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## Jurisdictional Bases for Criminal Legislation and its Enforcement

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# Jurisdictional Bases for Criminal Legislation and its Enforcement

B. J. George, Jr.\*

The doctrine of jurisdiction—the authority of nations or states to create or prescribe penal or regulatory norms and to enforce them through administrative and judicial action<sup>1</sup>—has been a source of difficulty in both international and domestic law for centuries.<sup>2</sup> The last two decades, however, have witnessed more conflicts over the invocation of forum penal laws to reach persons and activities outside national boundaries than had arisen for more than a century before. Moreover, treaties restricting some dimensions of penal jurisdiction based on other than the territorial concept have become increasingly common, and some nations have legislated to prevent their citizens or subjects from submitting to demands made by other countries exercising extraterritorial powers.<sup>3</sup> Before considering these developments and law reform measures arising from them, it may be helpful to survey traditional international law principles affecting legislative and adjudicative jurisdiction<sup>4</sup> and relevant American state and federal precedent.

## JURISDICTIONAL PRINCIPLES IN INTERNATIONAL LAW

Traditionally, international law has recognized six alternative bases for penal legislation:<sup>5</sup>

(1) Territorial sovereignty. Each state may regulate conduct on or in the air above its land and territorial waters.<sup>6</sup> An entire criminal transaction need not occur within national territory, although a significant or substantial part should.<sup>7</sup> This rests on the evident principle that the government and people of a state are most likely to be concerned about and affected by harmful acts committed within that state's boundaries.<sup>8</sup>

(2) Registry of vessels and aircraft. According to what on occasion has been called the "floating territory" principle, a ship or aircraft under the

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flag of a country<sup>9</sup> is within the sweep of domestic legislative power.<sup>10</sup> The doctrine rests "on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns [the vessel]." <sup>11</sup>

(3) Protected interest.<sup>12</sup> Nations may punish conduct outside their borders having or intended to have substantial harmful effect within their boundaries<sup>13</sup> or directed against the security of the state or a governmental function or interest.<sup>14</sup> Perpetrators need not be nationals of the prosecuting state.

(4) Nationality of an offender. Countries can define and punish criminal conduct of their nationals wherever the latter happen to be.<sup>15</sup> No other nation can object except, possibly, on the basis of dual nationality.<sup>16</sup>

(5) Nationality of victim, or "passive personality." States may endeavor to extend their penal laws to include harmful acts committed by noncitizens against their citizens wherever the latter may be.<sup>17</sup> This is a much more debated principle than the others canvassed here. It was asserted in *The Lotus Case*, before the Permanent Court of International Justice,<sup>18</sup> as a basis for applying Turkish penal law against an officer of a French vessel which caused a maritime disaster. The decision in the case, however, was based on alternative theories of jurisdiction.<sup>19</sup>

(6) Universality. The community of nations recognizes certain offenses like piracy,<sup>20</sup> slave trading,<sup>21</sup> hijacking<sup>22</sup> and perhaps certain terrorist acts<sup>23</sup> as matters of universal concern. Perpetrators of these offenses may be prosecuted and punished under domestic penal legislation by whatever nation apprehends them, whether or not such acts occur within the prosecuting nation's territory or affect its vessels, aircraft or nationals.<sup>24</sup> Genocide also may rest within the principle under modern customary international law.<sup>25</sup>

American federal and state courts have considered and applied many of these principles as a matter of constitutional law as well as statutory interpretation, an issue to which I now turn.

## AMERICAN FEDERAL AND STATE PRECEDENTS

Although over the decades most federal and state penal legislation has rested on the territorial principle, some examples exist of the use of most if not all of the principles recognized in international law.

### Territorial Jurisdiction

While the exercise of territorial jurisdiction generally is uncontroversial, certain special situations should be considered. By legislation,<sup>26</sup> federal

maritime and territorial jurisdiction extends to the high seas<sup>27</sup> and other waters within the admiralty and maritime jurisdiction of the United States and not within the jurisdiction of any American state.<sup>28</sup> It also comprehends vessels of American ownership whenever they are within the admiralty and maritime jurisdiction of the United States,<sup>29</sup> and American aircraft in flight over the high seas or any other waters within United States admiralty or maritime jurisdiction.<sup>30</sup>

For the most part, federal legislative competence rests on delegated substantive powers under the Constitution,<sup>31</sup> and not on locale.<sup>32</sup> In considering the exercise of federal legislative competence against the backdrop of international law, the Native American tribal cases are relevant, for depending on the circumstances United States courts may consider Native American tribes as separate sovereigns.<sup>33</sup> Tribes retain the power to enforce tribal criminal laws against tribal members unless Congress abrogates that power,<sup>34</sup> and also can invoke tribal laws against non-Indians on tribal lands, but not on privately owned lands enclosed within a reservation.<sup>35</sup> States may acquire jurisdiction over Native American lands only with the consent of an affected tribe,<sup>36</sup> but can be selective about the criminal statutes they declare applicable to those lands.<sup>37</sup> State criminal jurisdiction can be destroyed, however, if under the Major Crimes Act<sup>38</sup> an area within a state meets the legislative definition of "Indian country," the crime is a listed offense and the defendant is a Native American belonging to the group by which the status of Indian country has been determined.<sup>39</sup>

The consequence of these holdings is the same as if foreign nations maintained enclaves on American soil, causing difficulties in determining the extent to which federal and state law might govern those special geographical areas. Only because Native American groups were on the North American continent before Caucasians arrived and in the modern era maintain no external relations with other nations does such a form of extraterritoriality, which nations generally resist strongly,<sup>40</sup> continue to receive a measure of judicial and congressional recognition.

State and local law of course is primarily based on territorial jurisdiction. American states control their land and immediate coastal waters as established through federal law.<sup>41</sup> Municipalities derive their legislative powers from state constitutions and legislation,<sup>42</sup> but there is no federal constitutional basis to object to the exercise of otherwise authorized municipal powers over residents and activities in adjacent areas which impact upon a legislating and enforcing municipality.<sup>43</sup> Consonant with the federal law governing federal governmental enclaves,<sup>44</sup> states possess concurrent legislative and judicial competence unless the federal government has accepted a total relinquishment of state powers.<sup>45</sup>

### Extraterritorial Jurisdiction

More difficult issues arise with respect to prescription of rules applicable to acts occurring beyond territorial jurisdiction. The federal constitution does not restrict the exercise of penal legislative powers to the territorial and floating territorial principles. Congress can base statutes on the protective or objective territorial principle,<sup>46</sup> citizenship of offenders<sup>47</sup> and perhaps the passive personality concept.<sup>48</sup> The universality principle is recognized in the constitutional grant of authority to Congress to define and punish piracy and offenses against the law of nations,<sup>49</sup> as well as through United States ratification of the Convention on the High Seas.<sup>50</sup> Activities thus declared criminals may be prosecuted even though offenders never were present in the United States during a criminal transaction.<sup>51</sup>

Federal jurisdiction has extended to the point where United States courts have held that conspirators or accessories are criminally liable even though not physically within the United States when an overt act in furtherance of the conspiracy was committed in United States territory.<sup>52</sup> Commission of an overt act may satisfy the territorial principle even though it may have been innocuous and not directly related to a constituent element of a crime.<sup>53</sup> Such applications of the territorial principle approach so closely the protected interest principle that the requirement of an overt act within the United States may be disappearing.<sup>54</sup>

An ingrained judicial preference for the territorial principle is reflected, however, in a rule that, unless the language of a criminal statute shows clearly that Congress intended it to have extraterritorial effect,<sup>55</sup> there is a presumption of exclusive domestic or internal application which can be rebutted only through proof of a clear expression of congressional intent.<sup>56</sup> *United States v. Mitchell* well illustrates the underlying judicial concern over excessively broad exercise of federal legislative powers. There, federal authorities invoked the Marine Mammal Protective Act<sup>57</sup> to endeavor to penalize the capture of dolphins outside American waters by a United States citizen, resident in the Bahamas, who held a license to do so from the Bahamian government. The *Mitchell* court held that, because of the presumption against extraterritorial application, the act did not apply to the defendant's activities.

A particular problem for the American federal government has been an inability to try in American military courts service personnel who commit nonmilitary offenses,<sup>58</sup> and accompanying civilian dependents<sup>59</sup> or civilian employees of the armed forces<sup>60</sup> for offenses committed abroad.<sup>61</sup> Some of the latter cases might be tried in civilian courts, applying statutes based on the protected interest principle.<sup>62</sup> It also is possible through a treaty coupled with an enabling statute to create American civilian courts in other countries, although it is difficult to administer them in peacetime

because of the pervasive need to effectuate American constitutional safeguards governing criminal trials.<sup>63</sup>

There is no constitutional obligation to establish special overseas courts in lieu of surrendering for, or acquiescing in, trial of American service personnel, employees or dependents before the courts of host nations.<sup>64</sup> Nor are the federal constitutional rights of service personnel violated through their surrender in recognition of status-of-forces treaty obligations,<sup>65</sup> or even through their return by administrative action, before final discharge, from the United States to a host country for trial.<sup>66</sup> After final discharge, however, former military personnel cannot be recalled to active duty for court-martial prosecution of offenses committed before discharge.<sup>67</sup> This prohibition should embrace a return to active duty to facilitate an individual's surrender by administrative action to a foreign government, an objective which ought to be achieved only through international extradition if an appropriate treaty exists between the United States and the former host government.<sup>68</sup>

The federal Constitution does not block state enactment of penal statutes with extraterritorial application as long as their enforcement does not conflict with the foreign relations of the United States<sup>69</sup> or impinge upon the rights of other American states with concurrent jurisdiction.<sup>70</sup> Nevertheless, state courts traditionally have expressed hostility toward departures from exclusive reliance on the territorial principle unless part of a criminal transaction occurs within state boundaries or waters.<sup>71</sup> There are, however, examples of state reliance on citizenship or vessel registry,<sup>72</sup> and of the protected interest concept, at least if there is an identifiable harm sought or created within the forum state and the conduct was neither permitted nor required where it took place.<sup>73</sup> In several states, nonetheless, revision of constitutional language restricting criminal trials to the county or district in which crimes are perpetrated would be necessary before a place of trial could be established for anticipatory crimes committed entirely within another state or nation.<sup>74</sup>

## JURISDICTIONAL CONFLICTS AND THEIR RESOLUTION

### United States and Other Nations

Three patterns of conflict between the United States and one or more other nations, arising from the enforcement of or adjudications under criminal legislation with extraterritorial effect, have surfaced through the years. One arises from dual nationality when the United States demands a course of conduct of its citizens and another nation exacts a conflicting response.<sup>75</sup> This occurred, for example, before and during World War II when Japanese-American citizens in Japan were required, as Japanese sub-

jects, to engage in activities which American authorities later viewed as treasonable.<sup>76</sup> Because former enemy nations were not in a position to object effectively, these matters were disposed of as issues of domestic law rather than through diplomatic negotiations.

A second has been occasioned when persons commit crimes on American vessels within the territorial waters of another country. American doctrine asserts exclusive power if a ship's discipline is affected, but accepts concurrent authority if a criminal act "involve[s] the peace or dignity of the country or the tranquility of the port."<sup>77</sup> Conflicts of this sort have been resolved through diplomatic negotiations.<sup>78</sup>

A third arises from efforts to extend American economic and regulatory legislation to activities within other countries, a matter covered below.<sup>79</sup> In passing, one should note that the traditional law of self-incrimination under the fifth amendment does not recognize a claim of privilege because responses may incriminate under the laws of another nation. Some decisions<sup>80</sup> recognize potential unfairness in the traditional doctrine but almost without exception have avoided deciding the matter because the possibility in a particular proceeding of incrimination under the laws of another legal system has not been established to the court's satisfaction.<sup>81</sup>

### **American States and Other Nations**

Should an American state assert extraterritorial legislative and adjudicative powers in the face of a specific, legitimate protest from another affected nation, it would violate the United States Constitution.<sup>82</sup> Federal courts would intervene in such an instance, provided the conflict were actual and asserted by a foreign nation. An abstract or hypothetical conflict would not suffice.<sup>83</sup> If, by treaty, nationals of another country are accorded certain freedoms while in the United States, no American state or municipality can punish or otherwise impose sanctions on the exercise of such treaty rights.<sup>84</sup>

### **American States and the Federal Government**

In addition to problems of concurrent territorial jurisdiction, already mentioned,<sup>85</sup> conflict of subject-matter competence can arise if a state legislates inconsistently with national statutes based on a power delegated to Congress under the Constitution.<sup>86</sup> According to the "occupation of the field" doctrine, the conflicting state law is unconstitutional.<sup>87</sup> This might very well prove the case should state economic legislation bearing residual criminal penalties extend to international commerce or finance.

