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Extraterritorial Jurisdiction of Federal Criminal Law: The Assassination of Congressman Ryan

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CASENOTE

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United States v. Layton
509 F. Supp. 212 (N.D.Cal. 1981)

On November 18, 1978, United States Congressman Leo J. Ryan was murdered, and United States Deputy Chief of Mission Richard Dwyer wounded, in the Republic of Guyana. The two were investigating reports that members of a commune of the People's Temple, a religious cult established by Jim Jones, were being held against their will. The assassination of the Congressman triggered the mass suicide at Jonestown, Guyana, in which more than 900 members of the cult died. Lawrence J. Layton, a citizen of the United States and one of Jones' closest aides, was the only person left alive who was implicated in the crime.[1]

Layton was jailed for two years in Guyana where he was tried and acquitted of the murders of two cult defectors under the criminal laws of that nation.[2] Later, charges against him for the assassination of Congressman Ryan were dropped by Guyanese officials since all the witnesses had left the country.[3] Despite the absence of an extradition treaty,[4] the Guyanese Government cooperated in transferring Layton to the jurisdiction of the United States, where he was indicted on four criminal counts: (1) conspiracy to murder Congressman Ryan under 18 U.S.C. § 351(d); (2) aiding and abetting in his murder under 18 U.S.C. §§ 351(a), 2; (3) conspiracy to murder Deputy Chief of Mission (DCM) Dwyer - an internationally protected person - under 18 U.S.C. § 1117; and (4) aiding and abetting in his attempted murder under 18 U.S.C. §§ 1116(a), 2.[5]

Defendant Layton moved to dismiss the indictment on the

1. N.Y. Times, Nov. 4, 1979, at 49, col. 4.
2. N.Y. Times, Oct. 10, 1980, at 16, col. 6.
3. N.Y. Times, Nov. 4, 1979, at 49, col. 4.
4. N.Y. Times, Mar. 8, 1979, at 22, col. 1.
5. United States v. Layton, 509 F. Supp. 212, 214 (N.D.Cal. 1981).

ground that the court lacked subject matter jurisdiction because the underlying events had occurred in a foreign territory.[6] In denying this motion, the United States District Court for the Northern District of California held that extraterritorial jurisdiction was implicit in the respective statutes and that there was proper subject matter jurisdiction over all counts of the indictment.[7] *United States v. Layton*, 509 F. Supp. 212 (N.D.Cal. 1981).

This Note examines the historical and legal background against which the *Layton* opinion was written. It concludes with an analysis of the court's decision and of the underlying policy considerations involved in the extraterritorial application of federal criminal law.

I. Extraterritorial Jurisdiction Under International and American Law

International law recognizes five principles of legislative jurisdiction over criminal acts: (1) *territorial* and *objective territoriality*, (2) *protective*, (3) *nationality*, (4) *passive personality*, and (5) *universality*.[8] In denying the defendant's motion to dismiss, the court cited all but the *universality* principle as authority for exercising concurrent jurisdiction over the events that transpired in Guyana.[9]

The *territorial* principle was firmly established in American jurisprudence by Chief Justice Marshall when he stated: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[10] Article 3 of the *Harvard Research in International Law, Part II: Jurisdiction With Respect to Crime* states:

> A State has jurisdiction with respect to any crime committed in whole or in part within its territory.
> This jurisdiction extends to
> (a) any participation outside its territory in a crime committed in whole or in part within its territory; and
> (b) any attempt outside its territory to commit a crime in

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6. *Id.* at 215.

7. *Id.* at 212. On appeal to the United States Court of Appeals for the Ninth Circuit, the defendant's petition was dismissed as a nonreviewable interlocutory order. United States v. Layton, 645 F.2d 21 (9th Cir. 1981).

8. *Harvard Research in International Law, Part II: Jurisdiction With Respect to Crime*, 29 Am. J. Int'l L. 435 (Supp. 1935) [hereinafter cited as *Harvard Research*].

9. 509 F. Supp. at 216.

10. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812).

whole or in part within its territory.[11]

Article 3 also embodies the principle of *objective territoriality*, by extending the *territorial* principle to acts committed outside a state that are intended to produce and that do produce harmful effects within its boundaries.[12] The Restatement (Second) of the Foreign Relations Law of the United States permits a state to extend jurisdiction over such acts if:

> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies;
> (ii) the effect within the territory is substantial;
> (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and
> (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.[13]

The *objective territorial* principle has been firmly endorsed by American courts in cases where the defendant is a United States national.[14]

The *protective* principle is defined in the Restatement in the following terms:

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11. *Harvard Research, supra*, note 8, at 480.

12. *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911) for a description of this principle.

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

14. Blackmer v. United States, 284 U.S. 421, 436-37 (1931); Strassheim v. Daily, 221 U.S. 280, 285 (1911); American Banana Co. v. United Fruit Co., 213 U.S. 347, 355 (1908). A more difficult question of jurisdiction arises, however, when the defendant is an alien. There is currently a conflict among the federal courts on this subject, but the prevailing trend is in favor of exercising jurisdiction over an alien accused of causing harmful effects within the United States. Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967), *cert. denied, sub. nom.* Groleau v. United States, 389 U.S. 884 (1967) (Canadian conspiracy to smuggle heroin into the United States); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (antitrust violations alleged against a foreign corporation); *contra* United States v. Baker, 136 F. Supp. 546 (S.D.N.Y. 1955) (alien held not subject to the jurisdiction of the United States for falsifying and concealing a material fact to the Immigration and Naturalization Service).

British citizens were held subject to American jurisdiction by the Supreme Court for conspiracy to illegally import liquor in violation of the National Prohibition Act. The action, however, was pursuant to a treaty between the two nations authorizing such jurisdiction, and is an isolated example of the Court's assertion of extraterritorial jurisdiction over aliens. Ford v. United States, 273 U.S. 593, 609, 618 (1927).

> (1) A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.
> (2) Conduct referred to in Subsection (1) includes in particular the counterfeiting of the state's seals and currency, and the falsification of its official documents.[15]

The *protective* principle differs from *objective territoriality* in two significant respects. First, it applies only to acts that threaten a country's security or directly interfere with its governmental functions, not to acts against private persons.[16] Second, no actual effect need take place within a state's boundaries: a potentially adverse effect will suffice.[17] Although the Supreme Court of the United States has not cited the *protective* principle of international law as authority for exercising American jurisdiction over aliens for acts committed against the United States from abroad, several lower federal courts have invoked it under these circumstances.[18]

The *nationality* principle is recognized by both the Supreme Court of the United States[19] and under international law.[20] The conduct of a citizen, regardless of where it takes place, is subject to the legislative jurisdiction of the state of nationality "by virtue of the obligations of citizenship."[21]

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15. RESTATEMENT, *supra*, note 13, § 33.

16. United States v. Columba-Colella, 604 F.2d 356, 358 (5th Cir. 1979); United States v. Rodriquez, 182 F. Supp. 479, 488 (S.D.Cal. 1960).

17. United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1968).

18. *Id.*; United States v. Rodriguez, 182 F. Supp. 479, 487 (S.D.Cal 1960), *aff'd sub. nom.*, Rocha v. United States, 288 F.2d 545 (9th Cir. 1961), *cert. denied*, 366 U.S. 948 (1961); United States v. Archer, 51 F. Supp. 708 (S.D.Cal. 1943); *contra* United States v. Baker, 136 F. Supp. 546 (S.D.N.Y. 1955); *see also* Garcia-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory*, 19 U. PITT. L. REV. 567, 578 (1958); Swigert, *Extraterritorial Jurisdiction of Criminal Law*, 13 HARV. INT'L L. J. 346, 348 n.4 (1972).

