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The Extraterritorial Effect of Federal Criminal Statutes: Offenses Directed at Members of Congress

By Mark Petersen
Member of the Class of 1983

I. INTRODUCTION

Section 351 of the United States Criminal Code,1 enacted in 1971, prescribes penalties for offenses directed at members of Congress, which include assault, killing, kidnapping, and attempted conspiracies.2 This statute also provides for the use of federal agencies for investigating violations, but until 1982 it was silent as to a court’s reach in

2. The statute in pertinent part reads as follows:
   (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 [18 U.S.C. §§ 1111 and 1112].
   (b) Whoever kidnaps any individual designated in subsection (a) of this section shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if death results to such individual.
   (c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished by imprisonment for any term of years or for life.
   (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 term of years or for life, if death results to such individual.
   (e) Whoever assaults any person designated in subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than one year, or both; and if personal injury results, shall be fined not more than $10,000, or imprisoned for not more than ten years, or both.
   (f) If Federal investigative or prosecutive jurisdiction is asserted for a violation of this section, such assertion shall suspend the exercise of jurisdiction by a State or local authority, under any applicable State or local law, until Federal action is terminated.
   (g) Violations of this section shall be investigated by the Federal Bureau of Investigation. Assistance may be requested from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.
asserting subject matter jurisdiction when invoked.3

The penal authority of a sovereign state is generally limited to acts occurring within its territorial boundaries.4 Situations arise, however, when a nation will desire to assert its authority in criminal matters beyond its borders, even when the actor is a citizen of another country.5 This extension of the criminal laws of one sovereign to acts wholly or partially taking place in another state will be appropriate only when certain necessary prerequisites have been satisfied.6

In a world of increased terrorism and open hostility toward the United States and its policies,7 an attack or assault on a member of Congress travelling abroad is not an unlikely occurrence. As a representative of the government of the United States, a member of Congress is a particularly likely and vulnerable target, and a prima facie violation of section 351 is easy to imagine.

In the case of United States v. Layton,8 Chief Judge Robert Peckham concluded that the jurisdictional reach of section 351 could be extended to acts committed outside the borders of the United States "at least when the attack is by a United States citizen and when the Congressman is acting in his or her official capacity."9 The case involved the killing of a United States congressman in a foreign country by a United States citizen. In light of the aforementioned terrorism and hostility, it seems appropriate now to extend the Layton facts and ask an additional question. Would the federal courts of this country be able to obtain jurisdiction if a member of Congress was attacked or killed in another country by a foreign individual or group?10


4. See infra notes 70-76 and accompanying text.


7. See e.g., San Francisco Chron., Oct. 1, 1981, at 1, col. 3; See also infra notes 102-04 and accompanying text.


9. Id. at 220. Defendant was charged, inter alia, in the death of Congressman Leo J. Ryan at the Port Kaituma airport in Guyana on November 18, 1978. Layton moved for dismissal of all counts on various grounds, including lack of subject matter jurisdiction because the events on which the charges were based took place outside the territorial limits of the United States. The court held that subject matter jurisdiction was proper, and the motion was denied. The case, subsequently litigated, resulted in a mistrial.

10. The initial inquiry, of course, is whether the United States actually desires jurisdiction over the subject matter of the action. It is likely that the government would have a
This Note will examine this question with a view toward determining the extent to which section 351 can be extended extraterritorially, including a critique of the reasoning in *Layton*. Emphasizing the jurisdictional principles of the law of nations, the author will conclude that a federal court would be justified in asserting subject matter jurisdiction over a foreign defendant who has violated section 351 outside of the United States.

II. THE JURISDICTIONAL REACH OF UNITED STATES CRIMINAL LAW

A. The Problem

Subject matter jurisdiction is ordinarily limited to territorial application. Sovereign states have authority over acts committed solely within their borders. But in an ever-shrinking world, such a limited notion of jurisdiction is unrealistic and ignores the potential for compelling desire for jurisdiction, especially if the offense was political in nature. For purposes of this Note an affirmative answer will be assumed as to this initial question.

11. A scenario will be developed more fully throughout the text as necessary. The basic assumption is of a section 351 violation outside of the United States, by a foreign individual or group. A plausible situation might be the presence of a senator from the Foreign Relations Committee in Saudi Arabia, who is attacked by a foreign assassination team. The same basic jurisdictional problem would arise if a lone German gunman, upset over United States nuclear policy in Europe, were to assassinate (or attempt to kill) a member of Congress in Germany. Some of the competing interests may be different in each of these situations, however, and certain international principles may or may not be applicable in each case. These variations in analysis will be developed *infra* in the text.

12. Obtaining subject matter jurisdiction is but one step in a larger process. Other hurdles will have to be overcome, such as personal jurisdiction, extradition, concurrent jurisdiction, and immunities. For an overall view of this process see Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 CORNELL INT'L L.J. 71 (1978).

13. For purposes of this Note, "jurisdiction" will be used to mean a state's competence under international law to prosecute and punish for crime. See Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 439 (Supp. July 1935) [hereinafter cited as Harvard Research]. Another suitable definition of the term is found in *Restatement (Second) of the Foreign Relations Law of the United States* § 6 (1965) [hereinafter cited as *Restatement*]: "'Jurisdiction,' as used in the Restatement of this Subject, means the capacity of a state under international law to prescribe or to enforce a rule of law." For an analysis of the *Restatement*’s treatment of this subject see Metzger, *The Restatement of the Foreign Relations Law of the United States: Bases and Conflict of Jurisdiction*, 41 N.Y.U. L. REV. 7 (1966).

14. The Lotus Case (Fr. v. Turk.) 1927 P.C.IJ., ser. A, No. 4 (Judgment of Sept. 7), shows some of the various ways in which the term "jurisdiction" is used. For a comment on this aspect of the case see H. STEINER & D. VAGTS, *Transnational Legal Problems* 810 (1968).
current or conflicting jurisdiction. While such a narrow policy would be conceptually easier to apply, the problems created would quickly outnumber those avoided. Merely desiring jurisdiction over some particular act committed without the state, however, and being able to justify such jurisdiction as a matter of national sovereignty and international law, are two different things.

A common theory in international law is that criminal authority can generally be extended extraterritorially because of the sovereign powers of all states, which are limited only by the rights of other states within the world community. Extraterritorial application, however, will nearly always mean interfering with the territorial authority of another country, and therefore any international theory of extraterritorial jurisdiction is necessarily limited by the possibility of a valid objection by another state.

Notwithstanding this inherent limitation, the successful extraterritorial application of criminal law does occur. Historically, the United States has been reluctant to pursue such a course, but the desire and necessity to do so is likely to increase. In ascertaining the validity of such an extraterritorial assertion, a federal judge must carefully examine the relevant facts of each case to see if the government has satisfied the requirements which are set forth in this Note.

B. The Requirements

For any valid exercise of extraterritorial jurisdiction, three requirements must be satisfied. It must first be established that Congress has

15. See I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298 (1979); see also Berge, Criminal Jurisdiction and the Territorial Principle, 30 MICHL. L. REV. 238, 239 (1931).
19. The Lotus Case, supra note 14, is a famous early case involving the extraterritorial application of criminal law and the resulting conflict. Proceedings were instituted in Turkey following the collision of a Turkish collier and a French steamer on the high seas. The French steamer entered a Turkish port, and the responsible French officers were tried and convicted of manslaughter due to the death of eight Turkish citizens in the collision. After France protested the action, the Permanent Court of International Justice ruled that Turkey's action was consistent with the principles of international law, and allowed the conviction to stand.
20. See infra notes 45-50 and accompanying text.
the authority to create penal legislation having extraterritorial effect.\textsuperscript{22} Second, the government must show that Congress \textit{intended} a particular statute to have effect beyond the borders of this country. Finally, it must be determined that such an extension into the sovereign bounds of another nation is permissible under one of the jurisdictional theories of international law.

