Congressional Research Service

Report RL33658

Federal Extraterritorial Criminal Jurisdiction: Legislation in the 109th Congress

Charles Doyle, American Law Division

January 16, 2007

Abstract. Proposals introduced during the 109th Congress, that contain extraterritorial criminal jurisdiction components, took several forms. Some created or would have created new crimes with an overseas element. Others created or would have created new crimes and simply stated that they are to have overseas application. Still others created or would have created new crimes and articulated specific circumstances under which they apply abroad. And yet others would have expand existing statements of extraterritorial jurisdiction for existing crimes to enlarge the circumstances under which they apply.

Order Code RL33658

CRS Report for Congress

Federal Extraterritorial Criminal Jurisdiction: Legislation in the 109th Congress

Updated January 16, 2007

Charles Doyle
Senior Specialist
American Law Division

Prepared for Members and
Committees of Congress

Federal Extraterritorial Criminal Jurisdiction: Legislation in the 109th Congress

Summary

Crime is usually territorial. It is ordinarily a matter of the law of the place where it occurs. Nevertheless, a surprising number of American criminal laws apply outside of the United States. Application is generally a question of legislative intent, expressed or implied.

Three statutes enacted in the 109th Congress have sections that enjoy extraterritorial application. The USA PATRIOT Improvement and Reauthorization Act, P.L. 109-177, includes a handful of crimes that feature explicit extraterritorial jurisdiction. The Trafficking Victims Protection Reauthorization Act, P.L. 109-164, carries the Mann Act (18 U.S.C. ch. 117) and the peonage laws (18 U.S.C. ch. 77) overseas under certain circumstances. The Telephone Records and Privacy Protection Act, P.L. 109-476 outlaws various forms of fraud associated with the acquisition of telephone and e-mail records and states that extraterritorial jurisdiction exists over such offenses.

Comparable legislation pending at adjournment of the 109th Congress included:

- Border Protection, Antiterrorism, and Illegal Immigration Control Act (H.R. 4437)(House passed);
- Comprehensive Immigration Reform Act (S. 2611)(Senate passed);
- H.R. 5212 (relating to sexual offenses under the Military Extraterritorial Jurisdiction Act);
- S. 1226 (relating to human trafficking by federal contractors);
- S. 2402 (relating to money laundering);
- S. 12 (relating to war profiteering);
- S. 2356 (relating to war profiteering);
- S. 2361 (relating to war profiteering);
- H.R. 4682 (relating to war profiteering);
- S. 2368 (relating to alien smuggling);
- S. 2377 (relating to alien smuggling);
- S. 2454 (relating to alien smuggling).

In some instances the explicit statements of extraterritorial jurisdiction would have replicated the coverage the courts would have otherwise recognized. In some instances they would have expanded extraterritorial jurisdiction beyond that which the courts would have recognize in the absence of a statement; in still others they apparently would have curtailed it by mentioning some of the traditional grounds implicitly recognized and failing to mention others.

Contents

Federal Extraterritorial Criminal Jurisdiction: Legislation in the 109th Congress

Introduction

Subject matter jurisdiction over a criminal offense is usually a matter of the law of the place where the offense occurs. A number of federal criminal statutes, however, enjoy extraterritorial application. The most obvious include a statement of extraterritorial jurisdiction. The courts have held that the overseas reach of certain other statutes that have no such expressed statement must nevertheless be implied lest the intent of Congress be honored only imperfectly.[1] In recent years, Congress included statements of extraterritorial jurisdiction in its criminal statutes with increasing regularity. The trend continued in the 109th Congress.

Proposals introduced during the 109th Congress, that contain extraterritorial criminal jurisdiction components, took several forms. Some created or would have created new crimes with an overseas element. Others created or would have created new crimes and simply stated that they are to have overseas application. Still others created or would have created new crimes and articulated specific circumstances under which they apply abroad. And yet others would have expand existing statements of extraterritorial jurisdiction for existing crimes to enlarge the circumstances under which they apply.

Background

Some of the first federal criminal laws proscribed conduct occurring beyond the territorial confines of the United States. The first treason provision condemned that offense when committed "within the United States or elsewhere."[2] Those early federal crimes also included murder, manslaughter, maiming, and larceny, when committed within what we know today as the "special maritime and territorial jurisdiction of the United States."[3]

The special maritime and territorial jurisdiction of the United States refers to those areas such as federal enclaves over which the United States has exclusive or concurrent legislative jurisdiction; to the territorial waters of the United States; and

---

[1] See CRS Report 94-166, *Extraterritorial Application of American Criminal Law*, also available in an abridged version as CRS Report RS22497, *Extraterritorial Application of American Criminal Law: An Abbreviated Sketch*, both by Charles Doyle.

[2] 1 Stat. 112 (1790).