19. Blackmer v. United States, 284 U.S. 421 (1932).

20. The RESTATEMENT reads:

> (1) A state has jurisdiction to prescribe a rule of law
> (a) attaching legal consequences to conduct of a national of the state wherever the conduct occurs or
> (b) as to the status of a national or as to an interest of a national, wherever the thing or other subject matter to which the interest relates is located.

RESTATEMENT, *supra*, note 13, § 30.

21. Blackmer v. United States, 284 U.S. 421, 436 (1932).

A principle of international law enjoying less acceptance is *passive personality*, determining jurisdiction by reference to the nationality of the victim rather than the offender. This principle has little support in American case law[22] and has been specifically rejected by the Restatement.[23]

The *universality* principle applies to a limited number of international crimes and bases jurisdiction simply upon physical custody of the offender, regardless of nationality or the location of the crime.[24] Crimes that may be prosecuted under this principle include the slave trade, traffic in women or drugs, war crimes and terrorism.[25]

Unlike some civil law countries that have incorporated all five principles of international law in their penal codes,[26] the United States courts have followed the common law tradition of limiting extraterritorial jurisdiction of federal criminal law fairly strictly to offenses that fall under the principles of *nationality* and *territoriality*.[27] Such self-restraint, however, is not constitutionally mandated.[28]

The United States Supreme Court, in *United States v. Curtiss-Wright Export Corp.*,[29] recognized an "inherent power" in foreign affairs that passed directly to the federal government from the British Crown as an indispensable attribute of sovereignty. The Court held that this power, unlike internal sovereignty, is not dependent upon affirmative grants of power in the Constitution. Instead, it exists separate and apart in the same manner and to the same extent as when held by the Crown "save in so far as the Constitution in express terms qualifies its exercise."[30] The exercise of external sovereignty is governed then, not by the Constitution, but by "treaties, international compacts, and the principles of international law."[31]

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22. 509 F. Supp. at 216, n.5.

23. "A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals." RESTATEMENT, *supra*, note 13, § 30 (2) comment e.

24. RESTATEMENT, *supra*, note 13, § 34 comment b, illustration 2.

25. *Id.*; 509 F. Supp. at 223.

26. Swigert, *supra*, note 18, at 347.

27. Garcia-Mora, *supra*, note 18, at 569; Swigert, *supra*, note 18, at 347.

28. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

29. *Id.*

30. *Id.* at 317.

31. *Id.* at 318. For an alternate theory of congressional authority based upon express provisions in the Constitution, *see Federal Jurisdiction Over Crimes Committed Abroad by*

The practical result of the theory of external sovereignty is that it "leaves the Congress free to pick and choose principles of international law"[32] that it wishes to incorporate into its legislation, including all five principles of extraterritorial jurisdiction over crimes. However, Congress has seldom made explicit in its legislation whether a statute was intended to have extraterritorial effect. Such a determination is often left to the federal courts.[33]

When facts of a case give rise to the need for judicial interpretation concerning the extraterritorial scope of a statute, federal courts have adhered to a basic canon of construction in keeping with their reluctance to stray beyond the limits of the *territorial* and *nationality* principles. This policy construes federal criminal legislation as applicable only within the territorial limits of the United States in the absence of a clear legislative intent to the contrary.[34] Because of the great increase of American involvement in world affairs,[35] however, many statutes have been interpreted to assert extraterritorial jurisdiction in order to fulfill the aims of the legislation.[36]

In an attempt to guide the lower federal courts in determining whether a statute is to be given extraterritorial effect in a given set of circumstances, the United States Supreme Court set forth guidelines of interpretation in *United States v. Bowman*.[37] The Court stated:

> The necessary locus [for application of a federal statute], when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the

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Aliens, 13 STAN. L. REV. 155, 157 (1960).

32. United States v. Rodriquez, 182 F. Supp. 479, 491 (S.D.Cal. 1960).

33. United States v. Bowman, 260 U.S. 94 (1922).

34. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1908). "[A]ll legislation is prima facie territorial . . . " *Id.* at 357; RESTATEMENT, *supra*, note 13, § 38; *compare* National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453 (1974). "Even the most basic principles of statutory construction must yield to clear contrary evidence of legislative intent." *Id.* at 458.