This three-step process was utilized in \textit{United States v. Cotten}.\textsuperscript{23} The case involved the theft of government property, a violation of the federal criminal code.\textsuperscript{24} The defendants were found guilty and on appeal challenged the competency of the district court to hear this matter because it occurred outside the territorial bounds of the United States. In concluding that the extraterritorial extension of this federal criminal statute was valid, the Ninth Circuit found that such an application was constitutionally permissible, that it could be justified by a jurisdictional principle of international law,\textsuperscript{25} and that Congress intended the statute to have such an effect.\textsuperscript{26}

The \textit{Layton} court also found a valid assertion of extraterritorial jurisdiction using this same basic approach.\textsuperscript{27} After rather quickly concluding that proper congressional and international authority existed, the court stated that the principal question before the court was one of statutory interpretation.\textsuperscript{28} The court went on to carefully review the applicable case law in this area, as well as some of the legislative history of section 351, and determined that it was reasonable to infer that Congress intended this statute to apply \textit{wherever} a violation might occur.\textsuperscript{29}

A key element in the \textit{Layton} court’s holding was the nationality of the defendant. \textquote{[T]he courts of the United States have repeatedly up-

\begin{itemize}
  \item \textsuperscript{22} Epstein, \textit{supra} note 21, at 275, feels that this requirement is one of constitutional authorization. This is not, however, a universally accepted articulation of this element. See George, \textit{supra} note 18, at 614-15. Epstein acknowledges the idea of \textquote{inherent authority}, but places it within the general concept of constitutional authorization. Epstein, \textit{supra} note 21, at 280-81.
  \item \textsuperscript{23} 471 F.2d 744 (9th Cir.), \textit{cert. denied}, 411 U.S. 936 (1973).
  \item \textsuperscript{24} 18 U.S.C. § 641 (1976 & Supp. V 1981). The case also involved an action for conspiracy under 18 U.S.C. § 371 (1976 & Supp. V 1981), but the court felt that there was no problem with the extraterritorial applicability of this section, and confined its analysis to the theft section.
  \item \textsuperscript{25} Actually, the court found no need for explicit justification in this case, as no nation was offended by or objected to the prosecution of these defendants by the United States government.
  \item \textsuperscript{26} 471 F.2d at 749-50.
  \item \textsuperscript{27} 509 F. Supp. at 216.
  \item \textsuperscript{28} \textit{Id}.
  \item \textsuperscript{29} \textit{Id} at 217-21.
\end{itemize}
held the power of Congress to attach extraterritorial effect to its penal statutes, particularly where they are being applied to citizens of the United States, as is the case in this instance."

When the actor is not a United States citizen, the validity of subject matter jurisdiction must be determined using the same form of analysis found in Cotten and Layton. Therefore, a closer examination of the three relevant criteria is in order.

1. Congressional Authority

In justifying an exercise of extraterritorial jurisdiction, it must first be shown that Congress is authorized to so extend federal criminal law. In other words, the court must decide whether the principles of international law governing jurisdiction are available to the federal government. This requirement also has taken the form of demonstrating constitutional authorization for Congress to so act, but it is not clearly settled that this is a constitutional question.

One line of authority in this area has emerged from Justice Sutherland's holding in United States v. Curtiss-Wright Export Corporation. Sutherland wrote that the powers of external sovereignty of the United States do not emanate from the Constitution, but were vested in the collective colonies as a whole upon their separation from Great Britain. The reasoning continues that when this source of power is combined with the "necessary and proper" clause, Congress can create criminal legislation having extraterritorial effect if the foreign or domestic interests of the United States so dictate. Although this theory has provided justification for congressional authority in this area, the doctrine has been greatly criticized.

A theory justifying extraterritorial jurisdiction that has met less resistance is one that is based strictly on the Constitution. Congress has been delegated broad powers by the Constitution, such as the power to

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30. Id. at 215 (emphasis added).
32. Epstein, supra note 21, at 279-80.
33. 299 U.S. 304 (1936).
34. Id. at 316.
36. Empson, supra note 16.
regulate commerce with foreign nations, the power to declare war, the power to establish a uniform rule of naturalization, and the power to define and punish felonies on the high seas and offenses against the law of nations. Under this theory, these powers, when combined with the "necessary and proper" clause, provide Congress with the authority to enact legislation having extraterritorial effect.

Although the constitutional theory of congressional authorization apparently has more support, adopting either line of reasoning will achieve the same result: Congress is justified in creating penal statutes that can be extended extraterritorially. Therefore, the real initial inquiry as to any statute, including section 351, is whether Congress intended the statute to have extraterritorial effect.

2. Congressional Intent

This requirement focuses on whether Congress intended that the particular law in question have extraterritorial effect. This question is easily answered if the statute expressly states the extent to which it should be applied. In the specific case of section 351, however, there was formerly no facial indication of jurisdictional reach. Therefore, if this statute was to be applied extraterritorially prior to 1982, congressional intent to so extend would have to be inferred.

Common law countries historically have tended to emphasize judicial competency based on territoriality and have largely restricted jurisdictional reaching to situations involving nationals. This doctrine was satisfactory for the United States during its early years of isolationism, but has become less viable as the country has developed into an international power. American courts have remained reluctant, however, to give extraterritorial effect to criminal legislation unless that in-

41. George, supra note 18, at 616. See also Empson, supra note 16, at 34.
42. See Levitan, supra note 38. See also Comment, supra note 38. Both authors feel that Justice Sutherland's theory in Curtiss-Wright is historically deficient.
43. George, supra note 18, at 616.
44. See supra note 2 for the full text of section 351 as enacted in 1971. Subsection (i) was added to section 351 in 1982, providing that there is extraterritorial jurisdiction over the acts prohibited by the section.
46. Even in the area of nationality jurisdiction, however, common law countries have restricted this more than civil law countries. See Harvard Research, supra note 13, at 522.
47. Note, supra note 45, at 347-48.
tent is clearly indicated on the face of the statute. Thus, Justice Holmes indicated in *American Banana Company v. United Fruit Company* that there is a presumption that, if the statute is not clear on its face, its effect will be limited to the borders of this nation.

This principle of statutory construction is similarly reflected in section 38 of the *Restatement (Second) of Foreign Relations*, which limits the reach of legislation to acts occurring or taking effect within United States territory "unless the contrary is clearly indicated by the statute." The reporter's notes to this section show, however, that in some instances there may be room to infer such intent when it is not clearly indicated within the statute. This exception to the normally strict rule of interpretation has been used by courts when there was no indication as to jurisdictional reach, but failing to allow extraterritorial effect would defeat the clear purpose of the legislation.

Such an exception was made in *United States v. Bowman*, the first Supreme Court decision to prescribe such a rule of construction. The Court, faced with a violation of a federal criminal statute occurring on the high seas, addressed the question of jurisdiction. Admitting the presumption against extraterritorial application when Congress has not included this in the statute, Chief Justice Taft went on to say that such a rule regarding jurisdiction should not apply to criminal statutes that are not "logically dependent" on the location of the violation. If these types of laws are not given extraterritorial effect, their usefulness would be severely limited, leaving a gap of unreachable violations simply because they occurred outside the boundaries of the United States. "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.