### States Among Themselves

Because—under the double jeopardy clause,<sup>88</sup> for example—states are considered separate sovereigns, the interstate conflicts cases are a microcosm of international law conflicts. If legislative competence is invoked solely according to the territorial principle, exercise of judicial competence can result in multiple prosecutions of individual offenders only if criminal transactions extend across state lines.<sup>89</sup> Interstate conflicts also could occur should a state punish acts of its citizens committed in another jurisdiction, but they are exceedingly rare and treated hostilely by American state courts when they occur.<sup>90</sup>

More direct conflict can arise if states use the protected interest or passive personality principle to reach activities of persons never physically present or legal entities not conducting business within a prosecuting state at the time of that activity. Penal legislation thus based is valid only if the activity is punishable in both jurisdictions.<sup>91</sup> Otherwise, conduct innocent where performed might be punished in a state with which a defendant has no direct contact.<sup>92</sup>

Interstate compacts often confer concurrent “jurisdiction” over rivers and lakes through which state boundary lines run, designed to ensure at least one prosecution if it cannot be established beyond a reasonable doubt exactly where on a body of water an offense was committed. It is unconstitutional, however, for State *A* to extend its penal or regulatory legislation over waters clearly within the territory of State *B*, particularly in an effort to control otherwise lawful or permitted activities by citizens of State *B*.<sup>93</sup> This, too, constitutes a domestic application of principles familiar under the international law governing high seas and territorial waters.<sup>94</sup>

### Personal Jurisdiction Unaffected by Jurisdictional Defects

Whatever defects there may be in the invocation of standards governing exercise of legislative competence, individual defendants cannot benefit unless as a matter of forum constitutional law a statute is invalidated on its face.<sup>95</sup> That of course destroys the power of a court to enter a binding judgment.<sup>96</sup> If, however, a forum state rules that its penal legislation is valid and adjudicates accordingly, the fact that another nation can protest invocation of that legislation against its nationals or with reference to activities occurring within its boundaries has no impact on forum jurisdiction. That, at any rate, is the conclusion drawn from the generally-recognized rule that unlawful arrest, detention or return in defiance of extradition treaty law does not impair a court’s power to adjudicate the criminality of one physically before it.<sup>97</sup>



## ENFORCEMENT OF PENAL ADJUDICATIONS: THE PRISONER TREATIES

An interesting analog to the exercise of extraterritorial jurisdiction has arisen recently under the prisoner exchange treaties between the United States and several other countries.<sup>98</sup> Under these treaties, the United States has agreed to enforce foreign sentences against American citizens based on acts committed abroad, often beyond the reach of United States jurisdiction.

According to venerable dictum, no nation is to enforce the penal laws or adjudications of another country.<sup>99</sup> Hence, in the absence of treaty or authorizing legislation, a person convicted of a crime and sentenced to imprisonment in one jurisdiction cannot be confined in the prisons of another.<sup>100</sup> A consequence in the modern era has been that many Americans, often young persons transporting or in possession of controlled substances, have been prosecuted, convicted and sentenced to lengthy terms of imprisonment under conditions of incarceration viewed as inhumane according to American standards. The federal government has responded by executing several bilateral treaties allowing transfers of prisoners, nationals of one of the signatory nations, from the nation of imprisonment to the nation of citizenship for purposes of service of sentence.<sup>101</sup>

Under these treaties and implementing federal legislation,<sup>102</sup> incarcerated American citizens<sup>103</sup> may apply for transfer to federal custody and may be accepted if both the United States and the country in which a penal conviction<sup>104</sup> was entered consent. Before transfer, a prisoner must agree not to attack directly or collaterally the validity of the underlying conviction itself except in the courts of the nation in which it was entered.<sup>105</sup> A United States magistrate or a citizen specifically commissioned for the purpose by a federal judge must verify a prisoner's consent before transfer.<sup>106</sup> After transfer, a prisoner can challenge the legality of transfer, but not the validity of the underlying conviction, in the federal district court within the jurisdiction of which he or she is incarcerated or under supervision.<sup>107</sup> Prisoners on probation are transferable if a federal district court is willing to supervise probation within this country.<sup>108</sup> Those accepted in American prisons receive credit for time served<sup>109</sup> before transfer and the usual good time credits after,<sup>110</sup> and may be paroled.<sup>111</sup>

American federal and state courts are barred from detaining, prosecuting, trying or sentencing a transferred prisoner for the same offense on which the foreign conviction is based,<sup>112</sup> and only those deprivations of civil, political or civic rights or other disqualifications may be imposed which would have flowed from an American conviction for the same offense.<sup>113</sup> Sentences imposing an obligation to make restitution or reparations are enforceable as if they were civil judgments rendered by a federal

district court.<sup>114</sup> If transfer proceedings are ruled invalid or if the transferring nation wishes the prisoner returned on another matter after completion of service of sentence, the statute provides for retransfer of custody to the country in which the original criminal judgment was entered.<sup>115</sup>

American citizens returned to the United States under the treaty with Mexico began immediate efforts to obtain release from prison through habeas corpus on federal constitutional grounds.<sup>116</sup> Ultimately, however, the Ninth Circuit in *Pfeifer v. United States Bureau of Prisons*<sup>117</sup> and the Second Circuit in *Rosado v. Civiletti*<sup>118</sup> sustained the constitutionality of the prisoner transfer system.

Both courts agreed that the test to determine the validity of prisoner consents to transfer should be drawn from that governing guilty pleas in criminal cases,<sup>119</sup> and not from that according to which waivers of fourth amendment rights through consent to search are evaluated.<sup>120</sup> The difference is significant. Pleas of guilty are valid even though defendants are motivated by a desire to avoid harsher sanctions which will be imposed if they are tried and convicted,<sup>121</sup> provided they are counseled, have knowledge of the elements of the charge<sup>122</sup> and the consequences of submitting a guilty plea, and voluntarily elect a guilty plea as the best of an array of unpleasant alternatives. Consents to search, in contrast, must be free from any element of coercion or pressure other than the fact that officials request waiver. Both courts of appeals thought that prisoners with American nationality need only know that, under a treaty and federal law, incarceration, probation or parole close to home, in a familiar environment using a familiar language, is available as an alternative to incarceration in an alien environment. Because the statute provides procedural safeguards not dissimilar to those governing guilty pleas,<sup>123</sup> consents to transfer in compliance with it are lawful.

The *Rosado* court went beyond the mere fact of consent to consider whether American constitutional concepts of procedural due process and protections against harsh and inhumane punishment governed the return of American nationals from other countries where they had been convicted without like guarantees. The court thought no difficulty lurked in the fact that a Mexican judgment of conviction underlay execution of penalties in the federal prison, parole and probation system, because the treaty created mutual obligations on each signatory nation to receive and control prisoners adjudicated in the other.<sup>124</sup>

The Second Circuit clearly believed that the American petitioners before it had been convicted in the course of proceedings which fell far short of American concepts of due process and had been incarcerated in Mexico under unacceptably inhumane conditions. Nevertheless, the fundamental issue was whether the agreements executed by the petitioners not to attack their convictions directly or indirectly other than before

Mexican courts were invalid on federal constitutional grounds. The court thought they were not. Had the petitioners, while Mexican prisoners, refused to accept that condition, neither Mexico nor the United States would have consented to a transfer. Petitioners made a voluntary choice among available alternatives and the condition restricting the forum in which they might contest the original penal adjudication was neither needless nor arbitrary. The treaty exchange mechanism serves the interests of the United States in having its own nationals incarcerated or supervised within its own system. The treaty also protects the interests of American citizens who are or might be imprisoned abroad. Should the treaty be invalidated or the petitioners released, the hopes of these other citizens would be frustrated and they would have no alternative to service of sentence in a harsh environment.<sup>125</sup> That the court would not allow.

*Pfeifer* added two further dimensions. The petitioner there asserted that the mandated agreement not to attack the underlying judgment of conviction was an unconstitutional condition on the exercise of a constitutional right. That doctrine, however, extends only to limitations on vested constitutional rights<sup>126</sup> and has no application to a condition which merely confirms the situation which would exist in the absence of the treaty, namely, that criminal judgments can be attacked only in the courts of the nation which entered them.<sup>127</sup> *Pfeifer* also urged that the treaty meant the United States would be participating in a joint venture with Mexican authorities by accepting and incarcerating their American prisoners, thus encouraging Mexico to arrest, charge and adjudicate other Americans guilty of Mexican crimes. The court, however, did not perceive the holding of its cases on cooperative police investigations<sup>128</sup> as extending to the prisoner treaty setting.

Having survived the scrutiny of the *Rosado* and *Pfeifer* courts, the prisoner exchange treaties probably will withstand further constitutional challenges. Under them, the United States can enforce the criminal judgments of foreign courts whenever a treaty implemented by the federal statute authorizes the transfer of Americans to this country from foreign prisons or parole supervision.

## CONTEMPORARY PROBLEMS IN EXTRATERRITORIAL JURISDICTION

### Hovering and the Smuggling of Controlled Substances

Over a span of approximately two generations the United States has been particularly concerned with enforcing its laws on smuggling and controlled substances.<sup>129</sup> So-called hovering vessels or "mother ships"<sup>130</sup> encountered outside United States waters<sup>131</sup> have created a series of jurisdictional

and constitutional problems as the United States has sought to enforce these laws against the crews of hovering vessels.

The first statute directed at such vessels, the Anti-Smuggling Act of 1935,<sup>132</sup> was designed to forestall evasion of federal taxes on alcoholic beverages which could be imported following repeal of the eighteenth amendment.<sup>133</sup> It authorizes the President to declare offshore waters a "customs-enforcement area" within a maximum radius of one hundred nautical miles from the United States coast. It further authorizes hovering vessels to be boarded within an additional zone of fifty nautical miles. Five such zones were created shortly after enactment and apparently remain in existence.<sup>134</sup>

Related to this are two other statutes. First, United States Coast Guard personnel may carry out inquiries, examinations, searches, seizures and arrests upon the high seas and waters to prevent, detect and suppress federal criminal violations.<sup>135</sup> Second, both Customs and Coast Guard personnel may board vessels anywhere within customs waters<sup>136</sup> to examine ship's documents and inspect vessels and contents in connection with the enforcement of federal customs laws.<sup>137</sup>

A final dimension of the matter stems from provisions of the multilateral Convention on the High Seas to which the United States is a party.<sup>138</sup> Article 22 allows warships to intercept and board foreign merchant vessels on the high seas on three bases only: (1) reasonable grounds to suspect a ship is engaged in piracy; (2) reasonable grounds to suspect slave trading; or (3) a reasonable basis to believe a vessel flying a different flag in reality has the same nationality as the intercepting warship.<sup>139</sup> If none of these grounds exists and there is no special treaty affecting powers of warships of one nation to inspect merchant vessels of another, ships can be boarded only from warships of the same nationality.<sup>140</sup>

These provisions have been the object of substantial litigation within the past few years because United States Coast Guard and Customs Service personnel have boarded vessels on the high seas and in territorial waters, discovered evidence of criminal activity (usually controlled substances) and prosecuted those responsible. The defendants have asserted that their fourth amendment or other federal constitutional rights were violated so that the evidence against them must be suppressed.<sup>141</sup>

A first concern has been the factual, and particularly subjective, basis which boarding personnel must establish to legitimate a vessel interception. Safety and similar inspections may be carried out against known American registry vessels without a need for suspicion of noncompliance or wrongdoing.<sup>142</sup> Under all other circumstances, however, intercepting personnel must have a reasonable basis to suspect either United States vessel registry or nationality<sup>143</sup> or the violation of one or more federal criminal statutes.<sup>144</sup> For fourth amendment purposes, the stop-and-frisk

doctrine may be used by analogy if there is a reasonable basis to suspect that the crew of a vessel, whatever its registry, is engaged in violating federal law.<sup>145</sup>

*United States v. Postal*<sup>146</sup> illustrates the application of these principles. The first boarding of the vessel in *Postal* occurred within United States territorial waters and was based on a reasonable suspicion that the ship, which bore no name and which belatedly displayed what was claimed to be a Grand Bahamian flag, actually was of United States nationality. Therefore, the interception met federal statutory requirements and did not violate the Convention on the High Seas.<sup>147</sup> On inspection, the vessel in fact was determined not to be of United States registry or nationality.<sup>148</sup> Thereafter, a second boarding of the same vessel took place in international waters which could not be justified under either federal statutes or article 22 of the Convention. American officials already knew the vessel to be of foreign nationality and had no belief it was engaged in piracy or slave trading. Hence, boarding the vessel violated article 6 of the Convention.<sup>149</sup>

If boarding activities are unlawful, the most important practical as well as legal issue to be resolved by courts is that of sanctions. The *Postal* opinion is significant on this issue. The defendants argued that because the boarding of the vessel violated a treaty to which the United States was a party, that treaty directly required suppression of the evidence. Their argument relied on *Cook v. United States*,<sup>150</sup> in which the Supreme Court had ruled that a violation of a treaty between Great Britain and the United States prevented the forfeiture of a smuggler's vessel because the treaty was self-executing. The *Postal* bench, however, viewed article 6 of the high seas convention not to be self-executing, so that there was no ground generated by the treaty itself to suppress the evidence. That issue aside, by analogy to the *Ker* doctrine,<sup>151</sup> the court concluded that it could not justify suppression of evidence solely because principles of international law or non-self-executing treaty provisions might have been contravened by federal authorities. To this might be added the principle that individuals do not benefit directly from international law standards.<sup>152</sup> In illustration, *United States v. Williams*<sup>153</sup> noted that because Panama had authorized United States officials to board a ship of Panamanian nationality, its consent bound the defendants and destroyed any legal basis for them to object to an ensuing search and seizure.<sup>154</sup>

Obviously, difficult problems of federal constitutional and international law are posed by anti-smuggling, customs and controlled substances laws extending into international as well as territorial waters and by actions of American federal officials to enforce them. Ultimately, the United States Supreme Court should consider and resolve them. In the interim, however, the growing body of Fifth Circuit law provides an adequate theoretical

basis for vessel interceptions and searches, and a sufficient practical guide for federal officials.

### Antitrust Law Enforcement

The federal courts have been less successful in managing extraterritorial application of the Sherman Act, which extends to restraint of trade or commerce “among the several States, or with foreign nations.”<sup>155</sup> To the extent criminal prosecutions<sup>156</sup> are based on activities in restraint of trade by any person or entity, even of foreign nationality, within United States territory or on conduct by United States nationals or entities taking place outside United States territory directly affecting foreign commerce, there should be no basis in international law for objection on the part of any other nation, including one in which an American individual or company has acted.<sup>157</sup> The United States government, however, has asserted over the years that its legislative competence extends, under a form of the protected interest (or, as some prefer, “objective territorial”) principle, to activity by non-nationals outside American territory which has consequences within American boundaries.<sup>158</sup> This theory of jurisdiction is sometimes called the “effects doctrine.”<sup>159</sup> If conduct is intended to and actually does have an impact on United States imports or exports, federal law can be invoked even though the responsible persons or entities owe no allegiance to the United States.<sup>160</sup>

Whether the effects doctrine indeed should be acknowledged as cognizable under customary international law is hotly debated.<sup>161</sup> Some federal precedent adds qualifiers: the impact must be adverse and substantial and “the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—[must be] sufficiently strong vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”<sup>162</sup> If these concerns are met, there is both legislative and judicial competence; if not, proceedings ought not lie.

