Comment

Non-Extraterritoriality of "Special Territorial Jurisdiction" of the United States: Forgotten History and the Errors of Erdos

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   I. INTRODUCTION

   The "special maritime and territorial jurisdiction" of the United States under 18 U.S.C. § 7(3) is limited to:

   Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.¹

   Twenty-five years ago, United States v. Erdos,² a Fourth Circuit case, held that the first portion of such language (relating to lands reserved or acquired) applied to acts of U.S. nationals on U.S. embassy grounds in foreign state territory, while recognizing that the second portion (relating to

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places purchased or acquired) does not apply extraterritorially. For years, the Erdos decision lay dormant and was of little interest to federal prosecutors. Indeed, it is widely understood that a jurisdictional gap exists with respect to conduct of U.S. civilians abroad and that the special territorial jurisdiction provisions do not extend federal court jurisdiction to acts occurring in foreign countries. Recently, however, prosecutors in United States v. Cory and United States v. Haywood have attempted to resurrect Erdos and significantly extend its ruling to reach alleged conduct of U.S. nationals on military bases and in apartments in foreign state territory that happen to be rented by the U.S. government, and both a magistrate and a district judge have been misled. Nonetheless, it is evident that Erdos was significantly in error and that new efforts to obtain judicial extensions of the reach of § 7(3) so as to include acts on a military base or in an apartment in a foreign country are even more inappropriate.

This Comment will address issues concerning relevant jurisdiction under international law, the tests concerning extraterritoriality of U.S. statutes, correct application of the tests with respect to 18 U.S.C. § 7(3), the errors of Erdos and the need to reject its holding and rationale, and the

3. Erdos, 474 F.2d at 159–60. The need for “consent of the states” compelled its conclusion that places mentioned in the second portion of the subsection must be within the territorial boundaries of the United States. Id. As noted below in Section II.C, this is also clear from relevant legislative history.

4. CR No. 96-01019DAE (D. Haw.), writ of prohibition denied (9th Cir. 1998). Cory involved nonofficial acts of a U.S. national civilian that allegedly took place within a private residential apartment rented by the government of the United States (specifically, the Secretary of State) in Manila, the Philippines, as well as similar acts that allegedly took place within an apartment located on Yokota Air Force Base in Japan. The accused was charged with violations of 18 U.S.C. §§ 2241-2244.

5. CR No. 97-945-CR-MOORE (S.D. Fla. 1998). Haywood involved nonofficial acts of a U.S. national civilian that allegedly took place within a private residential apartment in Brasilia, Brazil rented by the government of the United States (specifically, the Secretary of State) from a private individual. The apartment was the only unit in a 36 unit condominium complex that was rented by the U.S. government. The accused was charged with violations of 18 U.S.C. § 113(a)(3) and 18 U.S.C. § 113(a)(6). Both Cory and Haywood involved alleged crimes of sexual abuse. At the request of defense counsel, affidavits were prepared by the author and filed during proceedings in each case. An affidavit by Professor Bernard H. Oxman was also filed in the Haywood proceedings. See Affidavit of Professor Bernard H. Oxman, Mar. 12, 1998, Haywood, CR No. 97-945-CR-MOORE (on file with The Yale Journal of International Law) [hereinafter Oxman Affidavit].

On April 17, 1998 a grand jury returned a superseding indictment charging Haywood with violating 18 U.S.C. § 112(a), asserting that he “did knowingly and unlawfully assault, strike and wound with a dangerous weapon an internationally protected person.” Superseding Indictment, Apr. 7, 1998, Haywood, CR No. 97-945-CR-MOORE (on file with The Yale Journal of International Law). Thus, the indictment under 18 U.S.C. § 113 was dropped and the magistrate’s report and recommendations denying a motion to dismiss for lack of jurisdiction on the basis of 18 U.S.C. § 7(3) became moot and could not be reviewed. See Government’s Response to Defendant Haywood’s Objections, Haywood, CR No. 97-945-CR-MOORE (on file with The Yale Journal of International Law). Section 112 is expressly meant to be extraterritorial and § 112(c) demonstrates an intent to reach a U.S. national defendant if the victim is an “internationally protected person” within the meaning of § 116(b) and is outside the United States at the time of an alleged incident. The definition of “internationally protected person” under § 116(b) reaches an “employee, or agent of the United States Government . . . and any member of his family then forming part of his household.” 18 U.S.C. § 116(b) (1994).
actual effect of relevant U.S.-Japan agreements considered in one of the recent cases. This Comment demonstrates that it is not possible for 18 U.S.C. § 7(3)—which is expressly related to the "territorial jurisdiction of the United States" if "maritime" jurisdiction does not pertain—to meet tests adopted by the Supreme Court to determine the extraterritorial reach of a U.S. statute. As explained in Part II of the Comment, several factors compel recognition of the non-extraterritoriality of § 7(3): the plain meaning of § 7(3), the express focus on "territorial jurisdiction of the United States," legislative history of § 7(3)'s precursor addressing territorially and geographically limited jurisdiction, several failed legislative efforts to modify the statute, and a recent government study of jurisdictional gaps.

Further, it was understood quite early in U.S. law that statutes must be interpreted so as to be consistent with international law, and this fundamental rule of construction has been retained by the Supreme Court. Under international law, the phrase "territorial jurisdiction" has an informing and consistent meaning that supplements the meaning of the first part of 18 U.S.C. § 7(3), since the United States does not, under international law, have territorial jurisdiction over U.S. embassy properties or installations abroad. Indeed, a U.S. claim of "territorial jurisdiction" over foreign territory would have serious international consequences. Congress has not chosen to fill these jurisdictional gaps, and it would be wrong for our courts to do so by asserting such jurisdiction.

A. The Significant Question: Extraterritoriality

Under international law, the United States has competence under the nationality principle to prescribe rules attempting to regulate the conduct of its nationals anywhere on the globe. The significant question for purposes of our inquiry is whether Congress has clearly chosen to exercise such a competence. With respect to 18 U.S.C. § 7(3), Congress has not. There is

6. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting) (highlighting one canon of statutory construction that requires construing national laws so as not to violate international laws); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804) ("[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently, can never be construed to violate... rights... further than is warranted by the law of nations... "); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 107–08 n.9 (1996); see also id. at 34 n.37, 54, 68 n.38, 99.