Although the rule in *Bowman* has not completely abrogated the reluctance toward extraterritorial extensions, American courts have had little difficulty invoking this rule when they felt the statute war-

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50. *Id.* at 357.
52. *Id.* § 38, at 107.
53. Chase, supra note 48, at 558.
54. 260 U.S. 94 (1922).
55. *Id.* at 98.
56. *Id.*
ranted such a result. Judge Peckham stated in Layton that the Bowman analysis has been applied "in every subsequent case where the issue has arisen." The Layton decision then applied the Bowman rule and concluded that section 351 was intended to have extraterritorial effect, at least where the actor was a United States citizen.

This Note is specifically considering a situation where the act occurs outside of the United States, and the actor is a citizen of a foreign country. This difference in the nationality of the defendant is unlikely, however, to alter the result of a finding that Congress intended section 351 to protect its members within or without the United States. The act to which this statute applies is not of a type logically dependent on the locality of the violation or the nationality of the violator. An attack upon a congressman or woman could reasonably be viewed as an action against the security of the United States government, and the Bowman analysis would validate an inference of congressional intent of extraterritoriality in such a situation.

Another factor to be considered when interpreting section 351 for legislative intent is the type of harm Congress meant to prevent. Considering the legislative history of this statute, it is evident that Congress was not only concerned with the lives of people elected as legislators of the United States, but also with the functioning and security of the federal government. This concern is not dependent on the nationality of the violator or the location of the act.

Thus, it seems not only appropriate but also logical to infer that Congress intended this statute to have effect irrespective of the borders of the United States or the citizenship of the defendant, and this was so even before section 351 explicitly allowed extraterritorial application. Criminal legislation concerned with conduct that would be injurious to

59. Id. at 220-21. At the time of this decision, section 351 had not been amended to add subsection (i) regarding extraterritoriality.
61. See Note, supra note 45, at 350.
63. See 116 Cong. Rec. 35655 (1970). During the floor debate before passage of 18 U.S.C. § 351, Senator Byrd of West Virginia stated, "This legislation is needed to protect representative democracy. Passage would help to guarantee the right of any Member of Congress to fulfill his constitutional duties and responsibilities as an elected official of our country." Id.
the government is particularly susceptible to this type of inference.\textsuperscript{64} If the nationality of the actor is to be a significant factor in an attempt to obtain extraterritorial jurisdiction over an act in violation of section 351, this factor will come into play upon the application of the principles of jurisdiction of the law of nations.

3. International Law

The third and final requirement for justifying an extension of penal law extraterritorially is finding an accepted principle of international law that condones such action under a particular set of facts. The understanding of existing principles and their application will be crucial to international acceptance of a nation's desire and competence to try a foreign defendant for conduct outside its borders.

The fundamental principle of international jurisdiction is founded on territoriality; states have a right to jurisdiction over events occurring within their borders.\textsuperscript{65} In some situations, however, international law acknowledges the right to extend criminal law beyond the state's borders.\textsuperscript{66} This extension must find its validity in a rule or principle of international treaty or customary law.\textsuperscript{67}

The law of nations has recognized five general principles of criminal jurisdiction upon which states have relied for extraterritorial assertions.\textsuperscript{68} These five principles are: the territorial principle; the nationality principle; the protective principle; the universality principle; and the passive personality principle.\textsuperscript{69} Each of these principles will be

\begin{itemize}
\item \textsuperscript{64} See Skiriotes v. Florida, 313 U.S. 69, 73-74 (1941).
\item \textsuperscript{65} See infra notes 70-76 and accompanying text.
\item \textsuperscript{66} See Note, supra note 45, at 346.
\item \textsuperscript{67} 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, 584 (1958). The Lotus Case (Fr. v. Turk.), supra note 14, at 166, indicates in its discussion of the international principles of jurisdiction that the adoption of any or all of the accepted bases is discretionary with each state.
\item \textsuperscript{68} See Harvard Research, supra note 13, at 445. See also RESTATEMENT, supra note 13, §§ 10-19; Empson, supra note 16, at 35-36; Epstein, supra note 21, at 282.
\end{itemize}

Harvard Research, supra note 13, is perhaps the most authoritative source on the subject. The research effort was organized in 1927 by Professor Manley O. Hudson at the Harvard Law School, in relation to efforts by the League of Nations to codify international law. A number of draft conventions were prepared on various subjects, including the Draft Convention on Jurisdiction with Respect to Crime, which was subsequently published in a supplemental volume of the American Journal of International Law in 1935. For information concerning the Harvard Research project see Kenny, Manley O. Hudson and the Harvard Research in International Law 1927-1940, 11 INT'L LAW. 319 (1977).

\begin{itemize}
\item \textsuperscript{69} Harvard Research, supra note 13, at 445.
\end{itemize}
briefly examined now before considering the extraterritorial application of section 351.

The Territorial Principle. This is the starting point for any discussion of international jurisdiction.70 The principle provides jurisdiction based on the location of the offense, a concept universally recognized.71 Thus, jurisdiction over conduct within a forum state is acknowledged regardless of the nationality of the actor.72 For the factual situation assumed in this Note, the territorial principle is by definition not applicable.

An extension of this most basic premise is the "objective territorial" principle.73 This "sub-principle" encompasses crimes initiated in one state, but producing "unintended effects within the jurisdiction of another [state]."74 This subpart of territorial jurisdiction has been interpreted to mean that the offender is constructively present within the forum state, and therefore the territorial principle is applicable.75 It is conceivable that a violation of section 351 by a foreign citizen not physically within the borders of the United States could come within the meaning of the objective territorial principle, a possibility that will be developed later in this Note.76

The Nationality Principle. This universally accepted principle provides that a country has criminal jurisdiction over its citizens, regardless of their particular location.77 The basic and most commonly asserted rationale for this proposition is the duty of allegiance owed to the state by its nationals.78 The fact that a nation's exercise of jurisdiction over its nationals is not generally a matter of concern to other sovereigns lends further justification to this argument.79

The nationality principle, although universally recognized, is not

70. See I. Brownlie, supra note 15, at 298.
71. Harvard Research, supra note 13, at 480. See also I. Brownlie, supra note 15, at 300.
72. See George, supra note 18, at 613.
74. Harvard Research, supra note 13, at 488.
75. Cook, supra note 17, at 312-13.
76. See infra notes 107-128 and accompanying text. For a comment on the recent use of this principle, see Note, Extraterritorial Jurisdiction—Mere Intent to Violate Criminal Statute is Sufficient to Maintain Jurisdiction Under the Objective Territorial Principle, 16 Tex. Int'l L.J. 149 (1981).
77. Harvard Research, supra note 13, at 519.
78. Chase, supra note 48, at 557.
79. See Harvard Research, supra note 13, at 519.
uniformly applied by all states. Common law countries such as the United States and England tend to limit the scope of this principle more narrowly than other countries, and the variation throughout all nations is extensive. These internal limitations and preferences are in part due to the potential problems accompanying the use of this principle, such as double jeopardy and dual nationality.

Because this Note examines a situation in which the nationality of the defendant is different than that of the forum state, this principle will play no part in the analysis of the reach of section 351.

The Protective Principle. This principle provides a basis for jurisdiction over acts committed abroad which threaten the "security, integrity or independence" of the forum state. This broadly encompasses many acts of a political nature, but jurisdiction over immigration, currency, or economic crimes has also been justified by the protective principle.

This principle has also been invoked to provide extraterritorial jurisdiction over crimes impairing some interest which the forum state feels a desire to protect. This would seem to be a workable proposition so long as the interests involved were something more than hazy or abstract ideas, but interpretation and definition by individual states are likely to vary, and the number of jurisdictional problems will likely be proportional to the scope of these differences.