Even though there may be an arguable basis for allowing an assertion of judicial competence over extraterritorial activities, the court in *Timberlane Lumber* believed there ought to be a “jurisdictional rule of reason” allowing a judicial order of forbearance in the interests of comity and fairness.<sup>163</sup> The elements to be weighed include

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such

effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.<sup>164</sup>

Although reasonable from an American perspective, this device to control over-zealous invocation of the effects doctrine is hardly satisfactory from the standpoint of the government of another nation. Determinations whether or not legislative competence will be recognized are for the courts after the fact, and a foreign government may well assume that no exercise of jurisdiction over acts performed within its geographical area is permissible under principles of international law.<sup>165</sup> Nonetheless, that is the position to which United States authorities generally have adhered.<sup>166</sup>

The United Kingdom has been adamant in its refusal to leave the basic decision concerning power to adjudicate extraterritorial antitrust and other matters to any foreign judiciary. Hence, the United Kingdom Parliament enacted the Protection of Trading Interests Act.<sup>167</sup> Under its provisions, the United Kingdom Secretary of State may take certain steps if he determines that actions under the laws of another nation affecting international trade, resting on acts done outside the territorial jurisdiction of that nation, affect persons conducting business in the United Kingdom. One step is to require those conducting business in the United Kingdom to notify the Secretary of State about requirements or prohibitions imposed or threatened to be imposed in accordance with the laws of another nation.<sup>168</sup> A second is to issue directives prohibiting compliance to whatever extent the Secretary desires, if compliance may result in damage to United Kingdom trading interests.<sup>169</sup> An order prohibiting compliance serves as a basis for invocation of the act of state doctrine by the recipient against sanctions based on noncompliance.<sup>170</sup>

Under section 2 of the Act, the Secretary may direct persons within the United Kingdom, whether or not they are citizens, to refuse to comply with process or other mandates from another nation to produce commercial documents or information located outside the territory of the mandating nation, if the demand infringes upon United Kingdom jurisdiction, or otherwise prejudices its sovereignty, national security or United Kingdom relationships with any other nation.<sup>171</sup> Secretarial order also can block compliance with process or other requests or demands not connected with an existing civil or criminal action in the requesting nation, or asking for unspecified documents.<sup>172</sup>

The principal immediate impact of the Act on American federal anti-trust criminal investigations and prosecutions will be to frustrate federal grand jury process directed at production of corporate and financial records located in the United Kingdom, unless the United Kingdom Secretary of State chooses to cooperate. Other nations, with or without equivalent legislation, share the United Kingdom response to American prosecutorial

use of the effects doctrine.<sup>173</sup> Federal authorities, therefore, might do well, in an effort to promote harmonious economic relations with other countries, to abandon reliance on the effects doctrine and accept the British view as orthodox under contemporary international law. Nonetheless, American doctrine as embodied in the pending *Restatement Revised*<sup>174</sup> adheres to a somewhat broader view as structured in federal precedent. This signals an indefinite time of international conflicts over United States enforcement of economic regulatory legislation.

### Securities Regulation

Similar problems of extraterritorial criminal jurisdiction are present in the field of securities regulations. As in the antitrust field, although most federal decisions have been rendered in civil matters, criminal sanctions are provided and the federal law draws no substantive distinctions between civil and criminal coverage. The Securities Exchange Act of 1934<sup>175</sup> penalizes fraudulent activities affecting the domestic securities market through "any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly."<sup>176</sup> The law also provides that federal securities law is not to apply to transactions outside the jurisdiction of the United States unless they contravene SEC rules and regulations governing them.<sup>177</sup> No such regulations have ever been issued. That might have been taken by federal courts as a basis for refusing extraterritorial application of federal securities law, yet the courts have given the statute extraterritorial effect if necessary to safeguard American securities markets and if there are sufficient minimum contacts to bring a transaction within the definition of interstate commerce.<sup>178</sup> Under the jurisdictional theories embraced in federal precedent, criminal prosecutions might be brought based on activities of non-United States citizens or entities outside the territorial jurisdiction of the United States.

There is of course no difficulty in prosecuting proprietors of fraudulent schemes hatched within the United States to defraud investors in other countries through advertisements in their own countries enticing them to invest in an American enterprise.<sup>179</sup> One may assume as well a basis to reach overseas activities by nationals or non-nationals to defraud American investors in American securities markets, as long as the statutory requirements are met.<sup>180</sup> American authorities, however, ought not use a sweeping effects or subject-matter doctrine to reach activities abroad which affect securities transactions only outside the United States, even though American nationals or ownership interests in an American enterprise are involved in a transaction. These matters can be left to prosecuting authorities in the nation where the principal activities were based.<sup>181</sup> If they are not, the same adverse governmental reactions and retaliatory



legislation may be expected as has been experienced in the setting of extraterritorial invocations of federal antitrust law.<sup>182</sup>

### FEDERAL CRIMINAL CODE PROPOSALS AFFECTING JURISDICTION

As the discussion above suggests, federal law regarding jurisdiction has developed in a somewhat uneven and occasionally objectionable fashion, as courts have responded to the exigencies of various situations. A comprehensive revision of the federal criminal laws could and should reform federal doctrine governing criminal jurisdiction. Such a revision has been under study since 1966 when Congress established a National Commission on Reform of Federal Criminal Laws.<sup>183</sup> The 1971 Commission report<sup>184</sup> eventuated in a series of Senate and House bills<sup>185</sup> extending down to the present congressional session.<sup>186</sup> None has been enacted to date, but one may assume that at some time within the decade Congress will legislate some form of a comprehensive federal criminal code to replace the existing, nearly two-century old accretion of federal penal statutes. Almost certainly, a new code will contain jurisdictional provisions similar to if not identical with those in current legislative proposals.

The originally proposed draft included not only a provision governing jurisdiction over offenses within the special maritime and territorial jurisdiction of the United States,<sup>187</sup> but also special provisions governing extraterritorial jurisdiction.<sup>188</sup> Over the following decade, a considerable refinement of these provisions has occurred. During the 96th and the present 97th Congresses, however, the two houses have adhered to competing formulations of jurisdictional doctrine to such an extent that there appears a strong likelihood that one of them ultimately will appear in an enacted code after a conference committee has done its work.

One procedural difficulty at the international level has been engendered by including jurisdictional elements in the primary definition of specific crimes. Under some extradition treaties the principle of mutuality means that the penal laws of both contracting nations must define sanctioned criminal conduct identically. If federal law contains a jurisdictional element which a counterpart statute in an asylum nation does not, there is a risk that authorities in the latter will deny extradition on grounds of lack of mutuality.<sup>189</sup> This concern has been accommodated by making jurisdictional factors the subject of separate subdivisions within sections of the proposed code, apart from subsections defining crimes and establishing sanctions for them.<sup>190</sup>

A second, albeit domestic, problem is allocation of responsibility to determine the existence of jurisdictional elements. The position of the

Senate Judiciary Committee has been that the matter of jurisdiction should be for the court and not the jury.<sup>191</sup> The House Judiciary Committee, in contrast, has never agreed to that approach, and the bills in the two houses since 1980 have continued to differ over whether determination of jurisdictional issues should be left to the trier of fact on the primary criminal charges or to the court as a matter of law.<sup>192</sup>

In many respects, the coverage of the House and Senate bills is substantially the same. The most basic concept is that of the "general jurisdiction of the United States if [an] offense is committed within the United States."<sup>193</sup> Next comes a three-pronged test of "special jurisdiction":<sup>194</sup>

(1) *Special territorial jurisdiction.* Both proposals are substantially congruent in their coverage of real property reserved or acquired for federal use over which federal authorities have exclusive or concurrent jurisdiction,<sup>195</sup> unorganized territories or possessions of the United States,<sup>196</sup> certain islands, rocks or keys<sup>197</sup> and offshore platforms on the outer continental shelf.<sup>198</sup> There is a slight difference in technique in delineating jurisdiction over Native American tribal groups and members.<sup>199</sup> The Senate version would govern the underlying problem in the setting of United States Code provisions governing Indian matters,<sup>200</sup> with only a cross-reference in the special territorial jurisdiction setting,<sup>201</sup> while the House prefers resolution of the matter within the Federal Criminal Code itself.<sup>202</sup> Both, however, retain the existing territorial jurisdictional doctrines, while expanding somewhat the list of offenses over which federal criminal jurisdiction is retained.<sup>203</sup>

(2) *Special maritime jurisdiction.* The two versions are intended to preserve existing jurisdictional concepts<sup>204</sup> and therefore differ only slightly in their language.<sup>205</sup> Both drafts preserve existing coverage of vessels within the admiralty and maritime jurisdiction of the United States but outside the jurisdiction of any state, if they belong to the United States, a state or a locality,<sup>206</sup> a citizen of the United States or a corporation created by or under the laws of the United States or one of its states.<sup>207</sup>

(3) *Special aircraft jurisdiction.* The two drafts carry identical provisions covering aircraft which consolidate scattered provisions of existing law.<sup>208</sup> Five circumstances qualify aircraft in flight<sup>209</sup> as within the special aircraft jurisdiction of the United States:<sup>210</sup> (a) Aircraft owned by the United States, a state, a locality, or an organization created by or under the laws of the United States or a state;<sup>211</sup> (b) civil aircraft as defined by federal statute;<sup>212</sup> (c) any other aircraft within the United States;<sup>213</sup> (d) any other aircraft outside the United States that has its next scheduled destination or last point of departure in the United States and next lands in the United States, or which has an offense committed abroad it as defined in the anti-hijacking convention<sup>214</sup> and lands in the United States with an alleged offender still on board;<sup>215</sup> (e) any other aircraft leased without crew

to a lessee with a principal place of business in the United States or, if it has no principal place of business, whose permanent residence is in the United States. <sup>216</sup>

The Senate bill covers basic principles of extraterritorial jurisdiction through a single comprehensive section, <sup>217</sup> although in any specific instance it is necessary to examine the jurisdictional subsection following the definitional elements of an offense for special applications. Unless otherwise expressly provided in statute, treaty or international agreement, extraterritorial jurisdiction would extend over offenses committed outside either the general <sup>218</sup> or special <sup>219</sup> jurisdiction of the United States only in eleven situations.

The first is when the victim or intended victim of a crime of violence <sup>220</sup> is directed against a United States official, <sup>221</sup> a federal public servant <sup>222</sup> outside the United States in the performance of official duties, or a national or an invitee of a national of the United States on the premises of a United States embassy or consulate. <sup>223</sup> The first two possibilities rest on the passive personality principle, <sup>224</sup> while the latter is an established special dimension of the territorial principle. <sup>225</sup>

The next three categories <sup>226</sup> cover treason <sup>227</sup> and sabotage; <sup>228</sup> various offenses of counterfeiting, perjury, false swearing, bribery, fraud, impersonation and obstruction of federal government functions committed by a national or resident of the United States; <sup>229</sup> and controlled substances offenses aimed at importing or ultimate sale or distribution within the United States. <sup>230</sup> All rest on the protected interest or objective territorial principle <sup>231</sup> coupled, in the instance of obstruction or impairment of federal government functions by a United States national or resident, with nationality of an offender. <sup>232</sup>

A fifth category, also resting on the protective principle, comprehends offenses based on entry of persons or property into the United States. <sup>233</sup> A sixth governs possession of explosives in a building owned by or under the care, custody or control of the United States. <sup>234</sup> Although this might well be within the concept of the special territorial jurisdiction of the United States, <sup>235</sup> it is specified in order to eliminate all doubt about the propriety of the exercise of extraterritorial jurisdiction. <sup>236</sup>

A seventh covers participation by persons outside the United States in the commission of an offense which causes or threatens harm as defined in a criminal statute, either within the United States or outside the United States, to a citizen, national or resident of the United States, an organization established under the laws of an American state or having its principal place of business within the United States, or the United States itself. <sup>237</sup> Jurisdiction under this provision is based on a combination of the territorial principle, <sup>238</sup> the passive personality theory and the protected interest principle.

The proposed statute lacks any restraints on the exercise of jurisdictional powers under the seventh category. This seems questionable in light of the serious adverse impact which unrestrained extraterritorial jurisdiction can have on United States international relations. Any restraints on the sweep of this provision would have to be accomplished through a judicial continuation of existing doctrine requiring a substantial federal interest in exercising jurisdiction.<sup>239</sup>

The eighth category is related to the seventh, in that it covers activity outside the general or special jurisdiction of the United States constituting an attempt, conspiracy or solicitation to commit a federal crime within the United States.<sup>240</sup> This rests, of course, on the territorial and protected interest principles.

The ninth consists of two branches.<sup>241</sup> The first covers offenses by federal public servants<sup>242</sup> (other than persons in the armed forces subject to court-martial jurisdiction for their crimes at the time charges are laid). The second covers members of federal public servants' households residing abroad because of such public servants' official duties, or persons accompanying the military forces of the United States.<sup>243</sup> This is intended to overcome the difficulties generated by Supreme Court decisions limiting court-martial jurisdiction over civilian employees and dependents<sup>244</sup> by giving federal district courts the competence to try such cases.<sup>245</sup>

A tenth covers offenses committed either by or against a United States national at a place outside the jurisdiction of any nation.<sup>246</sup> This might give authority to prosecute for crimes in Antarctica, on a space station or the moon or a habitable planet should space exploration move so far.<sup>247</sup> The provision rests on nationality of perpetrator or victim, as the case might be, although the analogy to the historical floating territory concept<sup>248</sup> is evident as well.

A final category covers offenses provided for in treaties or other international agreements to which the United States is a party, requiring this country to provide for federal jurisdiction over such offenses.<sup>249</sup> Illustrations include the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents,<sup>250</sup> and the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance.<sup>251</sup>

The House bill, consonant with its policy of leaving jurisdictional issues for resolution by triers of fact,<sup>252</sup> takes a different approach from that in the Senate proposal. Individual sections indicate when they are to have extraterritorial effect,<sup>253</sup> so that coverage in the general part is complementary only. Unless otherwise provided by law or treaty or other international agreement, extraterritorial jurisdiction exists outside the general and

special jurisdiction of the United States if any one of four alternatives<sup>254</sup> can be complied with.