7. Nationality jurisdiction, or the nationality principle, under international law allows a state to prescribe laws regulating the conduct of its nationals wherever they are in the universe. See PAUST, supra note 6, at 388, 396–97 n.15 (explaining general principles of jurisdiction that highlight the nationality principle).

8. If Congress clearly intended 18 U.S.C. § 7(3) to reach any (or some) conduct of U.S. nationals abroad, international law would support such an extraterritorial reach under the nationality principle. It might also be the case that certain U.S. domestic crimes would constitute violations of human rights law over which there is universal jurisdiction—in which case, under international law,
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no evidence that the section was based on nationality jurisdiction. Indeed, as expressly recognized, it is concerned with the "territorial jurisdiction of the United States" when "maritime" jurisdiction does not pertain. In addition, the Supreme Court has created tests that must be met before concluding that Congress chose to exercise any prescriptive competence extraterritorially. As demonstrated below, such tests cannot be met by § 7(3).

B. The Tests Concerning Extraterritoriality of a Federal Statute

The United States Supreme Court has demanded that the claimed reach of a federal statute extraterritorially be clearly manifest if not also clearly expressed. It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" The Supreme Court has

the United States would also have competence to enact laws with an extraterritorial reach under the universal principle of jurisdiction. See PAUST, supra note 6, at 392-93, 402-04 nn.43-60. Thus, the significant question is not whether international law allows a general competence to legislate when nationality or universal jurisdiction would pertain, but whether Congress has clearly chosen to exercise such a competence. As this Comment demonstrates, it has not.

The Restatement (Third) of the Foreign Relations Law of the United States also argues for limits of such competencies as a matter of international law (with the exception of universal jurisdiction) when the reach of legislation would not be "reasonable," after considering a number of potentially competing factors. See Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987) [hereinafter Restatement]; see also Timberline Lumber Co. v. Bank of Am., 549 F.2d 597, 614 (9th Cir. 1976) (articulating a multi-factor analysis based on the principle of comity). If the exercise of jurisdiction would not meet such a test, the Restatement avers, a U.S. court must decline jurisdiction as a matter of law. See Restatement § 403 cmt. a ("exercise of jurisdiction . . . is nonetheless unlawful if it is unreasonable"). Justice Scalia also accepts this approach. See, e.g., Hartford Fire, 509 U.S. at 818 (Scalia, J., dissenting) (supporting the "reasonableness" inquiry advocated by the Restatement as the correct approach to be applied in international choice of law cases). I do not accept such a view. See, e.g., JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 177-80 (1996) (arguing that the Restatement rule of "reasonableness" is deficient and demonstrating that Congress and the courts do not follow it); PAUST, supra note 6, at 403-04 n.56. Nonetheless, a defendant may choose to raise this claim, especially before Justice Scalia. If so, in cases like Cory and Haywood it would seem that contacts or links between alleged conduct abroad and U.S. territory, as well as substantial and direct effects within the United States from alleged conduct abroad are nonexistent. All relevant contacts and links with territory in these cases are abroad, although the nationality of an accused is one factor among many to be weighed and balanced.

also declared that a statute will not be given extraterritorial effect if it “contains no words which definitely disclose an intention to give it extraterritorial effect.” Another Supreme Court opinion noted:

States, 284 U.S. 421, 436–37 (1932) (“[L]egislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States.”); 34 Op. Att’y Gen. 257, 259–60 (1924) (noting that congressional intent to apply a 1912 Act to activity in a U.S. Embassy in London could not be imputed without express provisions in the legislation plainly indicating such an intention). For further discussion, see infra notes 10–13.

With remarkable abandon, the district court in Cory simply ignored Supreme Court precedent in this area and chose to significantly expand upon inconsistent reasoning in United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994). See Order Denying Defendant’s Motion to Dismiss Indictment and Granting the Government’s Motion in Limine, Apr. 16, 1998, Cory, CR No. 96-01019DAE (on file with The Yale Journal of International Law).

In order to make a determination as to whether Congress intended a statute to apply outside of the physical borders of the United States, the court must look to congressional intent. In Vasquez-Velasco the Ninth Circuit noted that there are some statutes where the court ‘may infer that extraterritorial application is appropriate from the nature of the offenses and Congress’ other legislative efforts to eliminate the type of crime involved.’ Id. at 5 (citing Vasquez-Velasco, 15 F.3d at 839 (citations omitted)). Even assuming that extraterritoriality can rest merely on such an inference, the nature of the crimes alleged in Cory (relating merely to sexual abuse) in no way suggests extraterritoriality. See Sale, 509 U.S. at 188 (“Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested.”).

Indeed, Vasquez-Velasco and cases quoted therein expressly addressed offenses involving the power of the United States to defend itself against obstructions to the operation of the U.S. government. These cases also address the reasonableness of inferring congressional intent to reach crimes abroad that threaten the U.S. government or to reach the murder of DEA agents attempting to investigate international drug trafficking, which on its face is a transnational crime implicating activity abroad. In Vasquez-Velasco, the Ninth Circuit stressed that “drug smuggling by its very nature involves foreign countries, and ... the accomplishment of the crime always requires some action in a foreign country,” Vasquez-Velasco, 15 F.3d at 839–41 & 839 n.4 (citation omitted) (quoting United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991)). Vasquez-Velasco added that “extraterritorial application ... [was] appropriate because these activities implicate national security interests and create a detrimental effect in the United States.” Vasquez-Velasco, 15 F.3d at 841. In no way do the crimes alleged in Cory on their face involve transnational crimes or elements, obstruct the functioning of the U.S. government, or implicate national security interests. Additionally, there were no direct effects within the United States, nor any intent to produce such effects within the United States.

Vasquez-Velasco further rested on protective and objective territorial jurisdiction. See id. at 840. Protective jurisdiction relates generally to conduct posing a significant threat to national security, territorial integrity, or political independence as well as the misuse of government documents. See PAUST, supra note 6, at 392. Objective territorial jurisdiction relates generally to conduct abroad (or partly abroad) with the intent to produce proscribed effects within the forum state (or with the foresight that such effects might occur) and that results in proscribed effects within the forum state. See id. at 389–91. Cory implicates neither of these two principles and instead can rest only on nationality jurisdiction.