[3] 1 Stat. 113-116 (1790).

to ships of American registry.[4] When a crime has been committed by or against an American, the special maritime and territorial jurisdiction of the United States also includes (1) any place outside the jurisdiction of any other country, (2) any foreign vessel scheduled to depart from or to arrive in the United States, and (3) any overseas federal installation or residence of personnel assigned to an overseas federal installation other than those covered by the Military Extraterritorial Jurisdiction Act.[5]

When committed within the special maritime and territorial jurisdiction of the United States, federal law criminalizes among other things, murder,[6] manslaughter,[7] maiming,[8] assault,[9] kidnaping,[10] arson,[11] property destruction,[12] theft,[13] robbery,[14] and sexual abuse.[15] The Military Extraterritorial Jurisdiction Act outlaws misconduct committed outside the United States by a member of the United States armed forces no longer subject to court martial jurisdiction or by anyone employed by or accompanying the United States armed forces, if the misconduct would constitute an offense punishable imprisonment for more than one year had it been committed within the special maritime and territorial jurisdiction of the United States.[16]

When the vitality of a statute defining a federal crime does not depend upon the place where the crime is committed such as in a federal enclave, the Supreme Court held in *Bowman v. United States* that a statute which makes no statement as to its overseas application may overcome the presumption of purely domestic application if the failure to do so would frustrate the purpose for which Congress enacted the statute.[17]

---

[4] 18 U.S.C. 7.

[5] 18 U.S.C. 7(7), (8), (9).

[6] 18 U.S.C. 1111.

[7] 18 U.S.C. 1112.

[8] 18 U.S.C. 114.

[9] 18 U.S.C. 113.

[10] 18 U.S.C. 1201.

[11] 18 U.S.C. 81.

[12] 18 U.S.C. 1363.

[13] 18 U.S.C. 661.

[14] 18 U.S.C. 2111.

[15] 18 U.S.C. ch. 109A.

[16] 18 U.S.C. ch. 212. Members of the armed forces may be subject to prosecution for criminal conduct under the Uniform Code of Military Justice, 10 U.S.C. 801 et seq., the territorial application of which is beyond the scope of this report.

[17] *United States v. Bowman*, 260 U.S. 94, 97-98, 102 (1922) ("We have in this case a question of statutory construction. The necessary *locus*, when not specifically defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all

The Court later held in *Ford v. United States* that a similarly silent statute will be thought to have extraterritorial application where its violation has the statutorily anticipated impact within the United States.[18]

Based on *Bowman* and *Ford*, the lower federal courts have concluded that a federal criminal statute may be applied extraterritorially if it meets either of those standards.[19] Yet they have also concluded that absent an explicit indication to the contrary Congress intends questions of the overseas application of federal criminal law to be resolved consistent with the principles of international law.[20] Particularly in the earlier cases, the courts looked to whether application would satisfy one of the five international principles under which extraterritorial application of criminal law had been recognized. Those principles will allow the application of the criminal laws of one country within the territory of another when:

- the misconduct occurs in part within the territory of the proscribing country (the territorial principle);

---

kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negate the purpose of Congress in this regard. We have an example of this in the attempted application of the prohibitions of the Anti-Trust Law to acts done by citizens of the United States against other such citizens in a foreign country. *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347. That was a civil case, but as the statute is criminal as well as civil, it presents an analogy.

"But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense"). *Bowman* involved the scheme of Americans to defraud the United States overseas.

[18] *Ford v. United States*, 273 U.S. 593, 623 (1927)("a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done"). *Ford* involved foreign rum runners seized on the high seas while on board a British ship hovering just outside U.S. territorial waters.

[19] E.g., United States v. Villanueva, 408 F.3d 193, 197-98 (5th Cir. 2005)("[Congressional] intent can be inferred when limiting the locus of a statute to U.S. territory would greatly curtail the scope and usefulness of the statute and leave open a large immunity for frauds that are as easily committed by citizens extraterritorially as at home")

[20] *United States v. Vasquez-Velasco*,15 F.3d 833, 839 (9th Cir. 1994)("In determining whether a statute applies extraterritorially, we also presume that Congress does not intent to violate principles of international law").

- the misconduct is that of a national of the proscribing country (the nationality principle);

- the proscription applies to misconduct committed against the nationals of the proscribing country (the passive personality principle);

- the misconduct has an impact within the proscribing country (the protective principle); and

- the misconduct is universally condemned (the universal principle).[21]

The lower federal courts have read these principles and the *Bowman* and *Ford* decisions to suggest that American extraterritorial criminal jurisdiction includes a wide range of statutes designed to protect federal officers, employees and property, to prevent smuggling and to deter the obstruction or corruption of the overseas activities of federal departments and agencies.[22] They have held, for instance, that the statute outlawing the assassination of Members of Congress may be applied against an American for a murder committed in a foreign country,[23] and that statutes

---

[21] "An analysis . . . discloses five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five general principles are: first, the *territorial principle*, determining jurisdiction by reference to the place where the offence is committed; second, the *nationality principle*, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the *protective principle*, determining jurisdiction by reference to the national interest injured by the offence; fourth, the *universality principle*, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the *passive personality principle*, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis for an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles." Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW (SUPP.) 439, 445 (1935) (emphasis added).