The first, after restating the general premise of the bill that extraterritorial jurisdiction must be specified in the description of an offense, confirms that attempt or conspiracy criminality lies if the intended offense would have fallen within extraterritorial legislative coverage had it been consummated.<sup>255</sup> The second, which is the exact counterpart of a Senate provision,<sup>256</sup> covers offenses committed by or against United States nationals at a place outside the jurisdiction of any nation.<sup>257</sup> A third, identical to the Senate's proposal,<sup>258</sup> would create federal district court jurisdiction over crimes committed abroad by federal public servants not subject to court-martial jurisdiction, members of federal public servants' households residing abroad because of public servants' official duties, and persons accompanying United States military forces.<sup>259</sup>

The fourth alternative, similar to the Senate version,<sup>260</sup> covers attempts or conspiracies to commit federal offenses within the United States, or participation from outside the United States in a criminal transaction occurring in whole or in part within the United States.<sup>261</sup> The important difference between the two approaches is that the House version requires a federal court to determine that there is a substantial federal interest in a criminal investigation or prosecution before federal extraterritorial jurisdiction attaches, while the Senate bill does not.<sup>262</sup> Assuming an unwillingness to relinquish entirely such an open-ended invitation for conflict with other nations,<sup>263</sup> the House language is preferable because it adopts a rule of substantiality as an expression of legislative policy.

One may hope that Congress soon will move more swiftly than it has over the past decade in enacting a new federal criminal code. The jurisdictional provisions of either the House or the Senate version are superior to the present rather cursory legislation. Because, in the author's thinking, highly technical issues of jurisdiction should not be left to jury resolution, but rather should be decided, preferably before trial, through a reasoned judicial decision subject if necessary to interlocutory appellate review, the Senate version appears best. But either version or a compromise bill will give more congressional guidance to the federal judiciary than it now receives.

#### THE AMERICAN LAW INSTITUTE RESTATEMENT REVISED (1981)

The American Law Institute embarked in 1980 on a version of its 1965 *Restatement (Second) of the Foreign Relations Law of the United States*, and in 1981 and 1982 considered certain provisions relating to jurisdiction.<sup>264</sup> Revision of

the *Restatement* is an important event because, in the absence of controlling legislation, the *Restatement* is likely to guide judicial attitudes toward jurisdiction.

The revision differs significantly from the 1965 version in its use of a three-fold classification of: (a) jurisdiction to prescribe—to subject to law, whether by legislation, executive acts or orders, administrative rules or regulations, or court judgments, the conduct, relations or status of persons or the interests of persons in things;<sup>265</sup> (b) jurisdiction to adjudicate—to subject persons or things to the process of courts or administrative tribunals;<sup>266</sup> and (c) jurisdiction to enforce—to exercise authority to compel, induce or reward compliance or impose sanctions for noncompliance.<sup>267</sup>

Under the revised *Restatement* draft, jurisdiction to prescribe embraces conduct occurring substantially within a state's territory;<sup>268</sup> the status of persons or interests in things present there;<sup>269</sup> conduct outside its territory having or intended to have substantial effect within its territory;<sup>270</sup> conduct, status, interests or relations of its nationals outside its territory;<sup>271</sup> conduct outside its territory by non-nationals directed against the security of the state or certain state interests;<sup>272</sup> and certain forms of criminal conduct of universal concern.<sup>273</sup>

Because legislative jurisdiction exercised on some of these bases may create conflicts with the laws of other nations, the *Restatement Revised* adopts a basic limitation, logically directed at adjudicating entities, that a state should not unreasonably<sup>274</sup> apply its law to conduct, relations, status or interests of persons or things having connections with another state or other states.<sup>275</sup> Certain criteria are set forth by which excessiveness can be determined.<sup>276</sup>

The *Restatement Revised* also gives special guidance on certain matters of peculiar concern to modern American law. Legislative competence is confirmed on antitrust matters if: (a) agreements in restraint of United States trade are made in the United States and carried out predominantly here, without regard to the nationality or places of business of the agreeing parties or participants in conduct; (b) agreements in restraint are made outside the United States and conduct or agreements in restraint of United States trade are carried out predominantly outside the United States, if a principal purpose of the conduct or agreement is to interfere with commerce of the United States and there is some effect on it; or (c) agreement or conduct in restraint of United States trade has substantial effect on the commerce of the United States and exercise of jurisdiction is not unreasonable under section 403(2) and (3).<sup>277</sup>

Jurisdiction over securities transactions can be asserted if they are carried out or are intended to be carried out<sup>278</sup> on a securities market in the United States, no matter what the nationality or place of business of participants in the transaction or the issuer of the securities.<sup>279</sup> Transac-

tions not on an American securities market may be regulated if: (a) securities of the same issue are traded on an American securities market; (b) representations are made or negotiations conducted in the United States concerning the transactions; or (c) the regulated party is a United States national or resident or those sought to be protected <sup>280</sup> are United States residents. <sup>281</sup>

The rule of reasonableness under section 403(2), however, governs all these applications, <sup>282</sup> as well as jurisdiction to adjudicate <sup>283</sup> and jurisdiction to enforce. <sup>284</sup> Reasonableness is determined in light of factors well documented in American and international law. <sup>285</sup>

Two provisions relate solely to criminal adjudications. One restates the traditional doctrine that courts within the United States adjudicate violations only of domestic criminal laws, not the penal laws of a foreign nation. <sup>286</sup> This, of course, has no impact on the exercise of domestic penal statutes punishing universal crimes or other nonterritorial offenses falling within a nation's competence to legislate. <sup>287</sup> A second is that criminal defendants must be personally present before a court in the United States can adjudicate a case, <sup>288</sup> although it should be kept in mind that the underlying constitutional rights to presence and confrontation are subject to valid waiver. <sup>289</sup>

## CONCLUSION

In a simpler era there was little need to consider problems of the reach of criminal legislation beyond a nation's borders, other than as it governed vessels of national registry. Today, with the United States a global power, with its corporate and commercial interests present almost everywhere in the world, with hundreds of thousands of its citizens visiting dozens of countries, and with its domestic economic interests easily affected by decisions and activities taken elsewhere, it is no wonder that Congress has given extraterritorial effect to much civil and penal legislation. This article has surveyed some of the resulting legal issues.

United States courts have addressed adequately the problems associated with the prisoner exchange treaties and search and seizure on the high seas. With respect to criminal statutes which apply extraterritorially, to the extent that the reach of such statutes is based on the nationality of either the offender or a human victim, there probably is no major cause for concern even though another nation can maintain a prosecution in the same matter based on the territorial principle. That is probably true as well of instances in which United States criminal legislation rests on the protected interest principle and activity of nationals of another country directly affects a matter of clear United States concern, for example,

counterfeiting its currency, forging its securities or evidences of obligation, or submitting fraudulent claims at its embassies or consulates.

In some difficult cases, the law of extradition acts to regulate the exercise of jurisdiction. The situs nation under traditional principles of international law may decline to extradite for offenses committed wholly outside the requesting nation's territory,<sup>290</sup> and may refuse to surrender its own nationals unless by extradition treaty it has agreed to do so.<sup>291</sup> The principle of *non bis in idem* is also a basis to deny extradition,<sup>292</sup> as is the fact of a pending prosecution not yet final so as to support the *non bis in idem* concept.<sup>293</sup> Conflicting claims of this nature can be resolved through administration of extradition machinery if a treaty exists. If not, the first nation to apprehend a defendant may proceed to judgment and the other can put its criminal justice machinery into play when and if that offender strays into its power.

The propriety of the exercise of claimed extraterritorial legislative powers becomes increasingly doubtful as a nation moves away from traditional crimes directly affecting governmental activities or officials. Most countries include some such coverage in their penal laws.<sup>294</sup> But the United States is significantly more active than other nations in its efforts to extend its economic regulatory legislation to activities lawful where done, often to the economic benefit of the situs nation. Federal grand juries and regulatory agencies all too often have asserted leverage over independent subsidiaries or trading partner entities within the United States to try to reach documents relating to exclusively off-shore transactions and entities; an outcome may be criminal indictments against foreign corporations, firms and banks which engage in few if any economic transactions within United States territory. It is no wonder that foreign nations like the United Kingdom<sup>295</sup> react strongly to legislative and judicial imperialism of this sort and are not content to rely on the reasonable exercise of federal judicial discretion<sup>296</sup> to avoid inappropriate intervention in their economic affairs. The American Bar Association has urged the Congress to restrict the scope of extraterritorial Federal Criminal Code coverage of economic matters,<sup>297</sup> and one may hope in the interests of amicable international relations that Congress will see fit to adopt such a position.

## NOTES

<sup>1</sup> See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 401 (Tent. Draft No. 2, 1981) [hereinafter cited as RESTATEMENT REVISED DRAFT No. 2].

<sup>2</sup> See generally George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609 (1966).

<sup>3</sup> See *infra* text accompanying notes 167-74.

<sup>4</sup> Jurisdiction to enforce, a term probably broad enough to comprehend cooperation in criminal investigations and law enforcement, see RESTATEMENT OF FOREIGN RELATIONS LAW OF THE



UNITED STATES (REVISED) §§ 431-433 (Tent. Draft No. 3, 1982) [hereinafter cited as RESTATEMENT REVISED DRAFT No. 3]; RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 401(2), is not covered in this article other than incidentally because other articles in this symposium do so.

<sup>5</sup> The use of the term "jurisdiction" in Anglo-American law to embrace legislative power to define crimes, administrative activity to enforce legislation and the powers of courts and other bodies to adjudicate hinders precise analysis. Use of the word "competence," as civil law systems do, helps avoid some of the problems. See George, *supra* note 2, at 610-11. RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 401, retains the usage of "jurisdiction," while recognizing a three-way classification. See *infra* text accompanying notes 264-66. On May 19, 1982, the American Law Institute considered §§ 401-522 but did not recommend any changes in language.

<sup>6</sup> RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, §§ 511-512; *Harvard Research in International Law, Jurisdiction With Respect to Crime* art. 1(d), 29 AM. J. INT'L L. SUPP. 466, 470 (1935) [hereinafter cited as *Harvard Research*].

<sup>7</sup> RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 402(1)(a).

<sup>8</sup> See generally Blishchenko & Shdanov, *The Problem of International Criminal Jurisdiction*, 1976 CAN. Y.B. INT'L L. 283; Fitzgerald, *The Territorial Principle in Penal Law: An Attempted Justification*, 1 GA. J. INT'L & COMP. L. 29 (1970).

<sup>9</sup> The matter of flags of convenience, according to which vessels may be registered in a country even though they are owned and operated by persons or legal entities of another nation, may have criminal as well as civil consequences. See generally RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 501, Reporters' Note 6. "A state cannot impose its nationality on a ship owned by its nationals if the ship is already registered elsewhere and is flying the flag of the state of registration." *Id.* at 68.

<sup>10</sup> *Harvard Research*, *supra* note 6, art. 4; RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 402, comment f, § 403, Reporters' Note 8; *United States v. Rodgers*, 150 U.S. 249, 264 (1893); *United States v. Hayes*, 653 F.2d 8, 14-16 (1st Cir. 1981).

<sup>11</sup> *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953).

<sup>12</sup> Sometimes referred to as the protective principle, see RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 402, comment d, or the "effects doctrine." See *id.* § 403, Reporters' Note 3; *infra* text accompanying notes 155-66. Jurisdiction over extraterritorial acts having or intended to have substantial harmful effects within a country's borders is dealt with by some courts as a matter of "objective territorial" competence. See, e.g., *United States v. Cook*, 573 F.2d 281, 283 (5th Cir.), *cert. denied*, 439 U.S. 836 (1978); *S.E.C. v. Kasser*, 548 F.2d 109, 114-16 (3d Cir.), *cert. denied sub nom. Churchill Forest Industries (Manitoba), Ltd. v. S.E.C.*, 431 U.S. 938 (1977); Trebec, *The Transnational Reach of United States Antitrust Laws*, 3 COMP. L. Y.B. 215, 224-25 (1979).

<sup>13</sup> RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 402(1)(c).

<sup>14</sup> *Id.* § 402(3); *Harvard Research*, *supra* note 6, arts. 7-8.

<sup>15</sup> *Harvard Research*, *supra* note 6, arts. 5-6; RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 402(2).

<sup>16</sup> Cf. *Kawakita v. United States*, 343 U.S. 717, 723 (1952) ("The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to responsibilities of both"); *Coumas v. Superior Court*, 31 Cal. 2d 682, 192 P.2d 449 (1948) (Greek law gave Greece jurisdiction over dual national of U.S. and Greece for offenses committed in California, precluding subsequent California prosecution under California's statute prohibiting double punishment). On dual nationality generally, see RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 713, comment d; Reporters' Note 2; RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 214, comment f; § 214, Reporters' Note 3; § 215, Reporters' Note 3.

<sup>17</sup> RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 402, comment e. Perhaps the most sweeping invocation of the concept to date was the Adolf Eichmann case, Attorney General

v. Eichmann, 36 I.L.R. 18 (Dist. Ct. Israel 1961), *aff'd*, 36 I.L.R. 277 (Sup. Ct. Israel 1962), in which Jews murdered before Israel became a state, were the "nationals" on which Israeli jurisdiction was based. *See* Trebec, *supra* note 12, at 226.

<sup>18</sup> Case of the S.S. "Lotus" (France v. Turkey), 1927, P.C.I.J., ser. A, No. 9; 2 M. HUDSON, *WORLD COURT REPORTS* 20 (1935).

<sup>19</sup> *See generally* *Harvard Research*, *supra* note 6, art. 4 comment at 509-10, 518; art. 10 comment at 578-79.

