeating that what is of particular importance here is not the development of any new substantive legal principle governing extraterritoriality, but rather statutory ratification of existing legal principles. Congress in effect confers its imprimatur on existing caselaw principles, and by so doing, raises interesting questions about the day-to-day application of the new statute.

82 S. 1722, *supra* note 2, § 204(e).

83 *See, e.g.*, Rinaldi v. United States, 434 U.S. 22 (1977); United States v. Nixon, 418 U.S.

But such judicial restraint is not the rule when the discretionary exercise of *extraterritorial* jurisdiction is involved. Rather, the federal courts, recognizing the need to avoid conflicts among the laws of foreign nations and the United States will examine the exercise of discretion and selectively enforce statutes when necessary.[84] Yet, a judicial determination of whether or not a "substantial interest" exists under the proposed code to justify the exercise of extraterritorial jurisdiction is specifically made nonlitigable in section 205(e).

This apparent congressional determination precluding judicial review of the exercise of discretion in such situations is tempered by the legislative history accompanying section 204.[85] The drafters recognized that a statutory provision barring such review would be unwise and contrary to existing caselaw.[86] The legislative history expressly states that the Congress "does not intend that section 205(e) override or otherwise effect the doctrine of comity as developed by the federal courts."[87] Thus, despite clear statutory language to the contrary, it appears that section 205(e) would not apply to situations involving judicial review of the discretionary exercise of extraterritorial jurisdiction, at least insofar as traditional considerations of comity are involved.

VI. CONCLUSION

The treatment of extraterritorial jurisdiction in the proposed federal criminal code suggests how comprehensive codification can have an impact on the enforcement of the federal criminal law. Nothing revolutionary or precedent-shattering would result from the proposed code's approach to the extraterritorial jurisdiction if the determination of extraterritoriality would continue to be on a case-by-case basis through interpretation of specific criminal statutes. The principles spelled out in sections 201, 204 and 205, as modified by the legislative history, track existing law. What is new to the federal criminal law, however, is the notion that such general principles of extraterritoriality should be codified, and that a general rule of construction should be created. The proposed code would, for the first time, offer a shorthand method for

683, 693 (1974); United States v. Thompson, 579 F.2d 1184 (10th Cir. 1978) (en banc); United States v. Wallace, 578 F.2d 251, 255 (5th Cir. 1978); Spillman v. United States, 413 F.2d 527 (9th Cir.), *cert. denied*, 396 U.S. 930 (1969). *See generally* Cardinale & Feldman, *The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View*, 29 SYRACUSE L. REV. 659 (1978).

84 *See* note 13 *supra*.

85 S. REP. NO. 96-553 at 48.

86 *Id.*

87 *Id.*

invoking extraterritorial jurisdiction, and, in so doing, raises interesting practical questions about the impact of such an approach on the extraterritorial enforcement of the federal criminal law.