35. Rosenfeld, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1009 (1976); Swigert, *supra*, note 18, at 348.

36. United States v. Fernandez, 496 F.2d 1294 (5th Cir. 1974) (counterfeiting statute); United States v. Cotton, 471 F.2d 744 (9th Cir. 1973) (statute dealing with theft of government property); Stegeman v. United States, 425 F.2d 984 (9th Cir. 1970) (bankruptcy statute); *see also* Rosenfeld, *supra*, note 35, at 1005-38 (discussion of extraterritorial effect given to statutes dealing with securities regulation, labor law, antitrust, export controls and environmental law).

37. 260 U.S. 94 (1922) (prosecution of Americans allegedly defrauding a government corporation by acts committed on the high seas and in a foreign country).

> territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.[38]

Whereas crimes against private individuals or property are prima facie territorial, absent an express provision to the contrary, the Court held that:

> [T]he 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[39] (emphasis added).

The *Bowman* test requires that the court first determine whether the nature of the law itself inherently mandates its extraterritorial application. If not, a presumption arises against such an application that may be overcome only if the government demonstrates a clear expression of congressional intent that the statute be applied beyond the territory of the United States.[40]

II. THE LAYTON OPINION

Following the guidelines laid down in *Bowman*, the *Layton* court analyzed the four counts of the indictment to determine if Congress would have intended the underlying statutes to apply to the facts of the case. The prerogative of Congress to authorize such extraterritorial jurisdiction was established under the *objective*

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38. *Id.* at 98.

39. *Id.*

40. Steele v. Bulova Watch Co., 344 U.S. 280, 285 (1952); United States v. Mitchell, 553 F.2d 996, 1002 (5th Cir. 1977). For a list of sixteen factors that a court may take into account in resolving the question of extraterritoriality, *see* Air Line Stewards and Stewardesses Association, Int'l v. Trans World Airlines, Inc., 173 F. Supp. 369, 377 (S.D.N.Y. 1959).

territoriality, nationality, protective and *passive personality* principles of international law.

The first count of the indictment charged Layton with conspiracy to kill Congressman Ryan, and the second count charged him with aiding and abetting in the murder of the legislator. Both counts were based upon 18 U.S.C. § 351, which provides sanctions for crimes specifically related to Congressional assassination, kidnapping and assault.[41] The second count was also based upon 18 U.S.C. § 2, that makes a conspirator in such crimes punishable as a principal.[42] Neither statute makes any provision for extraterritorial application.

The court first found that the nature of section 351 inherently mandates its extraterritorial application because of the government's legitimate interest in protecting itself from "obstruction and fraud."[43] In support of this finding, the court cited examples from the statute's legislative history that demonstrated its role as part of a statutory scheme to protect top officials of government, thereby assuring the integrity of representative democracy.[44] The court reasoned that on the basis of prior case law — where extraterritorial jurisdiction had been ascribed to federal criminal statutes protecting government property and checks — Congress was certainly "addressing as important a problem threatening the integrity of the government when it moved to protect Congressmen from assault and murder."[45]

As a second ground for inferring extraterritoriality, the court

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41. 18 U.S.C. § 351 reads in part:

(a) Whoever kills any individual who is a Member of Congress or a Member-of-Congress-elect shall be punished as provided by sections 1111 and 1112 of this title.

(d) If two or more persons conspire to kill or kidnap any individual designated in subsection (a) of this section and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any terms of years or for life, if death results to such individual.

42. 18 U.S.C. § 2 states:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principle.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principle.

43. 509 F. Supp. at 218; *Bowman*, 260 U.S. at 97-98.

44. 509 F. Supp. at 218-20; Response of the United States to Defendant's Motion to Dismiss Indictment at 14, United States v. Layton, 509 F. Supp. 212 (N.D.Cal. 1981).