It is possible that an act of aggression toward a member of Congress while abroad, committed by a foreign individual or group, could fall within the intended scope of this principle. Indeed, such a finding might well be essential to a valid extension of section 351 in such a situation, and therefore this basis will be examined more carefully infra.

The Passive Personality Principle. This principle condones extra-

80. See Epstein, supra note 21, at 284-85.
81. Chase, supra note 48, at 558.
82. For a comparison of various states' applications of the nationality principle see Harvard Research, supra note 13, at 522-31.
83. See I. Brownlie, supra note 15, at 303.
84. Harvard Research, supra note 13, at 543.
86. See I. Brownlie, supra note 15, at 303-04.
87. George, supra note 18, at 613.
88. See I. Brownlie, supra note 15, at 304.
89. See infra notes 129-159 and accompanying text.
territorial jurisdiction where the victim of the offense is a citizen of the forum state. Jurisdiction based on this principle is not universally acknowledged, and is the least acceptable of the five bases within international law. This principle, however, may be unnecessary. This is reflected in the Restatement (Second) of Foreign Relations Law of the United States, which has specifically rejected the passive personality rationale for asserting jurisdiction.

Regardless of the potential lack of need for it, the passive personality principle cannot be said to be universally invalid, and so must not be neglected in any analysis where its application would be appropriate. Because the scope of this Note is at least within the limits encompassed by the passive personality principle, its application will be considered.

**The Universality Principle.** This principle provides that the state apprehending the person committing the offense shall normally have subject matter jurisdiction when the crime is of such a nature as to be deemed to violate the interests of all sovereigns and offend notions of international public policy. Crimes falling within this principle have included piracy, slavery, narcotics trafficking, and hijacking, but the principle has been termed "universal" only for the offense of piracy; as to other crimes it has been called merely a basis of auxiliary competence.

The Layton decision did not mention the universality principle as a possible source of jurisdiction for that crime. This may have been because of the definition of the principle, or because of an attitude that murder is not the type of offense meant to be covered by this basis. Killing, however, in the form of terrorism, has been suggested as possibly being within the universality principle. Depending upon the specific facts of an offense, the intent of the actors, and the definition of terms such as "terrorism," it is conceivable that a section 351 violation would be an appropriate situation in which to base jurisdiction on this doctrine, and thus it will be considered.

It is evident now that international law will condone the assertion

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90. See Epstein, supra note 21, at 289.
91. Restatement, supra note 13, § 30(2), at 86.
92. See I. Brownlie, supra note 15, at 304.
93. Id. See also Epstein, supra note 21, at 289.
95. The court referred to this principle as providing "jurisdiction for certain crimes where custody of the offender is sufficient." 509 F. Supp. at 215.
96. See I. Brownlie, supra note 15, at 304.
of extraterritorial jurisdiction in certain instances. For a violation of section 351 by a foreign citizen in a foreign nation, the ability of a federal court to assert jurisdiction over the offense will depend on a finding that one or more of the principles of international law regarding jurisdiction has been satisfied.\textsuperscript{97} The remainder of this Note will examine the principles which might apply in such a situation\textsuperscript{98} to determine if an extraterritorial extension of section 351 would be valid.

\section*{III. APPLICATION OF THE INTERNATIONAL PRINCIPLES}

The remainder of this Note will be devoted to a discussion and analysis of the relevant international principles of subject matter jurisdiction, using the \textit{Layton} decision as a starting point. This Note is concerned with a factual situation very similar to that in \textit{Layton}, with one critical difference. In \textit{Layton}, the defendant was a citizen of the United States, a fact the court found significant.\textsuperscript{99} The analysis herein is based on a scenario in which the section 351 violation is by an actor who is \textit{not} a United States citizen.

Foreign travel by members of Congress is both frequent and extensive, due in large part to the increased role of the federal legislature in all aspects of foreign affairs.\textsuperscript{100} It was reported that in 1980 congressmen and women took a total of 442 trips to locations outside of the United States, to nearly every corner of the globe.\textsuperscript{101} By reason of their elected position, these people represented this nation and its government wherever they went.

International terrorism has also greatly increased in recent years.\textsuperscript{102} At a time when United States policies and actions have sparked dissatisfaction and protest overseas, it is conceivable that any symbol of those policies, such as a member of Congress, might be

\begin{footnotesize}
\begin{enumerate}
\item It has already been shown that Congress is authorized to enact legislation with extraterritorial effect, and that it is proper to infer they meant to do so when 18 U.S.C. § 351 was passed. \textit{See supra} text accompanying notes 31-64.
\item As previously noted, the strict territorial and nationality principles are not applicable for purposes of this Note. The assumption here is that the offense occurs beyond the borders of the United States and is committed by a foreign national.
\item 509 F. Supp. at 215, 216, 220.
\item \textit{Id.} at 219.
\item \textit{See generally} B. \textit{Jenkins, International Terrorism—A New Mode of Conflict} (1975); Evans, \textit{Perspectives on International Terrorism}, 17 \textit{Willamette L. Rev.} 151 (1980).
\end{enumerate}
\end{footnotesize}
targeted by an individual or group for a terrorist attack.\textsuperscript{103} This is certainly true of diplomats who have increasingly become the targets of terrorist attacks.\textsuperscript{104} A scenario involving a member of Congress, traveling in Europe and the subject of a terrorist attack, falls squarely within the bounds of section 351. It is likely that the United States would desire to assert jurisdiction over such an act. 

It has already been shown that Congress has the authority to extend jurisdiction with respect to section 351,\textsuperscript{105} and that it was reasonable to infer congressional intent, before it was explicitly granted, to apply this statute extraterritorially.\textsuperscript{106} The third requirement, however, must still be met. Assuming a violation of section 351 by a foreign national outside of this country, does an assertion of jurisdiction by the United States fall within one or more of the relevant principles of international law previously enumerated?

A. The Objective Territorial Principle

As previously shown, this principle "establishes the jurisdiction of the State to prosecute and punish for crime commenced without the State but consummated within its territory."\textsuperscript{107} It is considered an extension or subpart of the territorial principle,\textsuperscript{108} and has been adopted in both common law and civil law countries.\textsuperscript{109}

This principle was acknowledged by the United States Supreme Court in \textit{Strassheim v. Daily},\textsuperscript{110} when Justice Holmes stated: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect. . . ."\textsuperscript{111} Although \textit{Strassheim} involved jurisdiction between two states of the Union, this

\textsuperscript{103} The term "terrorism" is not easy to define. What some would view as terrorism, others might call common criminality, and still others warfare or justified political acts. For information on these problems and some of the common elements of terrorism see Bouthoul, \textit{Definitions of Terrorism}, in \textit{INTERNATIONAL TERRORISM AND WORLD SECURITY} (D. Carlton & C. Schaerf ed. 1975) (a paper presented to the Fifth Course of the International School on Disarmament and Research on Conflicts). For purposes of this Note, terrorism will be used generally to mean acts of violence motivated by social and/or political concerns, against individuals or groups because of their status as symbols of some opponent.

\textsuperscript{104} Evans, \textit{supra} note 102, at 152-53.

\textsuperscript{105} \textit{See supra} notes 31-43 and accompanying text.

\textsuperscript{106} \textit{See supra} notes 44-64 and accompanying text.

\textsuperscript{107} Harvard Research, \textit{supra} note 13, at 487-88.

\textsuperscript{108} Note, \textit{supra} note 73, at 1089.

\textsuperscript{109} Harvard Research, \textit{supra} note 13, at 488.

\textsuperscript{110} 221 U.S. 280 (1911).

\textsuperscript{111} \textit{Id} at 285.
language was relied on in *Ford v. United States*, a case where foreign nationals were prosecuted in the United States for violating federal prohibition laws.