Crimes against private individuals . . . like assaults [or] murder . . . must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If the punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.\footnote{11}

The Fifth Circuit, in United States v. Mitchell,\footnote{12} also noted that to overcome the territorial presumption, "and to apply the statute beyond the territory of the United States, the Government must show a clear expression of congressional intent."\footnote{13}

II. THE ERRORS OF ERDOS AND CORRECT APPLICATION OF THE TESTS

A. U.S. Embassy Grounds Are Not U.S. Territory

The opinion in Erdos is premised upon clearly incorrect assumptions and tests and should therefore not be followed. First, the Erdos opinion quoted and relied on a patently erroneous statement in a district court opinion in United States v. Archer\footnote{14} that a U.S. consulate building in foreign territory "is a part of the territory of the United States of America."\footnote{15} The contrary is well recognized—i.e., that a U.S. consulate building, or a U.S. embassy building and embassy grounds, in foreign state territory is on and/or a part of foreign state territory. Indeed, it is the foreign state, and not the United States, that has territorial jurisdiction under international law over acts occurring on such property. The foreign state's territorial jurisdiction remains even though its ability to enforce its laws is significantly limited—but not eliminated—by treaty and customary international law doctrines of immunity. As the International Court of Justice observed in 1950,

A decision to grant diplomatic asylum [in an embassy is not allowed because it] involves a derogation from the sovereignty of [the territorial] State. It [is not allowed because it] withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.\footnote{16}
Professor Brierly, a renowned British scholar, has also affirmed that “powers of jurisdiction within the legation” cannot be exercised as such.\(^{17}\) As an example of the application of this rule, he notes that in 1896, “the British Government refused to accept the [Chinese] minister’s contention that the [Chinese] Legation [in London] was Chinese territory.”\(^{18}\) Brierly also recognized that “the essence of the diplomatic privilege is immunity from *enforcement* of local law so long as the privilege lasts and not immunity from the application of the law” of the territorial state.\(^{19}\) The *Restatement* also affirms: “That premises are inviolable does not mean that they are extraterritorial. Acts committed on those premises are within the territorial jurisdiction of the receiving state, and the mission is required to observe local law,”\(^{20}\) adding that acts within embassy or diplomatic premises “are subject to the host state’s jurisdiction to prescribe, adjudicate, or enforce law except by means or in circumstances where an exercise of jurisdiction would violate the premises or interfere with their use for the designated purposes.”\(^{21}\)

The *Restatement* also recognizes these significant points in the reverse circumstance where the foreign consulate or embassy is on U.S. territory. For example, it notes that during a 1948 incident, the United States protested a Soviet attempt to exercise police power in a Soviet consulate within United States territory; that when persons occupied a Yugoslavian Mission to the United Nations in New York in 1977, the United States denied Yugoslavian claims that the mission grounds were extraterritorial and the persons occupying the Mission were tried later in the United States; and that a British court held in 1972 that a United Arab Republic consulate did not

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18. *Id.*
19. *Id.* at 214.
21. *Id.* § 466 cmt. b.
have extraterritorial status.\textsuperscript{22} The \textit{Restatement} affirms: "The applicability of United States law to acts committed on premises of foreign missions or consulates in the United States is beyond doubt."\textsuperscript{23} Thus, under both domestic U.S. and international law (which is supreme federal law\textsuperscript{24} and also used to interpret federal statutes\textsuperscript{25}), a U.S. embassy in foreign state territory is not U.S. territory and is not within the territorial jurisdiction of the United States, any more than a foreign embassy within the United States is foreign territory or within the territorial jurisdiction of a foreign state. It would not be lawful for the United States to claim territorial jurisdiction over U.S. embassy grounds abroad and such a claim must not be implied.

This is why 18 U.S.C. § 7(7), which pertains merely to conduct "outside the jurisdiction of any nation," also does not apply.\textsuperscript{26} U.S. embassy or consulate premises are clearly within the territorial jurisdiction of the host nation and are not "outside the jurisdiction" of the host nation, although extensive (but not absolute) immunities exist concerning actual enforcement of laws without U.S. consent.

B. \textit{There Must Be "Lands" Under U.S. Territorial Jurisdiction}

Erdos is wrong for a second reason. The first portion of 18 U.S.C. § 7(3), concerning "territorial jurisdiction," is expressly limited to "lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof."\textsuperscript{27} United States embassy grounds in foreign state territory are not lands under the territorial jurisdiction of the United States. On the contrary, they are subject to the territorial jurisdiction of the territorial state.\textsuperscript{28} More specifically with respect

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\item[22.] See id. § 466 reporters' note 2 (citing cases).
\item[23.] Id.
\item[24.] Concerning the status of international law as supreme federal law, see, for example, "\textit{PAUST}, supra note 6, at 6-9."
\item[25.] Concerning the use of international law to interpret federal statutes, see, for example, "\textit{id.} at 6-9, 62, 83, 94, 99, 105 n.2, 107-08 n.9, 193."
\item[26.] 18 U.S.C. § 7(7) (1994) reads: "Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States."
\item[28.] See \textit{RESTATEMENT} § 466, cmt. a, b (explaining that diplomatic and consular immunity does not mean that mission and consular premises are extraterritorial); \textit{BRIEFLY}, supra note 16, at 214 (noting that "the essence of the diplomatic privilege is immunity from enforcement of the local law . . . and not immunity from the application of the law"); \textit{1978 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW}, supra note 16, at 108-09 (recognizing that general immunities do not place premises outside the host state's territorial jurisdiction and describing reciprocal restrictions on diplomatic immunity, including the inspection of premises for building and construction code compliance); \textit{SEEN ALSO} Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 32(1) (stating that the sending state can waive immunity, thus allowing enforcement by the territorial state of its territorial jurisdiction) [hereinafter Vienna Convention]; \textit{id.} art. 39 (providing that any immunity from the host state's territorial jurisdiction regarding nonofficial functions normally ceases when a diplomat leaves the country); \textit{id.} art. 41(1) ("Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State."); Oxman Affidavit, supra note 5, at 3-4
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to the recent cases noted above, the same is true with respect to U.S. military installations in foreign state territory. Furthermore, housing units rented by the U.S. government are neither “lands,” territory, nor under the territorial jurisdiction of the United States. When “maritime” jurisdiction does not pertain, the express and constant focus of the statutory provision (and, indeed, legislative history) is on “territorial jurisdiction of the United States”—a phrase that also has a special meaning under international law—and not nationality jurisdiction, protective jurisdiction, or jurisdiction by consent (for example, by treaty or executive agreement). The phrase “territorial jurisdiction of the United States” necessarily conditions the rest of the meaning of § 7(3), especially related words like “lands . . . under the jurisdiction.” Moreover, because courts must construe federal statutes consistently with international law if at all possible, and under international law it would not be lawful for the United States to assert “territorial jurisdiction of the United States” over a U.S. embassy, military installation, or apartment unit in foreign state territory, § 7(3) must be construed accordingly.