[22] *United States v. MacAllister*, 160 F.3d 1304, 1308 n.8 (11th Cir. 1998)("On authority of *Bowman*, courts have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm"); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1346 (D.C. Cir. 2004)("In reaching its conclusion that the fraud statute before it in *Bowman* applied extraterritorially, the Supreme Court recited several other statutes, not expressly territorial, but which might by the very nature of the crime outlawed be supposed to apply extraterritorially. Among these, Chief Justice Taft, for the Court, noted the punishment of a consul who knowingly certified a false invoice, the forging or altering of a ship's papers, the enticing of desertions from naval service, and the bribing of a United States officer in civil, military, naval service").

[23] *United States v. Layton*, 855 F.2d 1388, 1395-397 (9th Cir. 1988) (At the time of the murder of Congressman Ryan for which Layton was convicted the statute was silent as to

prohibiting the murder or kidnaping of federal law enforcement officials apply in other countries even if the offenders are not Americans,[24] and even if the offenders incorrectly believed the victims were federal law enforcement officers.[25] They have also discovered extraterritorial jurisdiction appropriate:

- to cases where aliens have attempted to defraud the United States in order to gain admission into the United States;[26]

- to false statements made by Americans overseas;[27]

- to the theft of federal property by Americans abroad;[28]

- to drug trafficking on the high seas;[29]

- to an overseas plot to sabotage American airline flights;[30]and

- to counterfeiting, forging or otherwise misusing federal documents or checks overseas by either Americans or aliens[31].

---

its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)).

[24] *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204-206 (9th Cir. 1991); *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984).

[25] *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994).

[26] *United States v. Pizzarusso*, 388 F.2d 8, 9-10 (2d Cir. 1968); *Rocha v. United States*, 288 F.2d 545, 549 (9th Cir. 1961); *United States v. Khale*, 658 F.2d 90, 92 (2d Cir. 1981); *United States v. Castillo-Felix*, 539 F.2d 9, 12-3 (9th Cir. 1976).

[27] *United States v. Walczak*, 783 F.2d 852, 854-55 (9th Cir. 1986).

[28] *United States v. Cotten*, 471 F.2d. 744, 749 (9th Cir. 1973).

[29] *United States v. Perlaza*, 439 F.3d 1149, 1162 (9th Cir. 2006)("Drug trafficking presents the sort of threat to our nation's ability to function that merits application of the protective principle of jurisdiction"); *United States v. Gonzalez*, 311, F.3d 440, (1st Cir. 2002)("Congress obtains authority to regulate drug trafficking on the high seas under the protective principle of international law").

[30] *United States v. Yousef*, 327 F.3d 56, 96-97 (2d Cir. 2003)("First, jurisdiction over Counts Twelve through Eighteen is consistent with the 'passive personality principle' of customary international jurisdiction because each of these counts involved a plot to bomb United States-flag aircraft that would have been carrying United States citizens and crews and that were destined for cities in the United States. Moreover, assertion of jurisdiction is appropriate under the objective territorial principle because the purpose of the attack was to influence United States foreign policy and the defendants intended their actions to have an effect – in this case, a devastating effect – on and within the United States. Finally, there is not doubt that jurisdiction is proper under the 'protective principle' because the planned attacks were intended to affect the United States and to alter its foreign policy").

[31] *United States v. Birch*, 470 F.2d 808, 810-11 (4th Cir. 1972); *United States v. Fernandez*, 496 F.2d 1294, 1296 (5th Cir. 1954); *United States v. Aguilar*, 756 F.2d 1418, 1425 (9th Cir. 1985); *United States v. Castillo-Felix*, 539 F.2d 9, 12-3 (9th Cir. 1976).

In the more contemporary cases, the courts often also referred to the summary of the law portrayed in the Restatement,[32] that provides not only a somewhat different formulation of extraterritorial principles,[33] but also a list of factors to be considered in order to determine how the principles should be reasonably applied.[34]

The presumptions of domestic application and consistency with the principles of international law, however, operate as interpretative guides. They cannot overcome a clear expression of Congressional intent to the contrary.[35]

Explicit Extraterritorial Jurisdiction

"There is extraterritorial jurisdiction". Sometimes, Congress has simply declared that there is extraterritorial jurisdiction over the offense defined in the

---

[32] *United States v. Clark*, 435 F.3d 1100, 1106 n.8 (9th Cir. 2006)(citing both the Restatement and "the five principles"); *United States v. DeLeon*, 270 F.3d 90, 92 (1st Cir. 2001).

[33] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402 (1986)("Subject to §403 [relating to instances where jurisdictional claims would be unreasonable], a state has jurisdiction to prescribe law with respect to (1)(a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory; (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests ").

[34] ID. at §403 ("(1) Even when one of the bases for jurisdiction is under §402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable. (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability for such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state").