45. 509 F. Supp. at 218.

noted that the large increase in international travel by legislators had rendered them more vulnerable to attack.[46] The court found that failure to give section 351 extraterritorial effect would be "greatly to curtail the scope and usefulness of the statute and leave open a large immunity for [crimes] as easily committed by citizens on the high seas and in foreign countries as at home."[47]

The court then went on to consider the fourth count of the indictment, charging Layton with aiding and abetting the attempted murder of DCM Dwyer — an internationally protected person — under 18 U.S.C. § 1116(a)(2).[48] Section 1116 was amended in 1976 with the addition of subsection (c), pursuant to American obligations under two multilateral treaties: (1) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (U.N. Treaty),[49] and (2) Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance (O.A.S. Treaty).[50] Unlike section 351, subsection (c) provides section 1116 with a limited grant of extraterritorial jurisdiction under the *universality* principle. Subsection (c)

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46. *Id.* at 219.

47. *Id.*; *Bowman*, 260 U.S. at 97-98. The extraterritorial effect of 18 U.S.C. § 2 was premised upon a finding of extraterritoriality under section 351. 509 F. Supp. at 217 n.6.

48. The fourth count of the indictment was considered before the third since the finding of extraterritoriality under 18 U.S.C. § 1116 forms the basis for finding jurisdiction under the conspiracy statute — 18 U.S.C. § 1117 — mentioned in the third count. 509 F. Supp. at 221 n.17.

18 U.S.C. § 1116 reads in part:

> (a) Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

DCM Dwyer's characterization as an "internationally protected person" is based upon § 1116(b)(4) that defines such a person in the following terms:

> (A) a Chief of State or the political equivalent, head of government or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or
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> (B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.

49. 28 U.S.T. 1975, 1979, T.I.A.S. No. 8532.

50. 27 U.S.T. 1971, 1976, T.I.A.S. No. 8413. 18 U.S.C. § 1116 was originally enacted in response to the attack on the Israeli Olympic Team at the 1972 Olympic Games in Munich. United States v. Marcano Garcia, 456 F. Supp. 1358, 1360 (D.C.P.R. 1978).

states:

> If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender.[51]

However, the court found that the jurisdiction provided for by this section was inapplicable to the case at hand since the defendant was not present within the United States for the purposes of the statute at the time the indictment was handed down.[52] It did not dismiss the fourth count, however, but proceeded to infer an expanded grant of extraterritorial jurisdiction under section 1116 based upon article 3 of the U.N. Treaty, explicitly authorizing three additional grounds of jurisdiction under the *territorial, nationality* and *passive personality* principles.[53] Although these principles had not been incorporated into the language of section 1116, the court reasoned that Congress could not have intended to exclude them given the strong desire evident in a review of the statute's legislative history to give full legal effect to the treaties.[54] The court concluded its analysis by finding extraterritorial jurisdiction over the matters alleged in the fourth count under the principles of *nationality* and *passive personality* provided for in the U.N. Treaty.[55]

The last count of the indictment the court considered — the

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51. 18 U.S.C. § 1116 (c).

52. 509 F. Supp. at 221.

53. Article 3 of the U.N. Treaty reads in part:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 [which includes the crimes presently subject to this discussion] in the following cases:
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> (a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
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> (b) when the alleged offender is a national of that State;
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> (c) when the crime is committed against an internationally protected person . . . who enjoys his status as such by virtue of functions which he exercises on behalf of that State.
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> 2. Each State Party shall likewise take such measures to establish jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him . . . to any of the States mentioned in paragraph 1 of this article.

28 U.S.T. 1975, 1979, T.I.A.S. No. 8532.

54. 509 F. Supp. at 222-23.