<sup>20</sup> *See, e.g.*, Convention on the High Seas, *done* Apr. 29, 1958, arts. 14-21, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 522, comment c; RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 522(2)(a).

<sup>21</sup> Convention on the High Seas, *supra* note 20, art. 13; RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 522(2)(a); 134, Reporters' Note 2; § 702(b); 164-65, Reporters' Note 4; RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 404.

<sup>22</sup> *See generally* Convention on Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *done* Sept. 23, 1976, 24 U.S.T. 565, T.I.A.S. No. 7570; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; Convention on Offences and Certain Other Acts Committed on Board Aircraft, *done* Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Denaro, *In-Flight Crimes, the Tokyo Convention, and Federal Jurisdiction*, 35 J. AIR L. & COMM. 171 (1969); Lissitzyn, *In-Flight Crime and United States Legislation*, 67 AM. J. INT'L L. 306 (1973).

<sup>23</sup> *See, e.g.*, RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 404; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413. *See generally* Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087, 1097-1103 (1974).

<sup>24</sup> *Harvard Research*, *supra* note 6, arts. 9-10; RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 404.

<sup>25</sup> RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 702(a); comment c; Reporters' Note 3; RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 404, Reporters' Note 1. War crimes also may be within this principle. *See generally* RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 702, Reporters' Note 1; Sponsler, *The Universality Principle of Jurisdiction und the Threatened Trials of American Airmen*, 15 LOY. L. REV. 43 (1968-69); Trebec, *supra* note 12, at 226.

<sup>26</sup> 18 U.S.C. § 7 (1976).

<sup>27</sup> The statute uses the terminology of "special maritime and territorial jurisdiction of the United States," defined as "[t]he high seas, [and] any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State." *Id.* § 7(1). The Convention on the High Seas, *supra* note 20, art. 1, defines it as "all parts of the sea that are not included in the territorial sea or in the internal waters of a state." *See also* *United States v. Louisiana*, 394 U.S. 11, 22-23 (1968):

Under generally accepted principles of international law, the navigable sea is divided into three zones. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory . . . Beyond the inland waters, and measured from their seaward edge is a belt known as the marginal, or territorial sea . . . Outside the territorial waters are the high seas, which are international waters not subject to the dominion of any single nation.

*See generally* Clark, *Criminal Jurisdiction Over Merchant Vessels Engaged in International Trade*, 11 J. MAR. L. & COMM. 219 (1980).

<sup>28</sup> *See, e.g.*, *United States v. Tanner*, 471 F.2d 128 (7th Cir.), *cert. denied*, 409 U.S. 999 (1972).

29 18 U.S.C. § 7(1) (1976). Waters constituting the international boundary with Canada are covered in *id.* § 7(2).

30 *Id.* § 7(5).

31 See U.S. CONST. art. I, § 8 (*passim*).

32 Nevertheless, special provision is made for the exercise of federal jurisdiction over lands reserved or acquired for the use and under either concurrent or exclusive jurisdiction of the United States, and over any other place obtained for federal use with the concurrence of a state. 18 U.S.C. § 7(3) (1976). The first is comprehensive enough to cover places outside the United States proper, *e.g.*, the Ryukyu Islands before their reversion to Japan. *Rose v. McNamara*, 375 F.2d 924 (D.C. Cir. 1967); see generally *George, The United States in the Ryukyus: The Insular Cases Revisited*, 39 N.Y.U. L. REV. 785, 794-800 (1964). It also includes United States diplomatic stations in other countries. *United States v. Erdos*, 474 F.2d 157 (4th Cir.) *cert. denied*, 414 U.S. 876 (1973). Conversely, foreign consular facilities within United States territory may be considered foreign soil, although Congress can penalize crimes of violence committed there against consular officials. *United States v. Garcia*, 456 F. Supp. 1358 (D.P.R. 1978).

The second covers places like national forests and parks, military and naval facilities, and lands acquired for other federal governmental uses. *United States v. County of Fresno*, 429 U.S. 452, 455 (1977). Unless federal jurisdictional powers were reserved when statehood was granted, a state by statute must cede exclusive control over an area, either by retaining concurrent powers or relinquishing all authority. The United States must accept such a cession; whether that has occurred is for federal, not state, courts to determine. *DeKalb County, Georgia v. Henry C. Beck Co.*, 382 F.2d 992 (5th Cir. 1967).

33 The principal holding to this effect is *United States v. Wheeler*, 435 U.S. 313 (1978) (Native American tribal courts represent a separate sovereign and not the federal government, so that a tribal member may be prosecuted on the same matter before both a tribal court and United States district court without violating the double jeopardy clause, U.S. Const. amend. V).

34 *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

35 *Montana v. United States*, 450 U.S. 544, 557-67 (1981).

36 25 U.S.C. § 1321(a) (1976); *cf.* *Kennerly v. District Court*, 400 U.S. 423 (1971).

37 25 U.S.C. § 1321(a) (1976); *cf.* *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 493 n.40 (1979).

38 18 U.S.C. §§ 1152-53 (1976); *United States v. Johnson*, 637 F.2d 1224, 1230-31 (9th Cir. 1980).

39 *United States v. John*, 437 U.S. 634, 647-54 (1978).

40 Compare the drive toward legal modernization in Japan during the last quarter of the nineteenth century as a basis for renegotiating treaties giving western nations and their citizens' extraterritorial status in Japan. Henderson, *Law and Political Modernization in Japan*, in *POLITICAL DEVELOPMENT IN MODERN JAPAN* 387, 431 (R. Ward ed. 1968).

41 Submerged Lands Act, 43 U.S.C. §§ 1301-03, 1311-15 (1976); *United States v. California*, 382 U.S. 139, 145-51 (1964); *cf.* *People v. Weeren*, 26 Cal. 3d 654, 607 P.2d 1279, 163 Cal. Rptr. 255 (1980) (state's assertion of extraterritorial jurisdiction in absence of federal law).

42 *E.g.*, *Lee v. Watts*, 243 Ark. 957, 423 S.W.2d 557 (1968).

43 *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70-75 (1978).

44 See, *e.g.*, *State v. Stewart*, 175 Mont. 286, 573 P.2d 1138 (1977). See text accompanying note 32 *supra*.

45 See *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979).

46 *United States v. Baker*, 609 F.2d 134 (5th Cir. 1980).

47 *Blackmer v. United States*, 284 U.S. 421 (1932); *United States v. Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973).

- 48 *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal.), *cert. denied*, 452 U.S. 972 (1981); *United States v. Keller*, 451 F. Supp. 631, 635-37 (D.P.R. 1978).
- 49 U.S. CONST. art. I, § 8, cl. 10.
- 50 See text accompanying notes 20-25 *supra*.
- 51 *United States v. Flores*, 289 U.S. 137 (1933); *United States v. Bowman*, 260 U.S. 94 (1922); *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975); *United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974).
- 52 *Ford v. United States*, 273 U.S. 593, 619-20 (1927).
- 53 See *United States v. Schmucker-Bula*, 609 F.2d 399, 402-03 (7th Cir. 1980); *United States v. Baker*, 609 F.2d 134, 138-39 (5th Cir. 1980).
- 54 See *United States v. Mann*, 615 F.2d 668, 671 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); *United States v. Egan*, 501 F. Supp. 1252, 1257-61 (S.D.N.Y. 1980).
- 55 *United States v. Hayes*, 479 F. Supp. 901, 909-12 (D.P.R. 1979), *modified*, 653 F.2d 8 (1st Cir. 1981).
- 56 *United States v. Mitchell*, 553 F.2d 996, 1001-05 (5th Cir. 1977).
- 57 16 U.S.C. § 1361 (1976).
- 58 *O'Callahan v. Parker*, 395 U.S. 258 (1969).
- 59 *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957).
- 60 *Grisham v. Hagan*, 361 U.S. 278 (1960).
- 61 See generally RESTATEMENT REVISED DRAFT NO. 3, *supra* note 4, § 721, Reporters' Note 10; *Feinberg, Extraterritorial Jurisdiction and the Proposed Federal Criminal Code*, 72 J. CR.L. & CR. 385, 394-95 (Summer 1981); Note, *Subjection of American Military Personnel to Foreign Criminal Jurisdiction: The Territorial Imperative*, 58 IOWA L. REV. 532 (1973).
- 62 See *United States v. Zemater*, 501 F.2d 540 (7th Cir. 1974); *United States v. Cotten*, 471 F.2d 744 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973) (American citizens in Vietnam and Japan who defrauded federal government).
- 63 *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979); RESTATEMENT REVISED DRAFT NO. 3, *supra* note 4, § 721, comment h; § 722, Reporters' Note 16; RESTATEMENT REVISED DRAFT NO. 2, *supra* note 1, § 442, Reporters' Notes 4, 5.
- 64 *Williams v. Froehleke*, 490 F.2d 998, 1003-04 (2d Cir. 1973).
- 65 *Wilson v. Girard*, 354 U.S. 524, 529-30 (1957).
- 66 *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972); *Williams v. Rogers*, 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).
- 67 *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).
- 68 See *Valentine v. United States ex rel. Niedecker*, 299 U.S. 5 (1936).
- 69 *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Strassheim v. Daily*, 221 U.S. 280 (1911).
- 70 *Nielson v. Oregon*, 212 U.S. 315 (1909); *State v. Alexander*, 222 Ark. 376, 259 S.W.2d 677 (1953).
- 71 *E.g.*, *People v. Buffum*, 40 Cal. 2d 709, 256 P.2d 317 (1953); *People v. Duffield*, 387 Mich. 300, 197 N.W.2d 25 (1972); *State v. McCormick*, 273 N.W.2d 624 (Minn. 1978).
- 72 *People v. Weeren*, 26 Cal. 3d 654, 607 P.2d 1279, 163 Cal. Rptr. 255, *cert. denied*, 449 U.S. 839 (1980).
- 73 *E.g.*, *State v. Luv Pharmacy, Inc.*, 118 N.H. 398, 388 A.2d 190, 195-97 (1978); *People v. Fea*, 47 N.Y.2d 70, 390 N.E.2d 286, 416 N.Y.S.2d 778 (1979).
- 74 *State v. McCormick*, 273 N.W.2d 624, 628 (Minn. 1978). See generally *Blume, The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59 (1944); *George, supra* note 2, at 630-31.
- 75 See note 16 *supra*.
- 76 See *Kawakita v. United States*, 343 U.S. 717 (1952).
- 77 *Wildenhus's Case (Mali v. Keeper of the Common Jail)*, 120 U.S. 1, 12 (1887). See also

United States v. Flores, 289 U.S. 137, 157-58 (1933); United States v. Rodgers, 150 U.S. 249, 260 (1893); RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 512, Reporters' Note 5.

<sup>78</sup> See, e.g., 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 187-88, 208-23 (1941).

<sup>79</sup> See *infra* text accompanying notes 155-82.

<sup>80</sup> *E.g.*, Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478-81 (1972); *In re Grand Jury Proceedings* (Field), 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976); *In re Quinn*, 525 F.2d 222 (1st Cir. 1975).

<sup>81</sup> *But see In re Grand Jury Subpoena of Flanagan*, — F. Supp. —, 30 CRIM. L. RPTER. (BNA) 2471 (E.D. N.Y. Feb. 10, 1982). The court there found a grand jury witness, a member of the Irish Republican Army, had a reasonable fear that his testimony might be used against him in both the United Kingdom and the Republic of Eire, and therefore could refuse to testify. Grand jury secrecy requirements of Fed. R. Crim. Proc. 6(e) could not guarantee that foreign governments would not acquire the information, and use immunity conferred under federal statute cannot bar use of compelled evidence by courts of other countries.

*Flanagan* was distinguished, but criticized, in *Phoenix Assurance Co. of Canada v. Runck*, — N.W.2d —, 31 CRIM. L. RPTER. (BNA) 2030 (N.D. Sup. Ct., March 22, 1982). There, witnesses before a federal grand jury investigating arsons in North Dakota and Canada were given use immunity and testified without claiming privilege concerning Canadian criminality. During discovery proceedings in connection with a state civil action brought by an insurance carrier claiming insurance fraud, two of the civil defendants (former grand jury witnesses) claimed privilege against incrimination in Canada. The North Dakota Supreme Court disallowed the claim of privilege because they had received the benefit of use immunity in the federal proceeding and should not be allowed later to renege on the arrangement. Although the court questioned the legal and functional wisdom of allowing claims of privilege against incrimination based on foreign law because of the potentially crippling effect it would have on federal and state immunity legislation, the court allowed a third civil defendant who had not been a federal grand jury witness to claim privilege on the premise that no nonimmunized witness need disclose whether a claim of privilege is based on foreign or local law.

<sup>82</sup> U.S. CONST. art. I, § 10, cls. 1, 3; art. II, § 2, cl. 2. See also RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 131(3) (Trent. Draft No. 1, 1980).

<sup>83</sup> *Skiriotes v. Florida*, 313 U.S. 69, 72-74 (1941).

<sup>84</sup> *Asakura v. City of Seattle*, 265 U.S. 332 (1924). See generally RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 722.

<sup>85</sup> See *supra* text accompanying note 32.

<sup>86</sup> Particularly under U.S. CONST. art. I, §§ 8-9.

<sup>87</sup> *Massachusetts v. Westcott*, 431 U.S. 322 (1977); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

<sup>88</sup> *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959). Some states take a contrary view under their own constitutions. See, e.g., *People v. Cooper*, 398 Mich. 450, 247 N.W.2d 866 (1976).

<sup>89</sup> Illustrations include infliction of mortal injuries in one state followed by death in another, *Lane v. State*, 388 So. 2d 1022 (Fla. 1980); *People v. Duffield*, 387 Mich. 300, 197 N.W.2d 25 (1972); transportation of stolen property from one state to another, *Newlon v. Bennett*, 253 Iowa 555, 112 N.W.2d 884, *appeal dismissed*, 369 U.S. 658 (1962); *Younie v. State*, 281 A.2d 446 (Me. 1971); and a conspiracy conducted across state lines. *People v. Perry*, 23 Ill. 2d 147, 177 N.E.2d 323, 327-28 (1961); *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334, 349 (1964).