[35] *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006)("The legal presumption that Congress ordinarily intends federal statutes to have only domestic application is easily overcome in Clark's case because the text of §2423(c) is explicit as to its application outside the United States"); *United States v. Yousef*, 327 F.3d 56, 91 (2d Cir. 2003)("United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law, and in fact may conflict with both").

statute.[36] This appears to be shorthanded way of saying there is federal extraterritorial jurisdiction under any circumstances recognized under one or more of the internationally recognized principles. That is, there is jurisdiction over the crime committed outside of the United States if (1) the crimes occurs in part within the United States or has a substantial impact here (territorial principle), (2) the offender is an American (nationality principle), (3) the victim of the offense is an American (passive personality principle), (4) the crime relates to the national security, integrity of governmental processes, or similar interest of the United States (protective principle), or (5) the crime is universally condemned (universal principle) or (6) is one condemned by treaty or international agreement and occurs outside the territory of any country or within a country which is a signatory to the operative treaty or agreement.[37]

Several proposals in the 109th Congress followed this model. Numbered among them were several immigration-related proposals that would have amended the alien smuggling prohibitions in section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) and added this type of general statement of extraterritorial jurisdiction to it, proposed 8 U.S.C. 1324(a)(4). The bills in question were:

- Comprehensive Immigration Reform Act (S. 2611 as agreed to by the Senate);
- Border Protection, Antiterrorism, and Illegal Immigration Control Act (H.R. 4437 as passed by the House);
- Border Security and Interior Enforcement Improvement Act (S. 2377);
- Border Security and Interior Enforcement Improvement Act (S. 2368); and
- Securing America's Borders Act (S. 2454).

Even in the absence of a statement of extraterritorial jurisdiction, the courts seem likely to conclude that the statute was intended to have extraterritorial application and that such application constitutes no affront to the principles of international law. Smuggling aliens into the United States has an impact within the United States and thus comes within the territorial principle. In fact, the appellate courts to consider the question to date have concluded the section is extraterritorially applicable.[38]

A general statement of extraterritorial jurisdiction also appears in the Telephone Records and Privacy Protection Act, P.L. 109-476 (H.R. 4709) that outlaws the purchase or receipt in interstate or foreign commerce of fraudulently obtained confidential telephone records, 18 U.S.C. 1039(b).[39] The records in question are

---

[36] E.g., 18 U.S.C. 351(i)("There is extraterritorial jurisdiction over the conduct prohibited by this section"); 18 U.S.C. 1751(k)(same); 18 U.S.C. 1513 ("There is extraterritorial federal jurisdiction over an offense under by this section").

[37] *United States v. Yousef*, 327 F.3d 56, 108-110 (2d Cir. 2003).

[38] *United States v. Villanueva*, 408 F.3d 193, 197-200 (5th Cir. 2005); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1344-345(D.C.Cir. 2004); *United States v. Castillo-Felix*, 539 F.2d 9, 12-3 (9th Cir. 1976).

[39] In other context, "in interstate or foreign commerce" means through the use of the facilities or instrumentalities of interstate or foreign commerce, a narrower concept than activities that affect interstate or foreign commerce, *United States v. Ballinger*, 395 F.3d

those of a "covered entity," i.e., telecommunications carriers and "any provider of IP-enabled voice service," proposed 1039(b),(h). The bill appears to be limited to the records of service provided within the United States, because, for among other reasons, the definition of carriers is taken from the Communications Act of 1934 (47 U.S.C. 153) that regulates communications services provided within the United States, 47 U.S.C. 152.

Without an express statement of exterritorial jurisdiction, the federal wiretap law, 18 U.S.C. 2510-2522, that now affords certain privacy protections for telephone communications has been held to have no extraterritorial application.[40] On the other hand, the similarly silent wire fraud statute has been held to apply to at least some overseas violations.[41] With the express statement, the proposed prohibition would appear to apply overseas where the offender is an American (nationality principle) or the records relate to services provided in the United States (territorial and passive personality principles).

A general statement proposal appeared as well in two bills that would have condemned certain forms of fraud by government contractors, the War Profiteering Prevention Act (S. 2356), proposed 18 U.S.C. 1039(b), the Honest Leadership and Accountability in Contracting Act (S. 2361), proposed 18 U.S.C. 1039(b), and the Real Security Act (S. 3875), proposed 18 U.S.C. 1039(b). As in the case of the alien smuggling offenses, the courts have recognized extraterritorial jurisdiction over similar offenses previously, even in the absence of any explicit statutory statement.[42] Possible ambiguity in the bills' prohibitions make it difficult to describe the intended reach of their statements of extraterritorial jurisdiction with any confidence. Both bills would have outlawed government contractor schemes to defraud the United States, but then would have gone on to proscribe various forms of price gouging and deception without indicating what nexus to the United States, if any, would have been required for this second set of crimes. Assuming these latter offenses encompassed contractor abuse in any war or military conflict and (except for jurisdictional purposes) regardless of the victim, the proposed general statement of extraterritorial jurisdiction would have permitted prosecution at a minimum when (1) the offense was committed in part within the United States (territorial principle), (2) the offense was committed by an American (nationality principle), or (3) the offense was committed against the United States (protective principle).

1218, 1225-238 (11th Cir. 2005); *United States v. Weathers*, 169 F.3d 336, 341-342 (6th Cir. 1999); *United States v. Dinwiddie*, 76 F.3d 913, 919 (8th Cir. 1996).

[40] *Stowe v. Devoy*, 588 F.2d 336, 341 (2d Cir. 1978).

[41] *United States v. Kim*, 246 F.3d 186, 189-91(2d Cir. 2001).