To stress the point, whatever rights or controls might have been consented to under the Vienna Convention on Diplomatic Relations, concerning embassy property, or a Status of Forces Agreement (SOFA), concerning a military installation, simply cannot be labeled “territorial jurisdiction of the United States,” and no such international agreement confers or recognizes “territorial jurisdiction” in the sending state. Indeed, to do so would have dire policy consequences and constitute a serious affront (citing Vienna Convention, supra).

I agree with Professor Oxman that nothing in the Vienna Convention gives the United States the authority to prosecute American citizens who violate the law within residences leased by U.S. embassies abroad. See Oxman Affidavit, supra note 5, at 3–4 (“The Vienna Convention . . . contains no such grant of jurisdiction over the living quarters of diplomatic personnel . . . . An apartment leased by or for a U.S. diplomat in Brazil is Brazilian, not U.S., territory.”). Actually, the apartment is not land or territory as such, but an interest in realty, with possession in the lessee and title remaining in the lessor.

29. See PAUST, supra note 6, at 388–92 (describing the various conceptions of jurisdiction).
30. 18 U.S.C. § 7(3); see also United States v. Rubenstein, 19 C.M.R. 709, 785-87 (A.F.B.R. 1955), aff'd, 7 C.M.A. 523, 22 C.M.R. 313 (1957) (explaining that foreign land occupied by the military is not U.S. territory under § 7(3)); infra text accompanying notes 76–80 (discussing Rubenstein); cf. Oxman Affidavit, supra note 5, at 2. In his affidavit, Oxman states that [t]he jurisdiction asserted in 18 U.S.C. § 7(3) is based on the status of lands, not on the status of particular persons . . . . If that provision is construed to apply to an apartment located in Brazil, all persons within the apartment, including Brazilians, would be subject to the criminal jurisdiction of the United States. Such an assertion . . . would constitute a violation of Brazilian territorial sovereignty under international law . . . .

Oxman Affidavit, supra note 5, at 2. For a discussion of the meaning of “territorial jurisdiction” in § 7(3)'s legislative history, see infra text accompanying notes 40–62.
33. See infra Part IV.
to territorial states. They would be rightly outraged by a claim that any grain of their soil is either territory of the United States or land subject to the "territorial jurisdiction of the United States." Imagine the consequences if such a claim were made openly to the people of every nation where the United States has an embassy, consulate, or military base. Imagine the consequences if this claim were improperly extended to any apartment anywhere within a foreign country that happens to be rented by the U.S. government. Such a "territorial" jurisdiction would reach more than U.S. nationals. It would reach the conduct of foreign nationals in such apartments.\textsuperscript{34}

Not only must federal statutes be construed consistently with international law, if at all possible, but if Congress seeks to supersede international law the purpose to do so must also be clear and unequivocal.\textsuperscript{35} Here, it cannot be shown that Congress intended to violate international law by claiming "territorial jurisdiction of the United States" over foreign soil. Indeed, the plain meaning of the statute, known legislative history, and failed attempts to address known gaps in jurisdiction assure that Congress had no such intent.

Further, when Congress seeks to expand territorial jurisdiction it does so expressly. In 1996, Congress, consistent with international law, chose to expand the territorially limited jurisdiction in § 7(3) by expressly recognizing that the twelve mile territorial sea of the United States "is part of the United States" "for purposes of Federal criminal jurisdiction."\textsuperscript{36} The phrase "is part of the United States" actually reaffirms the focus of both the express statutory language and the legislative history on "territorial jurisdiction of the United States."

C. Legislative Intent and History

\textit{Erdos} is in error for a third reason. The court used the wrong test concerning congressional intent with respect to the possible extraterritorial reach of U.S. statutes. \textit{Erdos} stated that "[w]here the power of the Congress is clear, and the language of exercise is broad, we perceive no duty to

\textsuperscript{34} Even the failed legislative efforts to fill in the "gap" in U.S. statutes attempted merely to reach U.S. national conduct abroad. \textit{See infra} notes 64-69, 72-75 and accompanying text. Congress might choose to fill in this gap under the nationality principle of international law without producing the serious consequences that would follow from an attempted reach of "territorial" jurisdiction into apartments leased by the United States in foreign countries.

\textsuperscript{35} \textit{See}, e.g., \textit{Cook v. United States}, 288 U.S. 102, 119-20 (1933) (stating that "[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed"); \textit{United States v. Palestinian Liberation Org.}, 695 F. Supp. 1456, 1465, 1468 (S.D.N.Y. 1988) (reiterating the duty of courts to interpret statutes in a manner consistent with treaty obligations absent a clear and unequivocal abrogation of those obligations by Congress); \textit{PAUST, supra} note 6, at 99 (setting forth the circumstances under which an Act of Congress may supersede international law).

\textsuperscript{36} \textit{Pub. L. No. 104-132, § 901(a), 110 Stat. 1214, 1317 (1996)}. 
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construe a statute narrowly." As noted above, the correct test is markedly different. It requires a clear intent of Congress (if not also clear words within the statute) to effectuate the extraterritorial reach claimed. Further, the legislative history of the predecessor to § 7(3) actually demonstrates a desire that the "penal statute shall be construed strictly . . . . The law should be plain enough to apprise the citizen of the offense created and then construed strictly . . . ."38

Despite employing a "broad" interpretive approach that abandoned inquiry into the intent of Congress to apply a statute extraterritorially, Erdos did recognize that the latter portion of 18 U.S.C. § 7(3) (addressing "any place purchased or otherwise acquired by the United States") would only apply within the territorial boundaries of the United States.39 Thus, the latter portion of § 7(3) cannot apply to acts outside U.S. territory. Erdos also stated, partly in error, that the meaning of the statute "is not perfectly clear . . . or is the legislative history . . . and, indeed, it is possible that when the statute was enacted the attention of the Congress was not in the slightest focused on extraterritorial jurisdiction."40 Such a possibility, coupled with the significant recognition that the latter portion of § 7(3) cannot be extraterritorial, should have led to greater caution.