Although the United States has based subject matter jurisdiction on this principle, some confusion has arisen concerning the effect that the offense must have within the forum state. Must the effect be in the form of direct physical consequences or simply the impairment of an interest about which the state has some legitimate right to be concerned? In striving to maintain jurisdictional exercises based on territoriality, states have apparently extended the "objective territorial" principle to the point that it is very similar to the protective principle. Indeed, it has been noted that the gap between these two bases of jurisdiction is an extremely narrow one.

In *United States v. Pizarusso*, however, the Second Circuit very carefully distinguished the protective principle from the objective territorial principle. The court said that for a valid exercise of the objective territorial principle some *actual* effect must occur within the prescribing nation, while merely a "potentially adverse effect" on the security or functioning of the government will satisfy the protective principle. The court also noted that other courts in the United States have failed to properly recognize the distinction between these two principles.

Commentators have also criticized the blurring of these two jurisdictional principles. Professor George feels that the objective territorial principle should only be invoked when the violation includes some "observable act or event" within the forum state which "produces identifiable harm." This idea of a "direct harm" requirement for the objective territorial principle, as opposed to an "indirect harm" which may provide jurisdiction under the protective principle, has been favored by other writers as well.

The *Restatement (Second) of Foreign Relations* recognizes both an

112. 273 U.S. 593 (1927).
113. See Chase, supra note 48, at 564.
114. See George, supra note 18, at 618.
115. Harvard Research, supra note 13, at 494.
116. 388 F.2d 8 (2d Cir. 1968).
117. Id. at 10-11 (citing *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW* § 33 commentary, at 93 (1965)).
118. Id. at 11 (citing *Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961)).
119. George, supra note 18, at 618.
120. See *Empson*, supra note 16, at 35.
objective territorial basis and a protective principle for jurisdiction,\footnote{121. \textit{RESTATEMENT, supra} note 13, §§ 18, 32. Section 18, Jurisdiction to Prescribe with Respect to Effect Within Territory reads as follows:}{\footnote{122. \textit{RESTATEMENT, supra} note 13, at 93.}} but does not indicate any overlap or confusion between the two. The reporter's notes do indicate a tendency of the United States to rely on the territorial basis for jurisdiction when possible,\footnote{123. Harvard Research, \textit{supra} note 13, at 480. Article 3, Territorial Jurisdiction, reads as follows:}{\footnote{124. 509 F. Supp. at 216.}} lending credence to the notion that the objective territorial principle has been stretched into the area properly covered by the protective principle. The territorial jurisdiction provision of the Draft Convention on Jurisdiction with Respect to Crime indicates that some part or element of the crime must take place within the forum state for this basis to suffice.\footnote{Id. § 18.}{\footnote{Id. § 18.}} This would coincide with the "direct harm" requirement discussed above.

In the \textit{Layton} case the court stated that both the protective principle and the objective territorial principle were applicable as bases for extraterritorial jurisdiction.\footnote{\textit{Id.} § 18.} The underlying facts supporting the court's assertion based on the objective territorial principle are absent, however, suggesting the possibility that the court may have extended...
this provision past its intended bounds. This appears to be similar to the analysis which the *Pizzarusso* court was critical of.125

In the scenario suggested by this Note, the entire offense occurs outside of the territory of the United States. There is no "direct physical consequence"126 or "direct harm"127 that could be shown to exist within the forum state. If harm within the United States was intended as part of the act, it would be in the form of a threat to the security or operation of the government by the attack on one of its members or possibly a threat to the tranquility and integrity of the nation by terrorist action directed at one of its governing bodies. Neither of these threats is the sort of identifiable harm that should be evidenced for an assertion of objective territorial jurisdiction.128

Extending the objective territorial principle to the action contemplated by this Note is unnecessary jurisdictional fiction. Other bases in international law are better equipped to deal with this situation, as will be shown in the following sections. In a world made smaller and more compact by modern transportation and communication, to find jurisdiction based at least in part on older notions of strict territoriality (in situations where no required element of the crime occurs in the forum state) is to construct a jurisdictional foundation inherently defective and necessarily more vulnerable to attack.

**B. The Protective Principle**

The Draft Convention on Jurisdiction with Respect to Crime formulated this basis for extraterritorial jurisdiction in article seven:

A State has jurisdiction with respect to any crime committed outside

125. 388 F.2d at 10-11. Judge Medina stated:

However, the objective territorial principle is quite distinct from the protective theory. Under the latter, all the elements of the crime occur in the foreign country and jurisdiction exists because these actions have a "potentially adverse effect" upon security or governmental functions, Restatement (Second) Foreign Relations Law, Comment to Section 33 at p. 93, and there need not be any actual effect in the country as would be required under the objective territorial principle. Courts have often failed to perceive this distinction. Thus, the Ninth Circuit, in upholding a conviction under a factual situation similar to the one in the instant case, relied on the protective theory, but still felt constrained to say that jurisdiction rested partially on the adverse effect produced as a result of the alien's entry into the United States. The Ninth Circuit also cited Strasheim and *Aluminum Company of America* as support for its decision. With all due deference to our brothers of the Ninth Circuit, however, we think this reliance is unwarranted.

*Id.*

126. *See supra* note 113.

127. *See supra* note 117.

128. George, * supra* note 18, at 618.
its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.\textsuperscript{129}

This statement of the protective or security principle is articulated very similarly by the Restatement (Second) of Foreign Relations.\textsuperscript{130} This justification for extraterritorial jurisdiction has been adopted, at least in theory, by a majority of nations.\textsuperscript{131}

The rationale for this principle has historically rested on the following three premises: a sovereign right of self-defense; the inherent right of every state to determine the scope of its criminal laws; and the right of a country within the law of nations to be internally secure from foreign interference or influence.\textsuperscript{132} This third justification seems the most reasonable and soundly based.\textsuperscript{133} What is important to understand, however, is that this principle is based on the nature of the harm rather than the locus of the act.

The protective principle for obtaining jurisdiction has been applied in cases of politically hostile acts by foreign nationals in another country,\textsuperscript{134} as well as in cases of currency and economic offenses.\textsuperscript{135} It has been cited as the most common basis for the legislative extension of criminal laws beyond state borders.\textsuperscript{136} Actual use of the protective principle, however, has been infrequent,\textsuperscript{137} especially by the United States.\textsuperscript{138} Furthermore, the principle has been extensively criticized. As articulated by the Restatement and the Draft Convention, the principle has been said to be vague and easily confused with other bases, such as the objective territorial principle.\textsuperscript{139} Additionally, due to the shift of emphasis in international law from the state to the individual,\textsuperscript{140} and because of the human emotions often involved in crimes covered by this basis, it has been suggested that the usefulness of the

\begin{itemize}
\item \textsuperscript{129} Harvard Research, \textit{supra} note 13, at 543.
\item \textsuperscript{130} See \textit{supra} note 121.
\item \textsuperscript{131} See I. BROWNLIE, \textit{supra} note 15, at 303.
\item \textsuperscript{132} Garcia-Mora, \textit{supra} note 67, at 584-88.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} See Note, \textit{supra} note 73.
\item \textsuperscript{135} I. BROWNLIE, \textit{supra} note 15, at 303-04.
\item \textsuperscript{136} Harvard Research, \textit{supra} note 13, at 543.
\item \textsuperscript{137} See \textit{Note, supra} note 73, at 1094-95.
\item \textsuperscript{138} See J. BRIERLY, THE LAW OF NATIONS 299-301 (1963).
\item \textsuperscript{139} See George, \textit{supra} note 18, at 617-20.
\end{itemize}
protective principle has passed.\textsuperscript{141}