[42] *United States v. Walczak*, 783 F.2d 852, 854-55 (9th Cir. 1986)(18 U.S.C. 1001 (relating to material false statements on a matter within the jurisdiction of a federal agency or department)); *United States v. Cotton*, 471 F.2d 744, 749 (9th Cir. 1973)(18 U.S.C. 641 (relating to the theft of government property) and 18 U.S.C. 371 (relating to conspiracy to violate federal law or to defraud the government)); *Bowman v. United States*, 260 U.S. 94, 102 (1922)(a earlier version of 18 U.S.C. 371 (conspiracy to defraud the United States)).

"If": Free Standing Statements. At least as often as Congress uses a general statement of extraterritorial jurisdiction, it will state in a separate clause, subsection or section that there is extraterritorial jurisdiction over a particular offense under certain designated circumstances. For instance, 50 U.S.C. 424 declares, "There is jurisdiction over an offense under section 421 of this title [relating to disclosure of the identity of covert agents] committed outside the United States *if* the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence (as defined in section 1101(a)(2) of title 8)"(emphasis added). Statements of this kind serve to rebut any presumptions as to the purely domestic intent of Congress or as to the intent to conform to any conflicting principles of international law. On the other hand, by listing specific jurisdictional factors, Congress may be thought to have rejected application on the basis of unmentioned factors that might otherwise have been construed to support a claim of extraterritorial jurisdiction.

In the 109th Congress, the immigration reform proposals exemplified this approach. The Comprehensive Immigration Reform Act (S. 2611 as agreed to by the Senate), the Comprehensive Immigration Reform Act (S. 2612), and the Securing America's Borders Act (S. 2454) would have rewritten 18 U.S.C. ch. 75 relating to passport and visa offenses, and among other changes add a new section governing the extraterritorial application of the chapter, proposed 18 U.S.C. 1551(b):

> (b) Any person who commits an offense under this chapter outside the United States shall be punished as provided under this chapter if –
>
> (1) the offense involves a United States immigration document (or any document purporting to be such a document) or any matter, right, or benefit arising under or authorized by federal immigration laws;
>
> (2) the offense is in or affects foreign commerce;
>
> (3) the offense affects, jeopardizes, or poses a significant risk to the lawful administration of federal immigration laws, or the national security of the United States;
>
> (4) the offense is committed to facilitate an act of international terrorism (as defined in section 2331) or a drug trafficking crime (as defined in section 929(a)(2)) that affects and would affect the national security of the United States;
>
> (5) the offender is a national of the United States (as defined in section 101(a)(220 of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(12) of such Act); or
>
> (6) the offender is a stateless person whose habitual resident is in the United States.[43]

The specific jurisdictional circumstances in this proposed inventory reflected in part conditions under which the courts have approved extraterritorial application in the absence such a statement. Proposed section 1551(b)(1) would have grounded extraterritorial jurisdiction on the fact that the fraud or other offenses involved a U.S.

---

[43] The proposed offenses in chapter 75 are: 18 U.S.C. 1541 (trafficking in passports); 1542 (false statement in an application for a passport); 1543 (forgery and unlawful production of a passport); 1544 (misuse of a passport); 1545 (schemes to defraud aliens); 1546 (immigration and visa fraud); 1547 (marriage fraud); 1548 (attempt and conspiracy).

immigration document. The courts have recognized extraterritorial jurisdiction in such cases in the past.[44]

On the other hand, the proposed amendments to 18 U.S.C. ch.75 would have outlawed offenses involving foreign passports and passport offenses involving U.S. passports without regard to whether they were committed in frustration of U.S. immigration laws, proposed 18 U.S.C. 1541-1544.[45] Under existing law, the courts faced with a comparable prohibition relating to U.S. passports and a statute silent as to extraterritorial jurisdiction would likely uphold overseas application under the protective principle.[46] Under proposed section 1551(b) this option apparently would have been foreclosed, since the grounds for extraterritorial jurisdiction would have been specifically listed and the fact the offense involves a U.S. passport as such was not among them. The loss might have been minimal considering the scope of the grounds for extraterritorial jurisdiction under proposed section 1551(b).

Proposed section 1551(b)(2) would have permitted the exercise of extraterritorial jurisdiction over such offenses when they were committed "in or affect[ing] foreign commerce [of the United States]." The phrase bespeaks sweeping legislative authority when used in the context of interstate commerce where federalism cabins its scope.[47] Even after *Lopez* and *Morrison* the lower federal appellate courts have suggested that a prosecution need rest on no more than a de minimis impact on interstate commerce.[48] Its power over foreign commerce has been said to be at least equally robust.[49] On its face the section apparently would have had

---

[44] *United States v. Pizzarusso*, 388 F.2d 8, 9-10 (2d Cir. 1968)(18 U.S.C. 1546 (relating to fraud in connection with visas, permits or similar documents)); *Rocha v. United States*, 288 F.2d 545, 549 (9th Cir. 1961)(same); *United States v. Khale*, 658 F.2d 90, 92 (2d Cir. 1981)(same); *United States v. Castillo-Felix*, 539 F.2d 9, 12-3 (9th Cir. 1976)(18 U.S.C. 1426 (relating to the reproduction of naturalization or citizenship papers) and 8 U.S.C. 1324 (relating to bringing in aliens unlawfully)).