On its face, nothing in the text of § 7(3) applies to land outside the geographic boundaries of the United States. No legislative history is known to support anything to the contrary.41 Moreover, known legislative history is remarkably clear and speaks loudly and unavoidably against extraterritoriality. In 1908, when introducing legislation in the Senate that had been approved by a joint committee of Congress, and that became the precursor to § 7(3),42 it was declared:

39. See Erdos, 474 F.2d at 159.
40. Id. at 159-60. This statement is erroneous, first, because the meaning and legislative history are clear. Second, the legislative history clearly demonstrates that Congress was not attempting to reach extraterritorial acts.
41. See infra notes 42-63.
42. Then draft § 269(3) of the Penal Code, entitled "Offenses Within the Admiralty and Maritime and the Territorial Jurisdiction of the United States," was enacted in 1909 as § 272(3) of the Penal Code. Act of Mar. 4, 1909, ch. 321, § 272(3), 35 Stat. 1088, 1142. Chapter 11 of § 272 read in pertinent part:

The crimes and offenses defined in this chapter shall be punished as herein prescribed: .

. Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

§ 272(3), 35 Stat. at 1142–43.
Senator Heyburn: It is stated in the report [on Senate Bill 2982] that that section was framed in order to avoid repeating in each section of the chapter the territorial limitations in connection with every separate section . . . . The committee has reported § 269 to obviate the necessity of such a repetition . . . . It does not enlarge the jurisdiction of the United States courts by a hair's breadth . . . . Senators will find that we have not attempted to enlarge the jurisdiction of the United States either technically or geographically. We have simply gathered up a large number of existing provisions in the various statutes . . . . [W]e have gathered them together in a section at the beginning of this chapter in order to avoid the repetition with each separate section of this geographical jurisdiction . . . . [The committee . . . has] not enlarged the jurisdiction territorially or technically of the United States courts.33

Clearly, there was no intent to enlarge jurisdiction geographically or extraterritorially. The phrases “territorial limitations” and “this geographical jurisdiction” as well as the words “geographically” and “territorially,” unambiguously illustrate the nature of the jurisdiction contemplated and a territorial or geographical limitation to the jurisdiction that pertains under § 7(3). The very title of the legislation openly demonstrates a limitation to the “Territorial Jurisdiction of the United States” when admiralty or maritime jurisdiction does not pertain.44 Indeed, the constant concern in the House and Senate debates over the precursor to § 7(3) involved inquiry into concurrent and exclusive jurisdictional competencies of the federal government and various states within the United States as well as potential clashes and gaps between them.45

Representative Sherley also pointed out that the existence of new entities and activities “within the scope of [the U.S. government’s] territorial jurisdiction . . . [regarding] areas of territory brought under its exclusive jurisdiction” and the inadequacy of adopting the various and changing laws of the states for such areas.46 These reasons demonstrated, he argued, why the United States needed an “independent criminal code” applicable to such areas and a change from the “existing criminal law,” which merely provided “a general section which adopts the laws of the various States and which by legal construction incorporates these laws into the Federal code” applicable to “territories under the exclusive jurisdiction of the United States.”47 He further recognized that these territories are those where exclusive federal jurisdiction obtains under the Constitution “in [Article I.] section 8 [clause 17] relating to any land that is set apart for the exclusive use of the United States, like a fort, arsenal, dock yard, etc.” and “different kinds of land now owned by the National Government.”48

43. 42 Cong. Rec. 1185–86 (1908) (emphasis added).
44. Id. at 1184.
46. Id. at 586 (statement of Rep. Sherley) (emphasis added).
47. Id. (emphasis added).
48. Id. at 590.
Representative Houston focused attention on the Report of the House Committee on the Revision of Laws submitted to the Fifty-Ninth Congress.\textsuperscript{49} The Report stressed the imperfections of then-present legislative schemes governing U.S. territories acquired by cession since the 1825 and 1873 revisions. The Report quoted § 5391 of legislation enacted in 1873,\textsuperscript{50} which linked offenses not otherwise covered by a law of the United States to laws of the state in which such territory was located (by incorporating such state laws) and indicated the nature of such territory as a place "ceded to and under the jurisdiction of the United States."\textsuperscript{51} Section 5391 of the Revised Statutes of 1873–74 reads:

\begin{quote}
If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provided for like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States.\textsuperscript{52}
\end{quote}

The imperfections of § 5391 were emphasized by Representative Sherley while outlining the nature of the U.S. territory to be covered by the new legislation:

\begin{quote}
Subsequently it was held that even under section 5391, this law did not apply to any territory that had been obtained since 1825 except by cession, and it was discovered that a great deal of property, for military reservations, for arsenals, post-offices, customs-houses, quarantine stations, and court-houses had been acquired by reservation; that the United States, owning the land, existing in territorial form, would reserve a portion of it for Federal purposes, and then admit the State to the Union.\textsuperscript{53}
\end{quote}

Clearly, the focus of Congress was on the need for new legislation to govern land reserved by the United States upon creation of a state within the United States. In such an instance, reserved land was land that had been owned and controlled in a territorial and sovereign fashion by the United States and then retained for federal purposes when a new state was created and partial sovereignty was transferred to the new state.

In an effort to argue that the first portion of § 7(3) must be extraterritorial (partly because the second portion admittedly is not), Erdos questions why the first portion was made part of the enactment if the last portion (which begins with the phrase "or any place") ostensibly covers

\begin{footnotes}
\item[49.] Id. at 593 (statement of Rep. Houston).
\item[50.] 1873–74 Rev. Stat. § 5391 (1878).
\item[51.] 42 CONG. REC. 593 (1908) (statement of Rep. Houston) (emphasis added).
\item[52.] 1873–74 Rev. Stat. § 5391.
\item[53.] 42 CONG. REC. at 584 (statement of Rep. Sherley) (emphasis added).
\end{footnotes}
buildings within the states of the United States. One answer is that the last portion of § 7(3) is limited to places "for the erection of a . . . building," and does not cover "lands" more generally. During the Senate debate on the proposed legislation, express references were made to exclusive federal jurisdiction over various buildings, but references and concerns were also expressed with respect to exclusive federal jurisdiction over "a Federal reservation," "the District of Columbia," and "every park which surrounds a public building." Thus, the first portion of § 7(3) was needed to reach U.S. territory not meant for erection of a building and was expressly concerned with, and limited to, "lands."