<sup>90</sup> See, e.g., *State v. McCormick*, 273 N.W.2d 624 (Minn. 1979).

<sup>91</sup> *Id.*; *State v. Luv Pharmacy, Inc.*, 118 N.H. 398, 388 A.2d 190, 195-96 (1978).

<sup>92</sup> Compare limitations on use of long-arm statutes in, e.g., products liability cases. *Rush*

v. Savchuk, 444 U.S. 320 (1980); *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 453, Reporters' Note 4.

93 *Nielsen v. Oregon*, 212 U.S. 315 (1909).

94 *See supra* text accompanying notes 26-30.

95 *See, e.g., State v. McCormick*, 273 N.W.2d 624 (Minn. 1979).

96 *Cf. State v. Jones*, 166 Conn. 620, 353 A.2d 764 (1974) (subject-matter jurisdiction is a matter of law and can neither be waived nor conferred through consent of a defendant); *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967) (trial of a case over which a court lacks jurisdictional powers cannot result in a valid determination of guilt and a criminal judgment so entered is void and must be vacated irrespective of the sufficiency of the evidence submitted at trial to establish violation of the statute); *State v. Halstead*, 414 A.2d 1138 (R.I. 1980) (the rule that a court may hear only those cases arising within its territorial jurisdiction is a limitation on subject-matter jurisdiction).

97 *United States v. Crews*, 445 U.S. 463, 474 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519 (1952) (irregular interstate return); *Ker v. Illinois*, 119 U.S. 436 (1886) (irregular international return); *In re Pantojas*, 628 F.2d 701, 706 (1st Cir. 1980); *State v. Olinghouse*, 605 S.W.2d 58, 63 (Mo. 1980). *See generally* RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 432(1)(b); § 432, Reporter's Note 2: § 433(2), comment b; *Evans, Acquisition of Custody Over the International Fugitive Offender—Alternatives to Extradition; A Survey of United States Practice*, 40 BRIT. Y.B. INT'L L. 77 (1964); Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087, 1103-12 (1974).

The Second Circuit expressed restiveness over the *Ker* doctrine in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), on the basis that "abusive conduct, if it had actually occurred, could not be tolerated without debasing the processes of justice [if] the actions against [a returned defendant] were taken by or at the direction of United States officials." *United States v. Reed*, 639 F.2d 896, 901 (2d Cir. 1981) (summarizing the *Toscanino* holding). The court, however, has not in fact invoked its doctrine to benefit prisoners because in the cases before it no "acts of torture, terror, or custodial interrogation" were established, *United States v. Reed*, 639 F.2d at 901 (summarizing *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975)), the activities of United States agents were reasonable under the circumstances, *United States v. Reed*, 639 F.2d at 901-02, or no United States representatives in fact participated in the law enforcement activities complained of. *United States v. Lira*, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975).

The *Toscanino* rule is adopted in *Restatement Revised Draft No. 3, supra* note 4, § 433(3), comment c; Reporters' Note 3.

98 *E.g., Prisoner Transfer Treaty, 1979, United States-Turkey*, — U.S.T. —, T.I.A.S. No. 9892; *Prisoner Transfer Treaty, 1979, United States-Peru*, — U.S.T. —, T.I.A.S. No. 9784; *Prisoner Transfer Treaty, 1979, United States-Panama*, — U.S.T. —, T.I.A.S. No. 9787; *Prisoner Transfer Treaty, Mar. 2, 1977, United States-Canada*, 30 U.S.T. 6263, T.I.A.S. No. 9552; *Prisoner Transfer Treaty, Feb. 10, 1978, United States-Bolivia*, 30 U.S.T. 796, T.I.A.S. No. 9219; *Prisoner Transfer Treaty, Nov. 25, 1976, United States-Mexico*, 28 U.S.T. 7399, T.I.A.S. No. 8718.

99 *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.); RESTATEMENT REVISED DRAFT No. 2, *supra* 1, § 442(1).

100 *In re Bonner*, 151 U.S. 242 (1894) (inmate of Iowa prison, convicted by federal court in Indian Territory, released on habeas corpus).

101 *See* note 98 *supra*.

102 18 U.S.C.A. §§ 3244, 4100-4115 (Supp. 1981).

103 Some prisoners have been transferred from the United States to countries of their

nationality, but in describing the current constitutional litigation the procedures affecting United States nationals are most germane.

<sup>104</sup> Treaties may provide for transfer of juveniles adjudicated for what would have been an act of juvenile delinquency if committed in the United States or any state. 18 U.S.C.A. § 4110 (Supp. 1981). Parental consent or approval by a court is required before a juvenile prisoner's consent is operative under the treaty system, *id.* § 4100(b), but after transfer federal law for the treatment of juvenile delinquents governs. *Id.* § 4110.

<sup>105</sup> *Id.* §§ 3244(1), 4108(b)(1).

<sup>106</sup> *Id.* § 4108(a). Indigent prisoners have a right to counsel at federal government expense in the country of imprisonment. *Id.* § 4109. Similar hearings are provided for prisoners to be transferred from the United States. *Id.* § 4107; *Tavarez v. U.S. Attorney General*, — F.2d —, 30 CRIM. L. RPTR. (BNA) 2492 (5th Cir., Feb. 22, 1982).

<sup>107</sup> 18 U.S.C.A. § 3244(5) (Supp. 1981).

<sup>108</sup> *Id.* § 4104. Paroled prisoners may be received without the need for advance judicial consent. *Id.* § 4106(a)-(b).

<sup>109</sup> *Id.* § 4105(b). Prisoners also must receive the benefit of a pardon, commutation, amnesty or any other ameliorating modification or revocation of sentence by the country in which it was entered. *Id.* § 4100(d).

<sup>110</sup> *Id.* § 4105(c).

<sup>111</sup> *Id.* § 4106(c).

<sup>112</sup> *Id.* § 4111.

<sup>113</sup> *Id.* § 4112.

<sup>114</sup> *Id.* § 4115.

<sup>115</sup> *Id.* § 4114. A Mexican citizen transferred to Mexican custody under a prisoner exchange treaty, who escaped, returned to the United States and was apprehended, could be restored to Mexican custody pursuant to *id.* § 4107(b)(3) without following international extradition procedures. However, the prisoner had the right to counsel and to a habeas corpus hearing to dispute identity or the fact of escape, but not the validity of the Mexican penal judgment. *Tavarez, v. U.S. Attorney General*, — F.2d —, 30 CRIM. L. RPTR. (BNA) 2492 (5th Cir., Feb. 22, 1982).

<sup>116</sup> See generally Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 HARV. L. REV. 1500 (1977).

<sup>117</sup> 615 F.2d 873 (9th Cir.), *cert. denied*, 447 U.S. 908 (1980).

<sup>118</sup> 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980).

<sup>119</sup> *E.g.*, *Tollett v. Henderson*, 411 U.S. 258 (1973); *McCarthy v. United States*, 394 U.S. 459 (1969).

<sup>120</sup> *E.g.*, *United States v. Watson*, 423 U.S. 411 (1976); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Compare the standards imposed by the Supreme Court for waiver of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), with *Edwards v. Arizona*, 451 U.S. 477 (1981).

<sup>121</sup> *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

<sup>122</sup> *Henderson v. Morgan*, 426 U.S. 637 (1976).

<sup>123</sup> Cf. FED. R. CRIM. P. 11.

<sup>124</sup> The *Rosado* court used the analogy of extradition under treaty. 621 F.2d at 1192-93. See, *e.g.*, *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

<sup>125</sup> "[W]e by no means condone the shockingly brutal treatment to which [petitioners] fell prey. Rather, we hold open the door for others similarly victimized to escape their torment." *Rosado v. Civiletti*, 621 F.2d at 1200-01.

<sup>126</sup> *Pfeifer* relied on *United States v. Jackson*, 390 U.S. 570 (1968), which had invalidated a system in which defendants who pleaded guilty could not receive a capital sentence, but those who went to trial and were convicted might. This was viewed as an unconstitutional

burden on the sixth amendment right to jury trial. *Jackson* does not apply beyond capital cases, however. See *Corbitt v. New Jersey*, 439 U.S. 212 (1978).

127 The court used the analogy of the pardon cases, which recognize the validity of conditions placed on those who accept pardons. *Schick v. Reed*, 419 U.S. 256 (1974).

128 *Pfeifer*, 615 F.2d at 877. See *United States v. Emery*, 591 F.2d 1266 (9th Cir. 1978) (United States Drug Enforcement Administration agents participated in interrogation sessions conducted by Mexican officers; failure to give *Miranda* warnings invalidated the resulting confessions); cf. *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969) (evidence obtained by Philippine officers in violation of Philippine constitution and laws was not inadmissible in an American federal proceeding even though the Philippine officers may originally have acted because of information or requests submitted by American officials). See also RESTATEMENT REVISED DRAFT No. 3, supra note 4, §§ 432(1), 433(2), (4).

129 See generally Note, *Drug Smuggling and the Protective Principle: A Journey Into Uncharted Waters*, 39 LA. L. REV. 1189 (1979).

130 See *United States v. Zurosky*, 614 F.2d 779, 788 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980) (government claim that docked craft had contacted hovering mother ship not substantiated on record).

131 International law long has recognized several bases for peacetime interception of merchant ships on the high seas. See generally Clark, *Criminal Jurisdiction Over Merchant Vessels Engaged in International Trade*, 11 J. MAR. L. & COMM. 219, 227-30, 234-36 (1980). In addition, as nations endeavor to extend their territorial waters ever further away from their shores to exploit natural resources, see generally RESTATEMENT REVISED DRAFT No. 3, supra note 4, §§ 511-517; Note, *Jurisdiction Beyond 200 Miles: A Persistent Problem*, 10 CAL. WESTERN INT'L L.J. 514 (1980), a basis for asserting criminal jurisdiction is likely to follow, even though seldom exercised.

132 19 U.S.C. §§ 1701-1711 (1976).

133 See generally RESTATEMENT REVISED DRAFT No. 3, supra note 4, § 513, Reporters' Note 4; Ficken, *The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law*, 29 U. MIAMI L. REV. 700, 703-11 (1975).

134 See Ficken, supra note 133, at 710-11.

135 14 U.S.C. § 89(a) (1976).

136 Defined in 19 U.S.C. § 1401(j) (1976).

137 *Id.* § 1581(a).

138 Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11; RESTATEMENT REVISED DRAFT No. 3, supra note 4, § 522(2). Coast Guard vessels come within the definition of warship under the treaty, and can rely on its provisions even though the treaty is not viewed otherwise as self-executing. *United States v. Williams*, 617 F.2d 1063, 1082 (5th Cir. 1980); RESTATEMENT REVISED DRAFT No. 3, supra note 4, § 522, comment a. Art. 23 of the Convention incorporates a doctrine of hot pursuit which can justify activities extending beyond territorial waters. See *United States v. Postal*, 589 F.2d 862 (5th Cir.), cert. denied, 444 U.S. 832 (1979); RESTATEMENT REVISED DRAFT No. 3, supra note 4, § 513, comment h.

139 See RESTATEMENT REVISED DRAFT No. 3, § 522(2)-(3).

140 Convention on the High Seas, supra note 138, art. 6(1); RESTATEMENT REVISED DRAFT No. 3, supra note 4, 522(2)(c).

141 See generally RESTATEMENT REVISED DRAFT No. 3, supra note 4, § 433, Reporters' Note 4; Carmichael, *At Sea With the Fourth Amendment*, 32 U. MIAMI L. REV. 51 (1977); Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741 (1980); Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725 (1980).



142 *United States v. Warren*, 578 F.2d 1058, 1068 (5th Cir. 1978) (under 14 U.S.C. § 89(c) (1976)), *modified on other grounds*, 612 F.2d 887 (5th Cir.), *cert. denied*, 446 U.S. 956 (1980).

143 *United States v. Postal*, 589 F.2d 862, 870-71 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

144 *United States v. Ruano*, 647 F.2d 577 (5th Cir. Unit B 1981); *United States v. Guillen-Linares*, 643 F.2d 1054 (5th Cir. 1981) (inland waters); *United States v. Postal*, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979). The standard of reasonableness for search is that which the Supreme Court used in evaluating searches of first-class mail received from other countries in *United States v. Ramsey*, 431 U.S. 606 (1977); *see also United States v. Williams*, 617 F.2d 1063, 1079-80 (5th Cir. 1980).

145 *United States v. Streifel*, 665 F.2d 414 (2d Cir. 1981) (drifting vessel observed fifty miles off Cape Cod, with no cargo visible; radio checks with DEA produced information that the same vessel under different names had been involved in narcotics smuggling; Coast Guard vessel fired shot across bow and boarded; officer smelled marijuana in hold and discovered a large quantity of it; court sustained stop and boarding on the analogy of fourth amendment stop-and-frisk decisions, e.g., *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968)).

146 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

147 *See also* RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 522(3).

148 Boarding officials may check a vessel's topside to see if all persons on board are accounted for properly, without needing to establish reasonable suspicion beforehand. The plain view doctrine applies when incriminating evidence is turned up in the process. *United States v. Alfrey*, 612 F.2d 180 (5th Cir. 1980).

149 *See also* RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 522(2)-(3).

150 288 U.S. 102 (1933). *See also Ford v. United States*, 273 U.S. 593 (1927); *Ficken, supra* note 133, at 724-25.

151 *See supra* text accompanying notes 95-97.

152 *See* RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 703, comment c; Reporters' Note 5.

153 617 F.2d 1063, 1090 (5th Cir. 1980).

154 A similar position has been taken based on art. 6 of the high seas convention in *United States v. Green*, 671 F.2d 46 (1st Cir. 1982).

155 15 U.S.C. §§ 1, 2 (1976). *See generally* PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 7-75 (J. Griffin ed. 1979); Ongman, "Be No Longer a Chaos": *Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 Nw. U.L. Rev. 733 (1977); Trebec, *supra* note 12.