55. *Id.* at 225.

third to be handed down — charged Layton with conspiracy to murder an internationally protected person under 18 U.S.C. § 1117.[56] The finding of subject matter jurisdiction under this statute was dependent upon the court's finding of extraterritoriality in regard to section 1116.[57] Section 1117 makes no provision for extraterritorial application, but the court held that as a statute of general reference incorporating section 1116 in cases involving conspiracy, it incorporated as well any explicit or implicit grant of extraterritorial jurisdiction.[58] In support of its holding, the court cited cases where the extraterritorial reach of conspiracy statutes had been regularly upheld on the basis of a finding that the underlying substantive statute — in this case section 1116 — reached extraterritorial offenses, even though the conspiracy charges came under a separate section.[59]

III. Policy Considerations in the Extraterritorial Application of Federal Criminal Statutes

The difficulties in investigating and prosecuting crimes committed outside the territorial limits of the United States, especially where aliens are involved, have understandably caused Congress to be circumspect in providing for extraterritorial application of criminal statutes. The cooperation of the foreign nation(s) involved, particularly in obtaining *in personam* jurisdiction over the defendant(s) where no extradition treaty exists, is often a crucial factor. Distance, delay, voluntary attendance of foreign witnesses, and the expense in transporting them also pose formidable difficulties. The federal courts, by taking it upon themselves to determine the extraterritorial scope of certain statutes, not only must take into account the same policy considerations, but must also constantly bear in mind that in so doing they are performing an essentially legislative function. Thus the method of statutory construction employed by the courts has necessarily been strict, as is evidenced in the test set forth by the Supreme Court in *United States v.*

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56. 18 U.S.C. § 1117 states:

> If two or more persons conspire to violate section 1111, 1114, or 1116 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

57. 509 F. Supp. at 222 n.17.

58. *Id.* at 225.

59. *Id.*

Bowman.[60]

The Layton court faithfully applied the *Bowman* test in its finding of subject matter jurisdiction under all four counts of the indictment. However, the court in large part misapplied the principles of international law cited as authority for this finding, failing to properly evaluate and distinguish the policy considerations underlying the application of each one.

The *nationality, objective territoriality, passive personality* and *protective* principles were all cited as authority for the extraterritorial application of section 351, pertaining to crimes against Congressmen.[61] The court's assertion of the last three principles, while not *per se* fallacious, only served to blur the important distinctions among them without aiding in the resolution of the case.

Layton's American nationality provided more than sufficient justification for the extraterritorial application of section 351 under both domestic and international law. A United States citizen may not escape the obligations of citizenship—including observance of criminal statutes—simply by leaving the country.[62] Although a potential conflict might arise if conduct in violation of American laws also violates the laws of the host nation, the latter has priority under the *territorial* principle to try the defendant under its own legal system, in the absence of a treaty to the contrary. This occurred in the case at hand where Layton was not returned to the United States until the Guyanese judicial procedure had run its course, thereby dispensing with any possible conflict of concurrent jurisdiction.[63]

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60. 260 U.S. 94, 98 (1922).

61. 509 F. Supp. at 216.

62. The Supreme Court in Skiriotes v. Florida, 313 U.S. 69 (1941) stated at 73-74:

> Thus, a criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country though there be no express declaration to that effect.

See also RESTATEMENT, *supra*, note 13, § 30.

63. In the Response of the United States to the Defendant's Motion to Dismiss the Indictment at 19, United States v. Layton, 509 F. Supp. 212 (N.D.Cal. 1981), the government stated:

> Defendant can cite no Guyanese interest in restricting the exercise of United States jurisdiction over defendant's crimes in that country. The sovereignty of that nation is not offended by the prosecution of the offenses in the United States. Indeed, the Guyana government cooperated in deporting defendant to the United States to stand trial.

In regard to the potential conflict that assertion of the *nationality* principle might create with foreign jurisdictions, the Supreme Court has held that:

The *objective territorial* principle, while traditionally cited in conjunction with *nationality* as a basis for asserting extraterritorial jurisdiction, is not essential to the determination of the case at hand. It is primarily intended to reach acts committed abroad that produce effects within the state where those effects are felt by *private* persons.[64] The assassination of a Congressman does not provide an appropriate circumstance for the application of this principle. It is better reserved for the classic case where "A shoots B across the border", or for the more controversial cases involving allegations of antitrust violations against alien corporations.[65]

The *protective* principle, governing jurisdiction over acts with a potentially adverse effect on the government, was applied by the *Layton* court citing *United States v. Pizzarusso*.[66] Pizzarusso, however, was not an American, as was Layton, but an alien who had knowingly made false statements under oath in a visa application to an American official. The primary purpose behind the *protective* principle is to reach *aliens* who would not otherwise be subject to the jurisdiction of the government under the *nationality* principle.