A more important reason, evident especially from the legislative history, is that, unlike the first portion, the last portion of § 7(3) is limited by its terms to places purchased or otherwise acquired "by consent of the legislature of the State in which the same shall be." Some federal lands within what is now the United States were acquired directly by the United States without the "consent" of the legislature of a state within the United States (like Arlington Cemetery in Virginia—nearly within sight of Congress—and many places within the District of Columbia), and some were acquired in territorial form even before some states existed in such areas (especially in the West and Midwest). Indeed, in 1908 the Territory

56. 42 CONG. REc. at 1187 (statement of Sen. Bacon).
57. Id. at 1189 (statement of Sen. Heyburn).
58. Id. at 1192 (statement of Sen. Bacon).
59. 18 U.S.C. § 7(3).
60. The former residence of Confederate General Robert E. Lee was confiscated by the United States during the Civil War and was finally purchased from the family after General Lee's son won the right to receive compensation. See United States v. Lee, 106 U.S. 196 (1882). It had been previously held, in the circuit court in 1880, that no federal jurisdiction obtained over Arlington Cemetery since the United States purchased the property at a tax sale and without the consent of the State of Virginia. The circuit court had stressed that under article I, section 8, clause 17 of the United States Constitution, "[t]he constitution prescribes the only mode by which [the United States] can acquire land as a sovereign power, and therefore [the United States] hold[s] only as an individual when [the United States] obtain[s] it in any other way," i.e., without a consensual cession of sovereignty. United States v. Penn, 48 F. 669, 670 (C.C.E.D. Va. 1880).
61. For cases addressing the status of District of Columbia lands, see, for example, Johnson v. United States, 225 U.S. 405, 412, 416 (1912) (noting that § 5339 of the Revised Statutes of 1873–74 applied to the District of Columbia, as a place under the exclusive jurisdiction of the United States, until January 1, 1902, when the District Code became effective, and that the District "can hardly be said . . . to be . . . lands reserved"); and Winston v. United States, 172 U.S. 303 (1899) (holding that Revised Statutes § 5339 applied to the District of Columbia). See also infra note 63 (discussing Johnson).
62. See, e.g., Guith v. United States, 230 F.2d 481, 482 (9th Cir. 1956) (stating that lands in "Indian country" were "part of lands reserved . . . for the use of the United States" and holding that the site of a crime, being on "Indian country," a Blackfeet Indian reservation, was subject to federal jurisdiction under 18 U.S.C. § 7(3), despite the fact that there was private title to the land on the reservation); 42 CONG. REc. 584 (1908) (statement of Rep. Moon) ("[A] great deal of property . . . had been acquired by reservation: that the United States, owning the land, existing in territorial form, would reserve a portion of it for Federal purposes, and then admit the state to the Union.").
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of Oklahoma had only become a state one year previous and New Mexico and Arizona were still not states, but rather were territories of the United States within its geographic boundaries. Certainly the existence of every national park, reserved land, wetlands, or military land area cannot rest on the "consent" of a state legislature. Thus, the first portion of § 7(3) can reach additional "lands" within the territorial boundaries of the United States that are subject to the exclusive or concurrent jurisdiction of the United States, but that are not reserved or acquired "by consent of the legislature" of any state, and this would have been especially so in 1908. On its face,

the United States. Thus, Yellowstone National Park was not acquired "by consent of the legislature of the State[s] in which the same shall be," as required by the second part of § 7(3).

Federal legislation enacted prior to 1908 had provided federal court and federal territorial court jurisdiction over certain civil rights deprivations perpetrated "under color of territorial law." See Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 583–86 (1976) (holding that federal territorial, district, and circuit courts have jurisdiction under the 1871 Civil Rights Act for deprivation of rights under color of territorial law). In 1874, Congress provided that "[t]he Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States." Id. at 585 (quoting 1873-74 Rev. Stat. § 1891 (1878)). In 1875, Congress conferred general federal question jurisdiction on U.S. district courts. See id. at 585 (citing Act of Mar. 3, 1875, § 1, 18 Stat. 470). In 1908, it would have been quite consistent with the legislative scheme of consolidating such federal laws to recognize federal district court jurisdiction under then draft § 269(3), the precursor to 18 U.S.C. § 7(3), over matters occurring on United States territories within the boundaries of the United States. See supra text accompanying note 42.

Congress must also have had in mind land areas such as the Public Land Strip that was commonly known as "No Man's Land" bordered by the Territory of New Mexico, Texas, Colorado, and Kansas prior to the creation of the Territory of Oklahoma. See Cook v. United States, 138 U.S. 157, 165–66 (1891) (holding that crimes in the Public Land Strip were subject to prosecution under Revised Statutes § 5339 for murder "in any . . . place or district of country under the exclusive jurisdiction of the United States").

Nonetheless, the 1909 version also stressed the need for exclusive U.S. jurisdiction and courts had declared that the requirements of § 272(3), see supra note 42, were not met by mere purchase or control of lands within a state by the United States, since that would not give the United States exclusive jurisdiction. See, e.g., Pothier v. Rodman, 291 F. 311, 317–18 (1st Cir. 1923).

"It would seem to have been the opinion of the framers of the Constitution that, without the consent of the states, the new government would not be able to acquire lands within them . . . [s]uch consent should carry with it political dominion and legislative authority over them . . . Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the general government of lands within the states . . . The consent of the states to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor . . . subject to the legislative authority" [of the state].

Id. (quoting Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 530–31 (1885)); see also United States v. Penn, 48 F. 669, 670 (C.C.E.D. Va. 1880) (stating that the federal courts had no jurisdiction to try an individual for petty larceny committed at Arlington Cemetery when the United States purchased the property at a tax sale, without the consent of Virginia); 14 Op. Att'y Gen. 557, 557 (1875) (suggesting that mere U.S. ownership does not confer U.S. jurisdiction over that land; the United States must acquire jurisdiction from the state in which the land is located). In Pothier, it was
recognized that Camp Lewis Military Reservation was not acquired or reserved by the United States before the state of Washington existed, but was acquired subsequently and must, therefore, have been acquired with the appropriate consent of the state for exclusive federal jurisdiction to attach. See Pothier, 291 F. at 319-20. The Pothier court noted that such consent did not technically exist at the time of the alleged crime. See id. In addition, the Pothier court recognized that U.S. possession under war emergency legislation was not sufficient, since “the United States had acquired no title in the land embraced within Camp Lewis Military Reservation . . . [and] the sovereignty of the State over the tract had not been yielded up.” Id. at 320-21.