[45] Proposed 18 U.S.C. 1553(8) defines a passport as a "travel document attesting to the identify and nationality of the bearer that is issued under the authority of the Secretary of State, a foreign government, or an international organization; or any instrument purporting to be the same."

[46] *Cf., United States v. Birch*, 470 F.2d 808, 811-12 (4th Cir. 1972)(forgery of government documents comes within the protective principle).

[47] "Congress may regulate the use of the channels of interstate commerce. Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally Congress' commerce authority includes the power to regulate activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce," *United States v. Morrison*, 529 U.S. 598, 609 (2000)(internal citations omitted), quoting, *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

[48] *United States v. Foster*, 443 F.3d 978, 982 (8th Cir. 2006); *United States v. Johnson*, 440 F.3d 832, 841 (6th Cir. 2006); *United States v. Lee*, 439 F.3d 381, 387 (7th Cir. 2006); *United States v. Lynch*, 437 F.3d 902, 908-909 (9th Cir. 2006).

[49] *United States v. Clark*, 435 F.3d 1100, 1113 (9th Cir. 2006)("There is no counterpart to *Lopez* or *Morrison* in the foreign commerce realm that would signal a retreat form the Court's expansive reading of the Foreign Commerce Clause. In fact, the Supreme Court has

sufficient breadth, for example, to permit U.S. prosecution of a foreign national using a forged foreign passport in connection with passage between two European cities aboard a cruise line ship of foreign registry but with American passengers who booked their cruise in the United States.

This may be further than the courts have been willing to go absent some other justification for jurisdiction. Nevertheless, they have upheld jurisdictional claims where the illicit activity in a foreign commercial environment had a real or potential substantial effect in this country.[50] In *United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006), the defendant was convicted under a statute which applied to Americans who had traveled in foreign commerce prior to commission of the proscribed conduct overseas, 18 U.S.C. 2423(c). The court concluded that the statute came within Congress' legislative power under the commerce clause[51] and that it might be applied to misconduct of Americans overseas.[52] In *United States v. Yousef*, 327 F.3d 56, 110-11 (2d Cir. 2003), a terrorist plot to sabotage U.S. airlines overseas was thought to come within the protective principle since it was motivated by an effort to influence U.S. governmental policy.

Both proposed sections 1551(b)(3) and (4) would have been couched in terms of the national security interests of the United States,[53] a standard the courts have generally recognized within the protective principle.[54] Proposed section 1551(b)(5) would have been triggered when the offender was an American, again a commonly recognized basis for the assertion of extraterritorial jurisdiction.[55] The final proposed jurisdictional section, 1551(b)(6), would have covered stateless persons who are

---

never struck down an act of Congress as exceeding its power to regulate foreign commerce").

[50] *Ford v. United States*, 273 U.S. 593, 623 (1927)(upholding the conviction of rum runners seized on the high seas just outside U.S. territorial waters); *United States v. Wright-Baker*, 784 F.2d 161, 1689 (3d Cir. 1986)(uphold a conviction for possession of cargo of marijuana on the high seas destined the United States under the effects test).

[51] 435 F.3d at 1109-116.

[52] 435 F.3d at 1106-107.

[53] Proposed 18 U.S.C. 1551(b)(3), (4)("(3) the offense affects, jeopardizes, or poses a significant risk to the lawful administration of federal immigration laws, or the national security of the United States; (4) the offense is committed to facilitate an act of international terrorism (as defined in section 2331) or a drug trafficking crime (as defined in section 929(a)(2)) that affects and would affect the national security of the United States").

[54] *United States v. Yousef*, 327 F.3d 56, 110-11 (2d Cir. 2003); *Rocha v. United States*, 288 F.2d 545, 549 (9th Cir. 1961); *see also*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §402, cmt. f (1986)("International law recognizes the right of a state to punish a limited class of offenses committed outside its territory by persons who are not its nationals – offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems").

[55] *United States v. Clark*, 435 F.3d 1100, 1106-107 (9th Cir. 2006); *United States v. Harvey*, 2 F.3d 1318, 1329 (3d Cir. 1993); *see also*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §402(2) (1986).

"habitual" residents of the United States. A number of criminal statutes, recently enacted to implement our international obligations, use habitually residing, stateless offenders as a basis for extraterritorial application.[56] This would have been another.

In another example, the narco-terrorism offense, 21 U.S.C. 960A, created in the USA PATRIOT Improvement and Reauthorization Act,[57] outlaws overseas drug trafficking for the benefit of a foreign terrorist organization. It provides for extraterritorial jurisdiction if:

> (1) the prohibited drug activity or the terrorist offense is in violation of the criminal laws of the United States;
>
> (2) the offense, the prohibited drug activity, or the terrorist offense occurs in or affects interstate or foreign commerce;
>
> (3) an offender provides anything of pecuniary value for a terrorist offense that causes or is designed to cause death or serious bodily injury to a national of the United States while that national is outside the United States, or substantial damage to the property of a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions) while that property is outside of the United States;
>
> (4) the offense or the prohibited drug activity occurs in whole or in part outside of the United States (including on the high seas), and a perpetrator of the offense or the prohibited drug activity is a national of the United States or a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions); or
>
> (5) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States. 21 U.S.C. 960A(b).