Use of the *protective* principle in circumstances other than those enumerated in the Restatement[67] involves serious considerations of potential infringement of the sovereignty of foreign nations, since what may be viewed in one country as subversive acts against its government may be viewed in another as completely legitimate forms of political expression.[68] Although such fears are unwarranted in the *Layton* case since both countries condemned the murder of Congressman Ryan, in other circumstances use of the *protective* principle could open a Pandora's box of penal sanc-

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> The United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government.

Skiriotes v. Florida, 313 U.S. 69, 73 (1941); *see also* United States v. Bowman, 260 U.S. 94 (1922).

64. Strassheim v. Daily, 221 U.S. 280, 285 (1911).

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

66. 388 F.2d 8, 10-11 (2d Cir. 1968).

67. *See infra* text at 64.

68. "[I]t may be confidently asserted that the United States is not well disposed to prosecute foreigners for politically hostile acts committed in foreign territory." Garcia-Mora, *supra*, note 18, at 578.

tions against political acts redefined as criminal in another state's legal lexicon.

The *passive personality* principle, determining jurisdiction by reference to the nationality of the victim, was invoked by the court on the basis of Congressman Ryan's American citizenship. Although the assertion of this principle is more on point and may help it to gain a firmer foothold in American case law, the court recognized in a footnote that standing alone, it might not be adequate.[69] In any event, its assertion is of little moment given the much stronger basis for jurisdiction found under the *nationality* principle. As in the case of the *protective* principle, *passive personality* might be better reserved for use in cases involving aliens, immune from jurisdiction under the principle of *nationality*. Restraint is also well advised in the assertion of *passive personality*, lest countries come to penalize and enforce sanctions against controversial acts committed against their citizens abroad, as in the case of expropriation.

Although the *Layton* court went to great pains to substantiate its finding of subject matter jurisdiction under all four principles, it also stressed that the violation of section 351 was allegedly committed by an American citizen against a Congressman acting in his official capacity.[70] This emphasis effectively limited the holding of the case to these facts, and established the *nationality* principle as the only real authority relied upon, despite the court's dicta to the contrary. The government, however, contended that section 351 should not be so limited, and that it should also apply to aliens accused of crimes committed abroad against Congressmen,[71] regardless of whether they are acting in their official capacity.[72] This interpretation seems the more valid, since to limit the application of section 351 to crimes committed by American nationals certainly would be "greatly to curtail the scope and usefulness of the statute"[73] by undermining its protection of Congressmen in their travels abroad. The protection guaranteed to Congressmen by section 351 may not be logically restricted to acts by Americans if legislative intent is to be vindicated.[74] Its application to aliens can

69. 509 F. Supp. at 216 n.5.

70. *Id.* at 219-20.

71. Response of the United States to Defendant's Motion to Dismiss Indictment at 11, United States v. Layton, 509 F. Supp. 212 (N.D. Cal. 1981).

72. Brief for Appellee, at 16 n.16, United States v. Layton, 645 F.2d 21 (9th Cir. 1981).

73. *Bowman*, 260 U.S. at 98.