Later, with the enactment of § 7(3), concurrent jurisdiction with the states might suffice. It was also recognized that: “Prior to 1885 it is abundantly clear that the United States could only acquire jurisdiction by purchase, with the consent of the state legislature, for the purposes stated in Article I, § 8, cl. 17, unless the jurisdiction had been reserved by the United States when the particular state was admitted into the union.” United States v. Schuster, 220 F. Supp. 61, 63 (E.D. Va. 1963) (emphasis added). The Schuster court added that U.S. ownership was not sufficient to transfer sovereign power, but was also not required, and that a state might “cede part of its jurisdiction over privately owned property to its paramount sovereignty.” Id. at 64 (quoting Petersen v. United States, 191 F.2d 154, 156 (9th Cir. 1951)); see also Fort Leavenworth R.R., 114 U.S. at 525 (holding that a state may cede to the United States exclusive jurisdiction over a tract of land within its limits); Pothier, 291 F. at 312 (noting that the United States may purchase or acquire lands within a state without its consent, but that the United States can only exercise exclusive jurisdiction over lands within a state with the consent of the state); Penn, 48 F. at 670 (finding that the purchase of lands for the United States, for public purposes, does not of itself oust the jurisdiction of such states over the lands purchased); 14 Op. Att’y Gen. 557, 557 (1875) (same). Thus necessarily, it was recognized that there is a difference between the first portion of § 7(3), concerning lands “reserved,” and the second portion, concerning lands obtained with the “consent” of a state.

That difference was also noted by the Supreme Court in 1912. In Johnson v. United States, 225 U.S. 405 (1912), the Court noted that § 272 of the Criminal Code, see supra note 42, adopted by the joint committee of Congress after amendment of previous drafts, was “less broad than the provision recommended by the commission.” Id. at 414; see also 42 CONG. REC. 582 (1908) (discussing the history of the creation of the commission, the joint committee, and of the Final Report of the Commission). The Court stressed the difference between language that can be found in the two portions of § 272(3), but noted this as a difference between the commission draft, which addressed the clause “or in any other place . . . under the exclusive jurisdiction of the United States,” Johnson, 225 U.S. at 415, and the first portion of § 272(3). Id. at 414. The Court declared:

The difference to be observed . . . is the difference between “any fort . . . or other place under the exclusive jurisdiction of the United States,” and “any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof.” The word “lands” in the latter is limited, as the word “place” was in the former, by its association. It is further limited and, indeed, specialized by the qualification “reserved or acquired for the exclusive use of the United States.” In other words, it has a proprietary and not a governmental sense, and is very inapt, indeed, to describe the District of Columbia. . . . It will be observed, therefore, how general and comprehensive the first clause of § 5339 is, and in comparison how restricted and special is subdivision three of § 272. In other words, there is omitted from the latter the words by which . . . it was decided in Winston v. United States . . . that the act of January 15, 1897 . . . was applicable to the District of Columbia.

Id. at 414-15.

The Court added that:

The District of Columbia can hardly be said . . . to be in any proper or adequate sense “lands reserved for the exclusive use of the United States,” while the words “district of country under the exclusive jurisdiction of the United States” can be, as they had been, properly and adequately held to include the District of Columbia.

Id. at 416. In the next sentence of its opinion, the Court referred again to “the restricted language of § 272.” Id. at 416.

In this sense, the Supreme Court seems to fuse the two portions of § 272(3) together, as if neither the first portion nor the second can stand alone or provide alternative bases for federal court jurisdiction. Nonetheless, this approach is certainly consistent with the expectation that § 272(3) was not extraterritorial, since the second portion would also condition the first.
that is what the first portion of § 7(3) addresses. The plain meaning of § 7(3), the express and constant focus of the statutory provisions on "territorial jurisdiction of the United States," and known legislative history addressing owned land and geographically limited territorial jurisdiction compel recognition of the non-extraterritoriality of § 7(3).

Thus, it is clear that Congress did not intend § 7(3) to apply extraterritorially and it is inconceivable that application of the correct interpretive test (which requires proof of a clear intent of Congress to effectuate a claimed extraterritorial reach) can result in an extraterritorial reach to embassy property in foreign territory. Clearly also, it was not the intent of Congress that § 7(3) extend abroad to any apartment building or to any apartment unit used as a private residence in foreign state territory that happens to be rented by the U.S. government.

These points are confirmed and supplemented by legislative attempts subsequent to enactment of § 7(3). As noted by Professor Everett and Lieutenant Hourcle, there is a "jurisdictional gap" that precludes U.S. prosecution of civilians in time of peace for crimes that occur abroad, especially "on an American installation." They add: "[e]xpansion of the special maritime and territorial jurisdiction of Federal courts so that it would apply" to civilians abroad had been suggested but was not achieved. As they document, under one proposal to change existing legislation—H.R. 18857, 91st Cong. (1970)—U.S. nationals would have been covered if the civilian national’s conduct "took place while he was engaged in the performance of official duties or was within an armed forces installation." This proposed change was not adopted and the gap remains in such situations, and thus surely remains where conduct takes place outside the performance of official duties. It was also recognized that such a change would reach conduct "outside the United States and the special maritime and territorial jurisdiction of the United States," demonstrating that § 7(3) does not cover such conduct.

Everett and Hourcle also note that, during redrafting efforts in 1962, a Department of the Army statement during congressional subcommittee hearings affirmed that a jurisdictional "gap . . . now exists" and that serious offenses committed abroad by U.S. nationals in time of peace "are now punishable by U.S. courts only when committed within the United States.

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65. Id. at 200; see also id. at 189–90, 193, 200–201 (describing congressional proceedings and failed legislative proposals).
66. Id. at 201.
67. Id.
(e.g., murder and other serious offenses against the person)." The Department’s statement also recognized that 18 U.S.C. §§ 2377 and 2388 “are applicable only within the United States, its maritime jurisdiction, and on the high seas.” This is the correct interpretation of the reach of 18 U.S.C. § 7(3) and (7)—the latter at least while U.S. flag vessels are outside the jurisdiction of any foreign state.