An extension of the "vagueness" criticism involves the wide jurisdictional latitude available to states utilizing the protective principle.\textsuperscript{142} Much discretion is left to the individual nation to determine what its interests are or may be, and when these interests might be impaired or threatened. Thus, this principle has been viewed as having the potential for arbitrary application, with few if any guidelines for use.\textsuperscript{143} "The protective principle of criminal jurisdiction . . . apparently recognises no objective limits."\textsuperscript{144}

Despite these apparent problems and some question as to whether the United States has actually accepted the protective principle, it would appear that this country has recognized such a basis in some situations.\textsuperscript{145} Jurisdiction has been based on this principle many times for violations of federal law relating to entry into the United States by foreign nationals.\textsuperscript{146} In \textit{Rocha v. United States},\textsuperscript{147} six foreign nationals were accused of defrauding the United States by engaging in a sham marriage scheme in an attempt to enter the country as immigrants in a preferred status. Following their conviction in the district court, the defendants appealed, alleging, \textit{inter alia}, that the court was not competent to hear the matter because the events took place outside the borders of this country. The court of appeals stated that the defendants' acts were directed "against the sovereignty of the United States," and when such acts occur abroad, they fall within the scope of the protective principle.\textsuperscript{148}

In the \textit{Layton} case, Judge Peckham determined that the protective principle was available to the court as well as the objective territorial principle.\textsuperscript{149} Again, however, no underlying facts or principled reasoning is evident in the opinion. The court simply stated that "[t]he alleged crimes certainly had a potentially adverse effect upon the security or governmental functions of the nation, thereby providing the basis

\begin{itemize}
\item \textsuperscript{141} Garcia-Mora, \textit{supra} note 67, at 587-88.
\item \textsuperscript{142} See I. Brownlie, \textit{supra} note 15, at 304.
\item \textsuperscript{144} Id. at 70.
\item \textsuperscript{145} See Epstein, \textit{supra} note 21, at 288.
\item \textsuperscript{146} See, e.g., United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), \textit{cert. denied}, 392 U.S. 936 (1968) (foreign national falsifying statements on visa application); United States v. Archer, 51 F. Supp. 708 (S.D. Cal. 1943) (false statements made in application for a nonimmigrant visa).
\item \textsuperscript{147} 288 F.2d 545 (9th Cir.), \textit{cert. denied}, 366 U.S. 948 (1961).
\item \textsuperscript{148} Id. at 548-49. For a comment on this case see 62 COLUM. L. REV. 371 (1962).
\item \textsuperscript{149} 509 F. Supp. at 216.
\end{itemize}
for jurisdiction under the protective principle."¹⁵⁰ Such an unsupported finding directly exposes the use of this basis for jurisdiction to the criticisms previously noted.¹⁵¹ However obvious it may appear that the situation is on all fours with the criteria of the protective principle, only careful illumination of the facts and effects will prevent international legal condemnation and potentially damaging worldwide public opinion.

In the scenario assumed for this Note, the individual or group violating section 351 has acted specifically because the victim is a representative of the United States government. An act of aggression by a terrorist group or a disenchanted individual clearly violates the federal statute. Like the offense in Layton, it seems this situation squares directly with the rationale behind the protective principle. Before so concluding, however, the specific facts of the individual case should be examined carefully, and any doubts concerning the observation or interpretation of such an act as threatening or impairing the security of this country should be resolved.

Proper invocation of the protective principle occurs when the extraterritorial act threatens or impairs national interests, such as state integrity, security, or other social or governmental concerns.¹⁵² Terrorism would seem to be such a threat. Such acts are nearly always intended as broad social or political statements and as such can hardly be thought to be contained within the limited scope of simple domestic territorial law.¹⁵³ "[A]cts of terrorism are usually performed in abnormal circumstances and are intended to alarm and horrify certain responsible leaders or groups . . . creating a situation of collective danger. . . ."¹⁵⁴ Thus the protective principle can be viewed as an appropriate mechanism to secure extraterritorial jurisdiction over these types of offenses.¹⁵⁵

Assuming now that the victim of the act is a member of Congress, it can again be concluded that the protective principle would apply in most situations.¹⁵⁶ An attack against such a person because of the of-

¹⁵⁰. Id.
¹⁵¹. See supra notes 139-44 and accompanying text.
¹⁵². See Empson, supra note 16, at 37.
¹⁵⁴. Id.
¹⁵⁵. Id. at 382.
¹⁵⁶. If the criminal act were simply a robbery, for instance, with no political or social motivations, the offense would not fall within the bounds of the protective principle, and a
The act of violence against a congressman or congresswoman is undoubtedly an act directed at the sovereignty of the United States. Congressmen and women are essential elements of the government, creators as well as symbols of United States domestic and foreign policy, and their safety and protection are obviously important. The United States could reasonably view an act of violence against one of these members as a potential threat to its very existence, and asserting jurisdiction based on the protective principle in such an instance would be proper and consistent with international law.

For 15 years extensive changes to Title 18 have been considered and proposed, and presently there are bills before both the House and Senate for a new federal criminal code. A major change embodied in both the House and Senate versions of this code is the delineation of when extraterritorial jurisdiction is to apply. This would be accomplished by specifying certain situations, applicable to any provision of the code, when jurisdiction should be asserted extraterritorially. Section 204 of S.1722, Extraterritorial Jurisdiction of the United States, reads as follows:

Except as otherwise expressly provided by statute, or by treaty or other international agreement, an offense is committed within the extraterritorial jurisdiction of the United States if it is committed outside the general or special jurisdiction of the United States and—

(a) the offense is a crime of violence and the victim or intended victim is—
1. a United States official; or
2. a federal public servant outside the United States for the purpose of performing his official duties;
(b) the offense is treason or sabotage against the United States;
(c) the offense consists of—
1. counterfeiting or forgery of, or uttering of a counterfeited or forged copy of, or issuing without authority, a seal, currency, security, instrument of credit, stamp, passport, or public document that is or that purports to be issued by the United States;
2. perjury or false swearing in a federal official proceeding;
3. making a false statement in a federal government matter or a federal government record;
4. bribery or graft involving a federal public servant;
5. fraud against the United States or theft of property in which the United States has an interest;
6. impersonation of a federal public servant; or
7. any obstruction or impairment of a federal government function, if committed by a national or resident of the United States;
(d) the offense consists of the manufacture or distribution, as defined in 21 U.S.C. 802, of narcotics or other drugs for import into, or eventual sale or distribution within, the United States;
(e) the offense consists of entry of persons or property into the United States;
This showing of facts and effects is requisite to use of the protective principle as a basis for jurisdiction. If, however, this premise for extraterritorial jurisdiction is abolished as an internationally recognized principle due to the criticisms stated previously, competency over a section 351 offense would have to be justified on some other basis, such as the passive personality or universality principles.

C. The Passive Personality Principle

This principle is intended to provide jurisdiction to a nation when one of its citizens is the victim of a crime, and is premised on the duty of the state to protect its nationals.160 In the situation postulated for this Note, the passive personality or "nationality of the victim" principle is, on its face, applicable. This principle is not, however, universally accepted,161 and is thought to be the least justifiable criterion on which to base an assertion of extraterritorial jurisdiction.162

Although a state generally has a duty to protect its citizens, extending this protection to nationals abroad may be stretching this duty too far.163 In some cases, the foreign actor will be unaware of the forum state's laws, and little if any connection will exist between the

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160. Epstein, supra note 21, at 289.
162. L. Brownlie, supra note 15, at 303.
163. See J. Brierly, supra note 138, at 302.