156 Much of the controversy over extraterritorial reach of the Sherman Act has stemmed from civil, including treble damage, actions. Nevertheless, at times the juridical act precipitating intergovernmental disputes has been a grand jury subpoena *duces tecum* or other process issued in connection with a federal grand jury inquiry into possible criminal violations of the antitrust laws. *See, e.g.,* RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 420; 2 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD ch. 15 (2d ed. 1981); Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 271-72 (1981); Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 Nw. U.L. Rev. 487, 503-06, 507-09, 518-19 (1969). Grand jury investigations naturally presuppose valid legislative and adjudicative competence. Because the federal statute draws no distinctions between its civil and criminal coverage or application, the civil jurisdiction cases should govern criminal prosecutions as well until the federal judiciary decides to the contrary.

157 This, according to British analysis, is the maximum scope for penal jurisdiction under international law principles. *See* Lowe, *supra* note 156, at 164.

158 *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945).

159 See RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 415, Reporters' Note 3; Ongman, *supra* note 155, at 739-41.

160 Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979).

161 See *In re Uranium Antitrust Litigation* (Westinghouse Electric Corp.), 617 F.2d 1248, 1254-55 (7th Cir. 1980); Lowe, *supra* note 156, at 262-67. Australian law seems to lie closer to United States than to British doctrine. See Taylor, *The Extraterritoriality of the Australian Antitrust Law*, 13 J. INT'L L. & ECON. 273, 310 (1979).

162 Timberlane Lbr. Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976).

163 549 F.2d at 613. See also *In re Uranium Antitrust Litigation* (Westinghouse Electric Corp.), 617 F.2d 1248, 1255 (7th Cir. 1980).

164 Timberlane Lbr. Co., 549 F.2d at 614; see also *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979).

165 See Lowe, *supra* note 156, at 268-69.

166 But see Brett, *Extraterritorial Application of U.S. Antitrust Laws Seen as Diminishing*, N.Y.L.J., Monday, Oct. 5, 1981, at 4.

167 1980, c. 11 (in force from March 20, 1980). See generally Lowe, *supra* note 156, at 272-80.

168 Protection of Trading Interests Act 1980, c. 11, § 1(2).

169 *Id.* § 1(3). Exercise of such powers is not subject to judicial review. Lowe, *supra* note 156, at 273 n.84.

170 See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292-94 (3d Cir. 1979); RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 419(1); Reporters' Notes 1, 4-5.

171 Protection of Trading Interest Act 1980, c. 11, § 3(2).

172 *Id.* § 2(3). The act, *id.* § 5, prohibits British courts from enforcing multiple damages or "competition" judgments awarded by foreign courts, even though competent under foreign law to render them. It also allows British subjects or firms or persons carrying on businesses in the U.K. to "clawback" or recover multiple damages enforced against them in another nation unless, at the time the litigation commenced, an otherwise qualifying civil defendant was ordinarily resident or ordinarily conducted business in the nation in which the original award was given, and the activities giving rise to that award occurred exclusively in that nation. *Id.* § 6(2), (3). See generally Lowe, *supra* note 156, at 276-80.

173 See Onkelinx, *supra* note 156, at 507-08; RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 420, Reporters' Note 3.

174 See *infra* text accompanying notes 274-77. Federal criminal code proposals also preserve the doctrine. See *infra* text accompanying notes 237-39, 260-63.

175 15 U.S.C. §§ 78a-78kk (1976).

176 *Id.* § 78j. Criminal penalties are fixed in *id.* § 77x.

177 *Id.* § 78dd(b).

178 See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *rev'd on rehearing*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied sub nom.* *Manley v. Schoenbaum*, 395 U.S. 906 (1969). See also *IIT v. Cornfeld*, 619 F.2d 909 (2d Cir. 1980); *Des Brisay v. Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972). See generally Johnson, *Application of Federal Securities Laws to International Securities Transactions*, 45 ALB. L. REV. 890, 891 n.6 (1981) (citing comprehensively earlier literature); Mizrack, *Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities and Exchange Act of 1934*, 30 BUS. LAW. 367 (1975).

179 See, e.g., *United States v. Cook*, 573 F.2d 281, 284 (5th Cir.), *cert. denied*, 439 U.S. 836 (1978) ("That Congress would allow America to be a haven for swindlers and confidence men when the victims are European while expecting the highest level of business practice when the investors are American is 'simply unimaginable,'" quoting *IIT v. Vencapp Ltd.*, 519 F.2d 1001, 1016 (2d Cir. 1975)).

180 Interstate commerce, transportation or communications or the mails must be used directly or indirectly in effectuating a scheme.

181 See Johnson, *supra* note 178, at 931. See also *S.E.C. v. Kasser*, 548 F.2d 109, 113-14 (3d Cir.), *cert. denied sub nom. Churchill Forest Industries (Manitoba), Ltd. v. S.E.C.*, 431 U.S. 938 (1977).

182 See *supra* text accompanying notes 167-74. The provisions of the United Kingdom Protection of Trading Interests Act, *supra* note 167, are comprehensive enough to affect grand jury investigations of securities violations.

183 Act of Nov. 8, 1966, Pub. L. 89-801, 80 Stat. 1516.

184 NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS FINAL REPORT: PROPOSED NEW FEDERAL CRIMINAL CODE (1971), reprinted in *Reform of the Federal Criminal Laws: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 133-514 (1971) (commonly known as the *Brown Commission Report* after its chairperson, former Governor Edmund F. Brown of California) [hereinafter cited as *Brown Commission Report*].

185 S. 1, 94th Cong., 1st Sess. (1975); S. 1437, 95th Cong., 1st Sess. (1977) [hereinafter cited as S. 1437]; S. 1722, 96th Cong., 2d Sess. (1980); H.R. 6915, 96th Cong., 2d Sess. (1980).

186 S. 1630, 97th Cong., 1st Sess. (1981) [hereinafter cited as S. 1630]; H.R. 4711, 97th Cong., 1st Sess. (1981) [hereinafter cited as H.R. 4711]. See generally *Senate Committee on the Judiciary, Criminal Code Reform Act of 1981 Report to Accompany S. 1630*, S. Rep. No. 307, 97th Cong., 1st Sess. ch. 2 (1982) [hereinafter cited as *S. 1630 Report*]. Unfortunately, Senate inaction seems to spell the demise of a federal criminal code revision for the current session of Congress. See *American Bar Ass'n*, 18 *Washington Letter* (No. 5) 1 (1982).

187 See *Brown Commission Report*, *supra* note 184, § 201. Special maritime and territorial jurisdiction is defined *id.* § 210. See generally I Nat'l Comm'n on Reform of Federal Criminal Laws, Working Papers 33-67 (1970).

188 *Brown Commission Report*, *supra* note 184, §§ 201(e)-(i), 208, 212, 219. See generally I Nat'l Comm'n on Reform of Federal Criminal Laws, Working Papers 69-76 (1970).

189 See *Senate Committee on the Judiciary Criminal Code Reform Act of 1979 Report to Accompany S. 1722*, S. Rep. No. 553, 96th Cong., 2d Sess. 30 (1980) [hereinafter cited as *S. 1722 Report*]; *Senate Committee on the Judiciary, Criminal Code Reform Act of 1977 Report to Accompany S. 1437*, S. Rep. No. 605, 95th Cong., 1st Sess. 30 (1977) [hereinafter cited as *S. 1437 Report*].

190 See, e.g., the homicide provisions of S. 1630, *supra* note 186, §§ 1601(e), 1602(c), 1603(c); H.R. 4711, *supra* note 186, §§ 2301(d)-(e), 2302(d).

191 S. 1437, *supra* note 185, § 211, creating a new FED. R. CRIM. P. 25.1(b)(1) to that effect; see also *S. 1630 Report*, *supra* note 186, at 44-45; *S. 1437 Report*, *supra* note 189, at 40.

192 Compare S. 1630, *supra* note 186, § 201(c) (existence of federal jurisdiction is not an element of an offense), with H.R. 4711, *supra* note 186, § 116(a) ("the finder of fact shall determine issues of fact bearing on the existence of Federal jurisdiction over an offense"). See also *House Committee on the Judiciary, Criminal Code Revision Act of 1980 Report Together with Additional Separate, Supplemental, and Dissenting Views to Accompany H.R. 6915*, H.R. Rep. No. 1396, 96th Cong., 2d Sess. § 116, at 27 (1980) [hereinafter cited as *H.R. 6915 Report*].

193 S. 1630, *supra* note 186, § 202; H.R. 4711 *supra* note 186, § 112. "United States" in a geographic sense is defined to include all states, all places subject to the special territorial jurisdiction of the United States defined and discussed below, text accompanying notes 195-203, all waters subject to the admiralty and maritime jurisdiction of the United States, and the airspace overlying states, places and waters. S. 1630, § 111; *S. 1630 Report*, *supra* note 186, at 45. H.R. 4711 does not contain a counterpart definitional provision, but the same meaning is intended. See *H.R. 6915 Report*, *supra* note 192, at 23.

194 S. 1630, *supra* note 186, § 203, first paragraph; H.R. 4711, *supra* note 186, § 113(a).

195 S. 1630, *supra* note 186, § 203(a)(1); H.R. 4711, *supra* note 186, § 113(b)(1). Both are intended to continue the provisions of present 18 U.S.C. § 7(3) (1976), based in turn on U.S.

CONST. art. I, § 8, cl. 17. *See S. 1630 Report, supra* note 186, at 45-46; *S. 1722 Report, supra* note 189, at 41; *H.R. 6915 Report, supra* note 192, at 23-24. *See also supra* text accompanying note 32.

196 *S. 1630, supra* note 186, § 203(a)(2); *H.R. 4711, supra* note 186, § 113(b)(2). This is derived from U.S. CONST. art. IV, § 3, cl. 2. *See S. 1630 Report, supra* note 186, at 46; *S. 1722 Report, supra* note 189, at 41; *H.R. 6915 Report, supra* note 192, at 24.

197 *H.R. 4711, supra* note 186, § 113(a)(3) continues the coverage of 18 U.S.C. § 7(4) (1976), restricted to guano islands, etc., under 48 U.S.C. § 1411 (1976), but *S. 1630, supra* note 186, § 203(a)(4) removes that restriction and requires only that the President designate an island, rock or key as appertaining to the United States. *See S. 1630 Report, supra* note 186, at 49; *S. 1722 Report, supra* note 189, at 44-45.

198 *S. 1630, supra* note 186, § 203(a)(5); *H.R. 4711, supra* note 186, § 113(b)(4), both cross-referring to 43 U.S.C. § 1331(a) (1976). *See S. 1630 Report, supra* note 186, at 49; *S. 1722 Report, supra* note 189, at 45.

199 *See supra* text accompanying notes 33-38.

200 *S. 1630, supra* note 186, § 152, amending 25 U.S.C., at 336-38.

201 *Id.* § 203(a)(3).

202 *H.R. 4711, supra* note 186, § 114. This continues the approach in the present federal law. *See* 18 U.S.C. § 1162 (1976).

203 *See generally S. 1630 Report, supra* note 186, at 46-49; *S. 1722 Report, supra* note 189, at 42-44; *H.R. 6915 Report, supra* note 192, at 25-26. This relates to the present Major Crimes Act, 18 U.S.C. § 1153 (1976). For the basic interpretation of that legislation, *see Keeble v. United States*, 412 U.S. 205 (1973).

204 18 U.S.C. § 7(1) (1976). *See* text accompanying notes 26-39 *supra*; *S. 1630 Report, supra* note 186, at 49-50; *S. 1722 Report, supra* note 189, at 45; *H.R. 6915 Report, supra* note 192, at 24.

205 The Senate coverage is of the high seas or any other waters within the admiralty and maritime jurisdiction of the United States and outside any state's jurisdiction. *S. 1630, supra* note 186, § 203(b)(1)-(2). The House version specifies "the high seas" (which consists of those parts of the sea that are not included, in accordance with international law, in the territorial sea or the internal waters of a nation), *H.R. 4711, supra* note 186, § 113(c)(1), as well as any waters other than high seas within the admiralty and maritime jurisdiction of the United States but lying outside the jurisdiction of any state. *Id.* § 113(c)(2). Vessels registered, licensed or enrolled under United States law are covered when they are navigating the Great Lakes or the Saint Lawrence River where it constitutes the international boundary line with Canada. *S. 1630, supra* note 186, § 203(b)(4); *H.R. 4711, supra* note 186, § 113(c)(4) (both continuing the coverage of 18 U.S.C. § 7(2) (1976)).

206 This is a slight expansion on the coverage of 18 U.S.C. § 7(1) (1976). *See S. 1630 Report, supra* note 186, at 50; *S. 1722 Report, supra* note 189, at 46; *H.R. 6915 Report, supra* note 192, at 24.

207 *S. 1630, supra* note 186, § 203(b)(3); *H.R. 4711, supra* note 186, § 113(c)(3).

208 18 U.S.C. § 7(5) and 49 U.S.C. § 1301(38) (1976).

209 Aircraft are in flight from the moment when all external doors are closed following embarkation until the time any door is opened for disembarkation or, if there is a forced landing, until a competent authority assumes responsibility for the aircraft and persons and property aboard it. *S. 1630, supra* note 186, § 203(c) (final paragraph); *H.R. 4711(d), supra* note 186, § 113(d) (final paragraph). This language is derived from the Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, art. 2(a), 24 U.S.T. 565, T.I.A.S. No. 7570 (entered into force for the U.S. Jan. 26, 1973), and Convention for Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, art. 3(1), 22 U.S.T. 1641, T.I.A.S. No. 7192 (entered into force for the U.S. Oct. 14, 1971). The above definition is codified at 49 U.S.C. § 1301(34) (1976) (final paragraph).

210 See generally *S. 1630 Report*, *supra* note 186, at 50-51; *S. 1722 Report*, *supra* note 189, at 46; *H.R. 6915 Report*, *supra* note 192, at 24-25.