74. During the deliberations over passage of the statute, Senator Byrd articulated the

be upheld under the authority of both the *passive personality* and *protective* principles of international law, given that the murder of a congressman is a crime against a United States national having adverse effects upon the security and functions of the American government. Application of these principles would not be a matter of controversy with foreign jurisdictions, since the murder of a government representative is recognized in the Restatement as a crime "under the laws of states that have reasonably developed legal systems."[75]

Assertion of subject matter and *in personam* jurisdiction over aliens in such circumstances under the *passive personality* and *protective* principles should not be precluded simply because there may be greater likelihood of conflict with foreign jurisdictions than would be the case if the defendant is an American national. Nor should it preclude a request on the part of the American government that a foreign jurisdiction extradite an alien defendant, whether by treaty or as an act of policy. The fact that a foreign government may not always be inclined to submit one of its nationals or a national of a third state to United States jurisdiction should not by itself determine the scope of legislation designed to protect the integrity of the American government.

The *Layton* court's endeavor to find alternate grounds of jurisdiction under section 1116 for the crimes allegedly committed against DCM Dwyer was unnecessary since the *universality* principle was the proper authority. This principle was rejected by the court because of a questionable reading of subsection (c) of section 1116 that states:

> If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense *if the alleged offender is present within the United States,* irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender (emphasis added).[76]

Since Layton was not present in the United States when the indictment was handed down, the court found that jurisdiction

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purpose of section 351 in the following language: "This legislation is intended to protect representative democracy. Passage would help guarantee the right of any Member of Congress to fulfill his constitutional duties and responsibilities as an elected official of our country." 116 CONG. REC. 35,655 (1970).

75. *See infra* text at 64.

76. 18 U.S.C. § 1116 (c).

under the *universality* principle embodied in this subsection was precluded. However, there is nothing in the language of the statute itself that indicates an indictment should be barred prior to the offender's return to the United States. Jurisdiction was not enforced while the defendant was abroad, but upon his return. The "presence clause" relates only to a government's obligation to prosecute or extradite an offender under the U.N. Treaty if he or she should happen to be caught in that country, and is a grant of subject matter jurisdiction, not a limitation of *in personam* jurisdiction.[77]

It would have been far preferable to assert extraterritoriality under the principle of *universality* since it alone was expressly incorporated into the language of section 1116 by the Congress. Acts of terrorism against internationally protected persons are universal in character, having no regard for territorial boundaries. It is only through the assertion of extraterritorial jurisdiction over such crimes that their curtailment may be achieved. In cases where a state has no relation to either the defendant or to the crime, extradition is the more expedient course. In the *Layton* case, however, American jurisdiction under the *universality* principle was manifestly appropriate for both reasons.

IV. Conclusion

The question left open by the holding of the *Layton* decision — whether an alien may be subject to American jurisdiction under section 351 for crimes committed abroad against a United States Congressman — has been answered in the affirmative by section 208 of the proposed new Federal Criminal Code, now before Congress.[78] It is the role of the legislature, not the judiciary, to determine the extraterritorial scope of federal penal statutes, since their application outside the boundaries of the United States involves international political considerations outside a court's competence to decide. If Congress continues to defer this responsibility to the

77. Brief for Appellee at 13, United States v. Layton, 645 F.2d 21 (9th Cir. 1981). In its brief on appeal to the Ninth Circuit, the government argued that the district court also ignored the language of 18 U.S.C. § 3238 that provides that an indictment "may be filed in the district of the last known residence of the offender" if the offense was committed outside the jurisdiction of any particular state or district and if the offender has not been arrested or brought into any district. Thus, in the government's view, section 3238 would permit an indictment for offenses committed abroad while a defendant remains outside of the United States.

78. Swigert, *supra*, note 18 at 349.

federal courts, they will have no choice but to apply the *Bowman* test and attempt to divine legislative intent and purpose to the best of their ability. In so doing, however, great care should be taken to properly distinguish and assert the five principles of extraterritorial jurisdiction under international law, lest their authority becomes blurred and lose its impact.[79]

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79. The jury trial commenced on August 18, 1981, but after it became clear that the jury would be unable to reach a verdict on any of the four counts, the District Court for the Northern District of California declared a mistrial on September 26, 1981. The government is now going forward with a retrial. United States v. Layton, No. 80-416 (N.D.Cal. Jan. 11, 1982).