(f) the offense consists of possessing an explosive in a United States Government building;

(g) the offense is committed in whole or in part within the United States, the accused participates outside the United States, and there exists a substantial interest in federal investigation or prosecution; the provisions of section 205(c) apply also to this subsection;

(h) the offense constitutes an attempt, a conspiracy, or a solicitation to commit a crime within the United States;

(i) the offense is committed by a federal public servant, other than a member of the armed forces who is subject to court-martial jurisdiction for the offense at the time he is charged with the offense, who is outside the United States because of his official duties; or by a member of a federal public servant's household who is residing abroad because of such public servant's official duties; or by a person accompanying the military forces of the United States;

(j) the offense is committed by or against a national of the United States at a place outside the jurisdiction of any nation; or

(k) the offense is comprehended by the generic terms of, and is committed under circumstances specified by, a treaty or other international agreement, to which the United States is a party, that provides for, or requires the United States to provide for, federal jurisdiction over such offense.

S. 1722, 96th Cong., 1st Sess. (1979). For information concerning the proposed federal criminal code and extraterritorial jurisdiction see Feinberg, supra; Epstein, supra note 21; and Note, supra note 45.
Such concerns probably contributed to the rejection of this principle by the Restatement (Second) of Foreign Relations.\textsuperscript{165}

The Permanent Court of International Justice was faced with a claim of jurisdiction based on the passive personality principle in the case of the S.S. "Lotus,"\textsuperscript{166} but the court approved jurisdiction on other grounds.\textsuperscript{167} Apparently no case in the United States has based jurisdiction on this principle, although courts have listed it along with the other international principles when discussing extraterritorial jurisdiction.\textsuperscript{168} Furthermore, it has been said that no federal law "appears to provide for jurisdiction based on the United States citizenship or the official status (such as a consular employee) of an injured person."\textsuperscript{169}

The court in \textit{Layton} stated that the passive personality principle would support an assertion of extraterritorial jurisdiction in that instance, but discussed potential problems in using this basis for jurisdiction.\textsuperscript{170} Referring to the \textit{Restatement}, the court indicated that it was questionable whether this principle, by itself, would be sufficient for jurisdiction, but did not formally address the question because passive personality was not the sole premise in this case.\textsuperscript{171} In view of the criticism and apparently subordinate status of this principle,\textsuperscript{172} the \textit{Layton} court's fears were no doubt well founded.

In the scenario of a foreign actor beyond United States borders

\begin{itemize}
\item See Epstein, \textit{supra} note 21, at 289.
\item \textit{Restatement, supra} note 13, at 86. Section 30(2) reads: "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." \textit{Id.}
\item The Lotus Case (Fr. v. Turk.), \textit{supra} note 14. See \textit{supra} note 19 for a discussion of The Lotus Case.
\item \textit{Id.}
\item George, \textit{supra} note 18, at 621.
\item 509 F. Supp. at 216 n.5.
\end{itemize}

Passive personality jurisdiction is one of the bases for extra-territorial jurisdiction which is cited in the case law without any suggestion that it should not be relied upon by the courts . . . Given that the assertion of passive personality jurisdiction does not stand alone in this case as the sole basis for extra-territorial jurisdiction under recognized principles of international law, the court need not address the question of whether Congress could assert its jurisdiction over a crime merely on the basis of the nationality of the victim.

\textit{Id.}

\textsuperscript{171} Id.

\textsuperscript{172} The passive personality principle has been referred to as "admittedly auxiliary in character." \textit{Harvard Research, supra} note 13, at 445.
committing an offense encompassed by section 351, the passive personality principle is facially applicable, but its questionable status as a valid jurisdictional basis means that its use should be subject to close scrutiny. If the assault on a member of Congress is a domestic crime, such as a robbery without socio-political motivations, the need for the United States to vindicate its authority would be far less compelling and local law would likely protect United States interests. If, however, the attack is of a terrorist nature, such a resolution might not be adequate.

It has been suggested that the careful use of the passive personality principle in situations involving terrorist attacks would be appropriate and less subject to the general criticism of this basis.\(^{173}\) The principle might combine well with the protective principle in such situations to justify extraterritorial jurisdiction.\(^{174}\) Given the unstable foundation of the passive personality principle, and the section 351 scenario assumed for this Note, however, other less questionable bases of jurisdiction would suffice.\(^{175}\) The fact of the nationality of the victim, instead of providing an independent basis of jurisdiction, would simply be a favorable element tending to add validity to assertions based on other principles.\(^{176}\)

D. The Universality Principle

This principle provides a basis for jurisdiction premised upon custody of the offender, when the acts committed are of such a nature as to be universally condemned. The universality principle is acknowledged by all states with respect to piracy,\(^{177}\) but has had scattered and non-uniform application for some other offenses, most notably war crimes.\(^{178}\) The Restatement (Second) of Foreign Relations specifically articulates piracy as a basis for jurisdiction,\(^{179}\) and the reporter's notes suggest the possibility of universal treatment for such crimes as slave trade, drug, and prostitute trafficking as well as war crimes.\(^{180}\)

Although use of the universality principle is not favored in the United States, it has been invoked in certain instances.\(^{181}\) The Layton

\(^{173}\) Note, supra note 12, at 79.
\(^{174}\) Id.
\(^{175}\) See Harvard Research, supra note 13, at 445.
\(^{176}\) See Empson, supra note 16, at 33 n.10.
\(^{177}\) Harvard Research, supra note 13, at 445.
\(^{178}\) See I. Brownlie, supra note 15, at 304-05; Note, supra note 73, at 1091.
\(^{179}\) Restatement, supra note 13, § 34.
\(^{180}\) Id. at 97.
\(^{181}\) I. Brownlie, supra note 15, at 304.
court mentioned it as an acceptable basis for jurisdiction in interna-
tional law, but in no way relied upon this premise for its holding.\textsuperscript{182} This was probably due to the limited application this basis has had with respect to the types of acts universally condemned. In some in-
stances involving a section 351 violation, however, reliance on this principle might well be valid. As the universality basis continues to develop, it may play an expanded role in extraterritorial jurisdiction for some types of crimes, such as terrorism, possibly filling voids created due to the reluctance of states to make use of the often criticized pas-
sive personality and protective principles.\textsuperscript{183}

The Harvard Research Draft Convention formulated two articles based on a theory of universality. The first is specifically for acts of piracy,\textsuperscript{184} but the second would allow jurisdiction over foreign nation-
als for unspecified offenses in certain carefully defined situations.\textsuperscript{185} Thus, an alien offender whose extradition to the state where the act occurred has been refused could properly be tried in the state of cus-
tody if the act was punishable in both nations.\textsuperscript{186} This gives rise to the possibility that in certain situations involving a violation of section 351,

\begin{itemize}
  \item \textsuperscript{182} 509 F. Supp. at 215-16.
  \item \textsuperscript{183} See Harvard Research, supra note 13, at 579.
  \item \textsuperscript{184} Id. at 563 (art. 9).
  \item \textsuperscript{185} Id. at 573. Article 10, Universality—Other Crimes, states:
    \begin{enumerate}
      \item When committed in a place not subject to its authority but subject to the au-
thority of another State, if the act or omission which constitutes the crime is also an
offence by the law of the place where it was committed, if surrender of the alien for
prosecution has been offered to such other State or States and the offer remains
unaccepted, and if prosecution is not barred by lapse of time under the law of the
place where the crime was committed. The penalty imposed shall in no case be
more severe than the penalty prescribed for the same act or omission by the law of
the place where the crime was committed.
      \item When committed in a place not subject to the authority of any State, if the act
or omission which constitutes the crime is also an offence by the law of a State of
which the alien is a national, if surrender of the alien for prosecution has been
offered to the State or States of which he is a national and the offer remains
unaccepted, and if prosecution is not barred by lapse of time under the law of a State of
which the alien is a national. The penalty imposed shall in no case be more severe
than the penalty prescribed for the same act or omission by the law of a State of
which the alien is a national.
      \item When committed in a place not subject to the authority of any State, if the crime
was committed to the injury of the State assuming jurisdiction, or of one of its nationals, or of a corporation or juristic person having its national character.
      \item When committed in a place not subject to the authority of any State and the
alien is not a national of any State.
    \end{enumerate}
  \item \textsuperscript{186} See id. at 582.
\end{itemize}
understanding and cooperation could result in United States jurisdiction on the basis of this formulation of the universality principle.