When the violation relies upon a violation of U.S. drug or terrorism laws, section 960A(b)(1) calls for application of the extraterritorial standard of the underlying drug or terrorism statute. Its arm is as long as that of its predicate offenses. Sections 960A(b)(3) and (4) mirror the nationality principle – the offender is an American or an American is the victim of the terrorism offense financed by the drug trafficking.

The two remaining sections are more expansive. The first, section 960A(b)(2), becomes operable if either the predicate drug trafficking or the predicate terrorism offense occur in or affect the interstate or foreign commerce of the United States. As is the case of the passport offenses mentioned earlier, without reference to such a provision the courts would probably find extraterritorial jurisdiction, when either predicate offense had a substantial impact in the United States. Section 960A(b)(2) is likely to encompass even more, for as previously indicated the "effect on commerce" standard is particularly sweeping, especially in a foreign commerce context.

---

[56] 18 U.S.C. 2280(b)(A)(iii) (violence against maritime navigation), 2281(b)(1)(B)(violence against maritime fixed platforms), 2339B(d)(1)(B) (material support to terrorist organization), 2339C(b)(2)(A)(financing terrorism). 2339D(b)(2) (receipt of military training from a foreign terrorist organization), 2332f (bombings of public places or facilities; offense committed by or against a stateless person).

[57] P.L. 109-177, §122, 120 Stat. 225 (2006).

The court in *Yousef* concluded that "terrorism – unlike piracy, war crimes, and crimes against humanity – does not provide a basis for universal jurisdiction,[58] but found the exercise of jurisdiction justified on the basis of the protective principle.[59] Section 960A(b)(5) codifies a universal principle for the narco-terrorism offense, i.e., there is extraterritorial jurisdiction if the offender is later brought to or travels to the United States.

The USA PATRIOT Improvement and Reauthorization Act has another example of extraterritorial jurisdiction defined by the existence of specific jurisdictional factors. It outlaws the destruction of vessels and maritime facilities, 18 U.S.C. 2290, and confers extraterritorial jurisdiction if (a) the offender or the victim is an American, (b) an American is aboard a targeted vessel, or (c) the target vessel is an American vessel.[60] All of which would be consistent with the nationality and passive personality principles, and under some circumstances, with the territorial and protective principles.

The Trafficking Victims Protection Reauthorization Act, P.L. 109-164, uses a comparable style when it creates a new offense that prohibits anyone employed by or accompanying the federal government overseas from engaging in conduct that would violate 18 U.S.C. ch. 77 (relating to peonage)[61] or 18 U.S.C. ch. 117 (relating to travel for sexual purposes)[62] if committed within the United States or the special maritime or territorial jurisdiction of the United States, 18 U.S.C. 3271.

---

[58] 327 F.3d at 108.

[59] 327 F.3d at 110-11.

[60] "There is jurisdiction, including extraterritorial jurisdiction, over an offense under this chapter if the prohibited activity takes place . . . (2) outside the United States and – (A) an offender or victim is a national of the United States (as that term is defined under section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)); (B) the activity involves a vessel in which a national of the United States was on board; or (C) the activity involves a vessel of the United States (as that term is defined under section 2 of the Maritime Drug Law Enforcement Act, 46 U.S.C.App. 1903)," 18 U.S.C. 2290(a)(2).

[61] The following sections appear in 18 U.S.C. ch. 77: 18 U.S.C. 1581 (peonage; obstructing enforcement); 1582 (vessels for slave trade); 1583 (enticement into slavery); 1584 (sale into involuntary servitude); 1585 (seizure, detention, transportation or sale of slaves); 1586 (service on vessels in slave trade); 1587 (possession of slaves aboard vessels); 1588 (transportation of slaves from United States); 1589 (forced labor); 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor); 1591 (sex trafficking of children or by force, fraud, or coercion); 1592 (unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor). Each of the crimes proscribed in these sections is a felony punishable by a maximum term of imprisonment of at least two years).

[62] The following sections appear in 18 U.S.C. ch. 117: 18 U.S.C. 2421 (transportation generally); 2422 (coercion and enticement); 2423 (transportation [for sexual purposes involving minors and others]); 2424 (filing factual statement about alien individual); 2425 (use of interstate facilities to transmit information about a minor). Each of the crimes proscribed in these sections is a felony punishable by a maximum term of imprisonment of at least two years).

The Military Extraterritorial Jurisdiction Act already holds accountable for overseas special maritime and territorial felonies anyone employed by or accompanying the armed forces of the United States, 18 U.S.C. 3261. (H.R. 5212 would have amended section 3261 so that the act would have applied not only to felonies but to a range sexual offenses.) The act does not cover those employed by or accompanying federal entities other than the military departments or agencies and it does not cover misdemeanors (crimes punishable by a maximum term of imprisonment of one year or less), id.