211 *S. 1630*, *supra* note 186, § 203(c)(1); *H.R. 4711*, *supra* note 186, § 113(d)(1). See 49 U.S.C. §§ 1301(14) (civil aircraft is "other than a public aircraft"), (32) (definition of "public aircraft") (1976).

212 *S. 1630*, *supra* note 186, § 203(c)(2); *H.R. 4711*, *supra* note 186, § 113(d)(2). The cross-reference for the definition of "civil aircraft of the United States" is 49 U.S.C. § 1301(18) (1976).

213 *S. 1630*, *supra* note 186, § 203(c)(3); *H.R. 4711*, *supra* note 186, § 113(d)(3). Both are intended to bring forward language in 49 U.S.C. § 1301(34)(c) (1976). See *S. 1630 Report*, *supra* note 186, at 50; *S. 1722 Report*, *supra* note 189, at 46; *H.R. 6915 Report*, *supra* note 192, at 24.

214 The Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *supra* note 209, art. 1, defines the crime as unlawfully seizing or exercising control over an aircraft by force, threat of force or any other form of intimidation, and includes accomplices to one who commits such acts. Each contracting state undertakes to punish such conduct severely, *id.* art. 2, and to include it as an extraditable offense in an existing or future treaty, *id.* art. 8, or to prosecute the matter in its own courts. *Id.* art. 7.

215 *S. 1630*, *supra* note 186, § 203(c)(4); *H.R. 4711*, *supra* note 186, § 113(d)(4). These sections are derived from 49 U.S.C. § 1301(38)(d) (1976).

216 *S. 1630*, *supra* note 186, § 203(c)(5); *H.R. 4711*, *supra* note 186, § 113(d)(4). These restate 49 U.S.C. § 1301(38)(e) (1976).

217 *S. 1630*, *supra* note 186, § 204. See generally *S. 1630 Report*, *supra* note 186, at 51-55; *S. 1722 Report*, *supra* note 189, at 47-50; Feinberg, *supra* note 61, at 392-96.

218 See *supra* text accompanying note 193.

219 See *supra* text accompanying notes 194-216.

220 Defined in *S. 1630*, *supra* note 186, § 111.

221 Defined *id.*

222 Defined *id.*

223 *Id.* § 204(a).

224 See *supra* text accompanying notes 18-19. *S. 1630 Report*, *supra* note 186, at 52, and *S. 1722 Report*, *supra* note 189, at 47 suggest these rest on the protected interest principle, discussed *supra* text accompanying notes 12-14.

225 See *supra* text accompanying note 32.

226 *S. 1630*, *supra* note 186, § 204(b)-(d).

227 Defined *id.* § 1101.

228 Defined *id.* § 1111.

229 The list appears *id.* § 204(c).

230 *Id.* § 204(d) cross-refers to offenses defined in 21 U.S.C. § 802 (1976).

231 See *supra* text accompanying notes 12-14.

232 See *supra* text accompanying notes 15-16.

233 *S. 1630*, *supra* note 186, § 204(e).

234 *Id.* § 204(f).

235 See *supra* text accompanying notes 195-203. *S. 1630 Report*, *supra* note 186, at 53 n.96, and *S. 1722 Report*, *supra* note 189, at 48 n.92 cite *United States v. Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied* 414 U.S. 876 (1973), as establishing the principle.

236 See *S. 1630 Report*, *supra* note 186, at 51; *S. 1722 Report*, *supra* note 189, at 48.

237 *S. 1630*, *supra* note 186, § 204(g).

238 See *supra* text accompanying notes 51-54.

239 See *supra* text accompanying notes 161-66. *S. 1630 Report*, *supra* note 186, at 51, and *S. 1722 Report*, *supra* note 189, at 48 indicate that this requirement is intended to be incorporated, but there is nothing in *S. 1630* language so providing.

240 S. 1630, *supra* note 186, § 204(h). The specific definitions of activity in §§ 1001-1004 are probably adequate to control too sweeping an invocation of the provision for external application.

241 *Id.* § 204(i).

242 "Public servant" is defined *id.* § 111.

243 *Id.* § 204(i).

244 See *supra* text accompanying notes 58-63.

245 See S. 1630 Report, *supra* note 186, at 53-54; S. 1722 Report, *supra* note 189, at 49-50.

246 S. 1630, *supra* note 186, § 204(j).

247 See S. 1630 Report, *supra* note 186, at 55; S. 1722 Report, *supra* note 189, at 50.

248 See *supra* text accompanying notes 10-11.

249 S. 1630, *supra* note 186, § 204(k). See generally S. 1630 Report, *supra* note 186, at 55; S. 1722 Report, *supra* note 189, at 50.

250 *Supra* note 23, arts. 3, 7.

251 *Supra* note 23, arts. 1, 5, 8(d).

252 See *supra* text accompanying notes 191-92.

253 See, e.g., H.R. 4711, *supra* note 186, §§ 1732(c) (failing to appear as a witness in a federal official proceeding); 1733(c) (refusing to produce information for a federal official proceeding); 1734(d) (refusing to testify at a federal official proceeding); 1735(c) (disobeying a federal court order); 1741(c) (perjury in the context of a federal official proceeding); 1742(e) (making a false statement if the government is the United States, the government is a state, local or foreign government, and the false claim is of United States citizenship; or enumerated national credit and small business investment institutions are affected); 1743(c) (tampering with a federal government record); 1744(b)(2) (false emergency report by United States national to a federal organization or government agency as defined); 1751(c)(2) (bribery of federal public servant); 1752(c)(2) (graft involving federal public servant); 1754(d)(2) (trading in special influence affecting federal public servant); 1755(b) (trading in public office affecting federal public servant); 1756(b) (speculating on official action or information by federal public servant or affecting federal government agency); 1757(d) (tampering with a federal public servant); 1758(b) (retaliating against a federal public servant); 2301(d)(2) (murder if the victim is the President, President-elect, Vice-President, Vice-President-elect, acting President by law, Senator, Representative, Senator or Representative-elect, delegate or resident commissioner to Congress, or a federally protected foreign individual); 2311(c)(2) (maiming of same classes of victims enumerated for murder); 2315(c)(2) (terrorizing federally protected foreign individual); 2321(c)(2) (kidnapping in the special jurisdiction of the United States or affecting the same classes of victims enumerated for murder); 2501(d) (arson of property owned by or under the care, custody or control of the United States, or being produced, manufactured, constructed or stored under contract for the United States); 2502(e) (aggravated property destruction of the same categories of property as in arson); 2521(c)(2) (robbery of federally protected foreign individual); 2522(c) (extortion against federally protected foreign individual); 2538(b) (commandeering a United States registry vessel); 2541(d) (counterfeiting written instruments made or issued by or under the authority of or guaranteed by the United States); 2542(d) (forgery of same); 2543(d) (traffic in counterfeiting or forging implements within the special jurisdiction of the United States).

Customs offenses are based in part on a concept of "introduce" embracing transactions beginning anywhere outside the United States. *Id.* § 1914(2).

These incorporate collectively all the traditional bases for extraterritorial jurisdiction except, perhaps, for the universality principle. See H.R. 6915 Report, *supra* note 192, at 21.

254 Although the disjunctive "or" is not included, the intent is to make them independent alternatives. See H.R. 6915 Report, *supra* note 192, at 21-23.

255 H.R. 4711, *supra* note 186, § 111(c)(1).

256 See *supra* text accompanying notes 246-48.

257 H.R. 4711, *supra* note 186, § 111(c)(2). See H.R. 6915 Report, *supra* note 192, at 22 (using as an illustration ice floes in Antarctica).

258 See *supra* text accompanying notes 241-45.

259 H.R. 4711, *supra* note 186, § 111(c)(3). See H.R. 6915 Report, *supra* note 192, at 22.

260 See *supra* text accompanying notes 237-39.

261 H.R. 4711, *supra* note 186, § 111(c)(4).

262 *Id.* (final paragraph). See H.R. 6915 Report, *supra* note 192, at 23-24, indicating a legislative purpose to retain existing federal judicial doctrine, discussed *supra* text accompanying notes 155-66, 175-82.

263 See *supra* text accompanying notes 167-74.

264 RESTATEMENT REVISED DRAFT No. 3, *supra* note 4; RESTATEMENT REVISED DRAFT No. 2, *supra* note 1.

265 RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 401; RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, §§ 402-18.

266 RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 401(2); RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, §§ 441-43.

267 RESTATEMENT REVISED DRAFT No. 3, *supra* note 4, § 401(3).

268 RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 402(1)(a).

269 *Id.* § 402(1)(b).

270 *Id.* § 402(1)(c).

271 *Id.* § 402(2).

272 *Id.* 402(3). This is to be clarified to indicate that the protective principle is all that is meant. 4 ALI Reporter, No. 1, p. 8 (Oct. 1981) [hereinafter cited as 1981 ALI Reporter].

273 RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 404.

274 The reporters agreed to consider substitution for the term "unreasonable" of an alternative like "extravagant" or "exorbitant." 1981 ALI Reporter, *supra* note 272, at 8.

275 RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 403(1). The language will be clarified to indicate whether a connection is enough to precipitate applicability of the limitation, or whether there actually must be a clear jurisdictional conflict. 1981 ALI Reporter, *supra* note 272, at 8.

276 RESTATEMENT REVISED DRAFT No. 2, *supra* note 1, § 403(2). The factors include: (a) the extent to which activity takes place within or has substantial, direct and foreseeable effect upon or in a regulating state; (b) links like nationality, residence or economic activity between the regulating state and persons principally responsible for the activity, or between it and those whom the law or regulation is designed to protect; (c) the character of the regulated activity, the importance of regulation to the regulating state, the extent to which other nations regulate such activities, and the extent to which such a regulation is generally accepted as desirable; (d) the existence of justified expectations that might be protected or hurt by a regulation; (e) the importance of regulation to the international political, legal or economic system; (f) the extent to which regulation is consistent with international tradition; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by other states. Even if none of these criteria is directly affected, a law or regulation can be unreasonable if it requires persons or entities to violate another state's norms not unreasonable under those same criteria. In such an instance the respective interests of the regulating nations should be evaluated under the same criteria in respect of one another. *Id.* § 403(3). Even if Congress exceeds international law bounds in a clear purpose to assert jurisdiction, its product if otherwise constitutional is effective as law within the United States. *Id.* § 403(4)(b).

277 *Id.* § 415. The reporters are to revise this section to show applicability of the principle of reasonableness throughout, to suggest some circumstances which are *prima facie* reason-

able, to create greater flexibility in the categories and make them less rigid, and to make clear applicability of the Clayton Act. 1981 ALI Reporter, *supra* note 272, at 8.

278 The reporters are to consider deleting this alternative. 1981 ALI Reporter, *supra* note 272, at 8.

279 RESTATEMENT REVISED DRAFT NO. 2, *supra* note 1, § 416(1).

280 The effects principle rather than the passive personality principle is intended here. 1981 ALI Reporter, *supra* note 272, at 8.

281 RESTATEMENT REVISED DRAFT NO. 2, *supra* note 1, § 416(2). There is also special coverage of tax jurisdiction, *id.* §§ 411-413, and foreign subsidiaries of United States corporations, *id.* § 418, but these have at most only a slight bearing on criminal law matters.

282 *Id.* § 416(2).

283 *Id.* § 441(1).

284 Provisions on jurisdiction to enforce are contained in RESTATEMENT REVISED DRAFT NO. 3, *supra* note 4, §§ 431-432.

285 The alternatives on which jurisdiction to adjudicate may be rested under RESTATEMENT REVISED DRAFT NO. 2, *supra* note 1, are: (a) the person or thing is present within a state's territory on other than a transitory basis; (b) a natural person is domiciled or (c) resident in a state's territory; (d) a natural person is a national of the state; (e) a corporation or juridical person is organized pursuant to the law of the state or one of its subdivisions; (f) a ship, aircraft or other vehicle to which an adjudication relates is registered under the laws of the state; (g) a natural or juridical person has consented to exercise of jurisdiction by the state or a court or administrative tribunal (although this would have no validity in a criminal case because jurisdiction to adjudicate cannot be conferred through consent; *see supra* note 96); (h) a natural or juridical person regularly carried on business within a state or (i) carried on activity creating liability within a state (but only in respect to that activity); (j) a natural or juridical person carried on activity outside the state having a "substantial, direct, or foreseeable effect within the state" which created liability (but only in respect to that activity); or (k) a thing is owned, possessed or used in a state, but only with respect to that thing or a claim reasonably connected with it. *Id.* § 441(2). Special appearances are allowed to challenge jurisdiction, but other appearances (in noncriminal matters, at any rate) waive a defense of lack of jurisdiction. *Id.* § 441(3).

286 *Id.* § 442(1). This should have no impact on the resolution of the matter of treaty authorization for service of foreign judgments of conviction within the correctional system of a nation of citizenship. *See supra* text accompanying notes 99-128.

287 RESTATEMENT REVISED DRAFT NO. 2, *supra* note 1, § 443.

288 *Id.* § 442(2).

289 *Illinois v. Allen*, 397 U.S. 337 (1970); decisions cited *supra* note 96. *See generally* 1 B. GEORGE, MICHIGAN CRIMINAL PROCEDURE 10.20, 28, 29 (2d ed. 1980).

290 *Harvard Research in International Law, Extradition*, 29 AM. J. INT'L L. SUPP. 86-95 (1935) [hereinafter cited as *HRIL Extradition*].

291 *See, e.g., id.* at 123-37, 236-38; M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 435-42 (1974).

292 *HRIL Extradition, supra* note 290, at 144-48; Bassiouni, *supra* note 291, at 452-59.

293 *HRIL Extradition, supra* note 290, at 148-51.

294 Library of Congress studies on the extraterritorial coverage of the penal laws of a number of countries may be found in *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., Part III, Subpart C, 2173-2313 (1972).

295 *See supra* text accompanying notes 167-72.

296 *See supra* text accompanying notes 163-66, 274-83.



<sup>297</sup> See ABA Summary of Action of the House of Delegates, 1979 Annual Meeting 20-21 (1979).