If use of the universality principle expands, some terrorist acts might come under the coverage of this basis. Such terrorism may often be the type of threat to the foundation of the world community upon which the principle of universality is founded. Terrorism has been likened to piracy, and terrorist acts in the form of airplane hijacking are clearly a form of air piracy. To date, however, there appears to have been little, if any, use of this principle in relation to terrorism except in limited and non-exclusive instances, and to base jurisdiction solely on universality would be presently inappropriate.

Notwithstanding this lack of customary use, the possibility of claiming the universality principle for jurisdiction over acts of terrorism has been viewed approvingly. As the effective control and prosecution of such acts becomes increasingly difficult, the criticisms and shortcomings of the other international principles might well give way to an expanded notion of universality jurisdiction. A terrorist act against a member of Congress abroad would be an appropriate situation for use of an expanded version of this principle if the United States were to gain custody of the actors. In such a case, a sympathetic world community might condone such an assertion, making it unnecessary to premise jurisdiction upon less firm ground, such as the protective principle or nationality of the victim.

IV. CONCLUSION

This Note has shown that Congress is authorized to create penal legislation that extends beyond the borders of the United States. Furthermore, it is permissible to infer congressional intent to extend jurisdiction even when extraterritorial reach is not indicated on the face of the statute. In the specific case of section 351, such an inference, prior to 1982, would have been appropriate. Therefore, whether the United States as a member of the world community may properly assert the criminal authority embodied in section 351 within the sovereign bounds of other nations will depend upon the specific facts of a viola-

189. See Note, supra note 73, at 1098.
190. Id. at 1099-1100.
191. See DeSchutter, supra note 153, at 383, 388.
tion and the applicability of the accepted international principles of extraterritorial jurisdiction.

In the framework of a reasonable and potential scenario, an offense violating section 351 committed by a foreign national outside of the United States could result in a strong desire by this country to obtain jurisdiction over the crime. Assuming the basic set of facts used in this Note, such an act would fall within the scope of one or more of the accepted international principles. The protective principle would apply most clearly if the attack has political motivations or is undertaken against a member of Congress not as an individual, but as a symbol. Beyond the harm to the individual, the government of the United States is harmed and threatened in a way the protective principle is designed to cover. The United States would certainly be justified in invoking this principle to validate an extraterritorial extension of its law. The protective principle has been criticized, however, and its standing in the international legal community is somewhat dubious.

Using the "objective territorial" principle would be as clearly inappropriate as the protective principle is appropriate. Certainly the scenario assumed for this Note would result in some harmful effect in the United States, but this effect is not the type envisioned by this expansion of the territorial basis. The situation where an individual fires a gun in one country, striking a person in another country, illustrates the effect that the "objective territorial" principle is designed to cover. When the effect of the act is a more indirect harm to the security or structural elements of a state, asserting the "objective territorial" principle would simply confuse this basis with the protective principle. Such an attempt could hardly add validity to the asserting government's actions.

The passive personality principle appears to be directly applicable, but it too has been criticized and is invoked upon facts and circumstances far less fundamental and compelling than any of the other international bases. If the act in question were one of terrorism, the universality principle might be used to justify the extraterritorial jurisdiction of section 351. This would represent an expansion of this basis, however, and though it is possibly a valid and necessary expansion, it is not one that to date is widely accepted.

Another factor was apparently important, although not decisive, in

192. Such a criminal act would certainly be encompassed by the penal laws of the state where the act occurs.

193. See J. BRIERLY, supra note 138, at 300.
United States v. Layton. The court, in finding that extraterritorial jurisdiction was appropriate, felt that the "official nature of Congressman Ryan's trip to Guyana" lent support to such a result. It is difficult to imagine, however, why this fact should be persuasive. The official or unofficial nature of the presence of a congressman or woman in another country does not alter the intent or motivation behind the act, the nationality of the victim, nor the harm to the government of the United States. The application of the principles of international jurisdiction would not change. If, for instance, the offense was a terrorist act, politically motivated and directed at the member of Congress because of his or her position in the government, the fact that the member was vacationing would have little or no bearing on a determination that the protective or universality principles were applicable.

Another point the Layton court seemed to imply was that the principles of international jurisdiction are cumulative, and satisfying more than one basis adds validity to the government's assertion. Thus, in a footnote, the court indicated that the passive personality principle might not be sufficient standing alone but in this case it was not the sole basis, and therefore not a problem. Some scholars have loosely ranked the various principles, and indicate that a state’s position may be strengthened by use of multiple bases. It is important, however, that a state base its jurisdictional assertion on the most persuasive principle available to it. The principles often seem to overlap, however, and the occurrence of a situation where two or more bases validly apply would no doubt make the assertion more reasonable. As previously noted, although justification may not ultimately rest upon an auxiliary base, such as the passive personality principle, the fact of the victim's nationality may be persuasive for a successful assertion.

With respect to the scenario hypothesized for this Note, it is evident that one or more of the principles of international criminal jurisdiction are applicable. Therefore, the United States conceivably could

194. 509 F. Supp. at 220.
195. It is possible, however, that the official nature of such a trip could be evidence of the motivation for the action, and therefore such a determination might be appropriate. But it is the motivation, or intended harm or effect, which is important to a finding of extraterritorial jurisdiction.
196. 509 F. Supp. at 216.
197. Id. at 216 n.5.
200. See I. Brownlie, supra note 15, at 305-06.
201. See supra note 176 and accompanying text.
assert its penal authority beyond its own borders in such an instance. But the use of the international principles is not a simple mechanical or automatic operation carried out blindly when application would be convenient. Prior to the matter ever coming before a federal district court the government must cautiously decide whether it should assert jurisdiction in a particular case.202

If the act is a crime in both the United States and the country where it occurs, that country will have territorial jurisdiction over the offense. An attempt by the United States to assert its penal authority would give rise to a number of problems. Some of the potential trouble areas include concurrent or conflicting jurisdiction, double jeopardy, loss of evidence, and inability to locate or secure witnesses.203 Problems may also arise concerning international agreements, extradition, and immunity.204 In light of these problems, it is incumbent upon a nation, when considering whether to seek jurisdiction beyond its own borders, to consider each case on its own facts, examining both the policies and effects involved.205

Assertion of extraterritorial jurisdiction must be undertaken carefully, with substantial consideration given to the potential conflicts and the possibility of upsetting world order.206 Applying the international principles in any less careful manner would not only be intellectually shallow, but potentially very dangerous. Tremendous foresight, consideration of all possible alternatives, and near-altruistic self-control may be necessary to prevent confrontation or the breakdown of relations. Ultimately, proper and sufficient prosecution of the crime and punishment for the offense is the goal, and cooperation may be the key to ensuring this, regardless of the location of trial.

202. See Feinberg, supra note 159, at 390.
203. See Chase, supra note 48, at 558.
205. See H. STEINER & D. VAGTS, supra note 14, at 800.