The definition of special maritime and territorial jurisdiction fills some of the gaps, 18 U.S.C. 7(9). It makes the special maritime and territorial offenses applicable when committed by Americans on overseas federal installations or in the residences of personnel assigned to such facilities, id. The focus of 18 U.S.C. 3271 appears to be the misconduct which neither section 7(9) nor the Military Extraterritorial Jurisdiction Act can reach: (1) peonage and sexual transportation offenses committed overseas by foreign nationals employed by or accompanying federal entities other than the U.S. armed forces; and (2) such offenses committed overseas by Americans employed by or accompanying such entities when committed in locations other than federal facilities or related residences.

Rather than create a new crime but to much the same effect, the Federal Contractor Extraterritorial Jurisdiction for Human Trafficking Offenses Act (S. 1226) would have added a jurisdictional statement to end of chapter 77 that would have prohibited government contractors from engaging in conduct that would violate 18 U.S.C. ch. 77 (relating to peonage) if committed within the special maritime or territorial jurisdiction of the United States, proposed 18 U.S.C. 1596. The result would have been much the same as under P.L. 109-164: extraterritorial jurisdiction would have existed over (1) peonage offenses committed overseas by foreign nationals employed by or accompanying federal entities other than the U.S. armed forces; and (2) such offenses committed overseas by Americans employed by or accompanying such entities when committed in locations other than federal facilities or related residences, proposed 18 U.S.C. 1596.

Another proposal would have amended rather than created a separate jurisdictional statement. In its present form, the statement of extraterritorial jurisdiction in money laundering cases extends to cases involving more than $10,000 and either a United States citizen or conduct occurring in part within the United States, 18 U.S.C. 1956(f)(1). S. 2402 would have amended the section so it extends to cases involving more than $10,000 and either a United States citizen, conduct occurring in part within the United States, or conduct having an effect in the United States, proposed 18 U.S.C. 1956(f)(1).

Interwoven Statements. As a matter of style, the statements of extraterritorial jurisdiction are often interwoven among the elements of the offense rather than parsed out as a separate clause, subsection or section. Thus for instance, the treason statute outlaws treason when committed within the United States or elsewhere. The USA PATRIOT Improvement and Reauthorization Act supplies samples of this type of statute as well. It creates two new transportation offenses. One condemns anyone "who knowingly transports aboard . . . any vessel outside the United States and on the high seas or having United States nationality" explosives

or certain other dangerous materials with the knowledge they are to be used to commit various crimes of terrorism, 18 U.S.C. 2283. The second uses the same "on the high seas or having United States nationality" language but applies it to the transportation of an individual known to be traveling to or from the commission of a crime of terrorism, 18 U.S.C. 2284.

Other than explosives, the materials whose transportation is covered in the new section 2283, biological weapons, chemical weapons, nuclear materials and the like, are subject of international treaties and agreements under which the United States is a party. Each of the criminal statutes enacted to implement those agreements provides for extraterritorial application. In the case of biological weapons, extraterritorial jurisdiction exists if the offender or victim of the offense is an American;[63] for chemical weapons and weapons of mass destruction it also exists if the offense is committed against federal property whether within or outside the United States;[64] for nuclear material offenses it also exists if the offender is later found in the United States.[65]

The extraterritorial jurisdiction of the predicate terrorism offenses associated with section 2284 (transporting a terrorist) vary considerably, ranging from implicit,[66] to general statements,[67] to detailed specific statements of extraterritorial jurisdiction.[68]

In the absence of a jurisdictional element, the offenses under sections 2283 and 2284 would have enjoyed the same extraterritorial application as the underlying predicate offenses.[69] By making a jurisdiction factor an element of the offense, however, sections 2283 and 2284 preclude extraterritorial jurisdiction on any other basis.

---

[63] 18 U.S.C. 175 ("There is extraterritorial federal jurisdiction over an offense under this section committed by or against a national of the United States").

[64] 18 U.S.C. 229(c).

[65] 18 U.S.C. 831 (c)(3), 2332a(a)(1), (3), (b).

[66] 18 U.S.C. 1361 (destruction of federal property).

[67] 18 U.S.C. 351(i)(assassination of Members of Congress, etc.)("There is extraterritorial jurisdiction over the conduct prohibited by this section").

[68] 18 U.S.C. 37)b)(2) (violence at international airports)("There is jurisdiction over the prohibited activity in subsection (a) if . . . (2) the prohibited activity takes place outside the Untied States and (A) the offender is later found in the United States; or (B) the offender or victim is a national of the United States . . .").

[69] Those who aid or abet in the commission of an offense and who are guilty of acting as accessories after the fact of its commission are subject to the same extraterritorial jurisdiction as the principles, *cf. United States v. Villanueva*, 408 F.3d 193, 198, 202 (5th Cir. 2005)(recognizing extraterritorial jurisdiction for a violation of the alien smuggling statute and upholding the conviction a defendant aided and abetted the offense abroad); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991)(extraterritorial jurisdiction of the predicate offenses applies to accessories after the fact). The offenses here, sections 2283 and 2284, are simply accessory offenses.