During further legislative attempts to redraft the statute in 1966, General Manss, the Judge Advocate General of the Air Force, testified that in Japan, the stepdaughter of an Air Force sergeant shot and killed the sergeant; the Japanese subsequently declined to prosecute. He further testified that the United States was unable to prosecute. General Manss also testified that the wife of a civilian employee in Taiwan shot her husband “in the living room” of their quarters, and the United States again could not prosecute. General Manss stated that “most of the time we have no jurisdiction” over “offenses committed on the base property within our control.” Indeed, despite the existence of 18 U.S.C. § 7(3), the Supreme Court recognized in Kinsella v. United States ex rel. Singleton the want of legislation providing for trials in capital cases in Article III courts sitting in the United States and noted the Executive’s recognition during argument “that there had been no effort in the Congress to make any provision for the prosecution of such cases either in continental United States or in foreign lands.”

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68. Id. at 189 (quoting Hearings on Constitutional Rights of Military Personnel Before the Senate Subcomm. on the Judiciary, 87th Cong. 484–49 (1962)).
69. Everett & Hourcle, supra note 64, at 189.
70. See supra note 23 (quoting text of 18 U.S.C. § 7(7)).
72. Everett & Hourcle, supra note 64, at 190 (quoting Joint Hearings).
73. 361 U.S. 234 (1960).
74. Id. at 245. The Supreme Court added that it cannot fill such a gap “either on a case-by-case basis or on a balancing of [powers and interests approach],” and it “cannot diminish [or] expand” the power of Congress to address domestic crimes of civilians committed outside the U.S. Id. at 246.

In remarkable error, the district court in United States v. Cory, CR. No. 96-0109DAE (D. Haw.), writ of prohibition denied (9th Cir. 1998), concluded that no jurisdictional gap was created by Reid v. Covert, 354 U.S. 1 (1957) (dealing with the jurisdiction over a civilian wife who had allegedly murdered her husband, a military officer, on an airbase in England), and subsequent cases. Order Denying Defendant’s Motion to Dismiss Indictment and Granting the Government’s Motion in Limine, Apr. 16, 1998, at 13, Cory, CR No. 96-0109DAE (on file with The Yale Journal of International Law). Cory argued that Reid "did not discuss the applicability of 18 U.S.C. § 7(3), nor did it acknowledge the creation of a jurisdictional gap" and, most curiously in view of the appropriate test of extraterritoriality, that "Congress' failure to act actually demonstrates the 'non-existence' of such a gap." Id. The Cory court went on to argue that if Reid created such a gap, "Congress would have already acted to bridge the gap" and "would not allow such a gap to exist, for it would create a sense of insecurity . . . ." Id.

History and Supreme Court recognitions, however, cannot be so easily ignored. In Reid, the
government had argued against the creation of such a gap. See Reid, 354 U.S. at 48 (Frankfurter, J., concurring) (recognizing government’s argument that “only a foreign trial could be had” if no military jurisdiction existed). Justice Clark stated that “[t]he Court today releases two women from prosecution though the evidence shows that they brutally killed their husbands, both American soldiers, while stationed with them in quarters furnished by our armed forces on its military installations in foreign lands.” Id. at 78 (Clark, J. dissenting). He added, “worst of all, it gives no authoritative guidance to what, if anything, the Executive or Congress may do to remedy the distressing situation.” Id. Addressing a future alternative—“trial of offenders by an Article Ill court in this country” for offenses committed on a U.S. military installation in a foreign country—Justice Clark opined that such would be most impracticable “even if the Congress and the foreign nation involved authorized such a procedure.” Id. at 88 (emphasis added); see also id. at 76 n.12 (Frankfurter, J., concurring) (noting that “practical problems in the way of such a choice are obvious and overwhelming,” and would impose “a ridiculous burden” on the government). Thus, clearly, Justice Clark thought that Congress had not authorized such a procedure and that a gap remained. Consistent with this, he added: “[t]he only alternative remaining—probably the alternative that the Congress will be forced to choose—is that Americans committing offenses on foreign soil be tried by courts of the country in which the offense is committed.” Id. at 88 (Clark, J., dissenting). He concluded: “[a]ll that remains is for the dependent of our soldiers to be prosecuted in foreign court.” Id. at 90. See also McElroy v. United States ex rel. Guagliardo, 361 U.S. 281, 259 (1960) (Harlan, J., dissenting) (worrying that the decision may “result in our having to relinquish to other nations . . . a substantial part of the jurisdiction now retained over American personnel under the Status of Forces Agreements”); id. at 276-77 (Whittaker, J., concurring in part and dissenting in part) (recognizing that no jurisdiction exists “at bases in foreign lands—where jurisdiction of our civil courts does not extend” and that none exists over employees as force members “when ‘outside the United States’—where our civil courts have no jurisdiction and do not exist” (citation omitted)).

Moreover, after the decision in Reid there was no prosecution for the next forty years of any accused service-wives, or any other civilians, under 18 U.S.C. § 7(3) for acts allegedly committed on a U.S. military installation in a foreign country. It was common knowledge that such a gap existed. See, e.g., supra notes 64-69, 72-73; infra notes 75-82; see also DONALD N. ZILLMAN ET AL., THE MILITARY IN AMERICAN SOCIETY 3-17 to 3-18 (1978) (stating that, after Reid and subsequent cases, an “offense could be made punishable under the United States Criminal Code . . . [but] [w]ith a few exceptions Congress has not chosen to define as criminal conduct by American citizens outside the United States . . . . The [Reid] line of cases forbids court martial jurisdiction . . . . and Congress has not passed a statute authorizing trial in a federal district court.”).

75. See OVERSEAS JURISDICTION ADVISORY COMM., REPORT TO THE SECRETARY OF DEFENSE, THE ATTORNEY GENERAL, AND THE CONGRESS OF THE UNITED STATES 9 (1997) (“‘jurisdictional gaps’ exist with respect to ‘civilians accompanying the armed forces in foreign countries’ and are “not news to the Congress or to other U.S. Government entities”); id. at 10-11 (noting that among several never-adopted legislative proposals to fill gaps were those designed to cover civilians “within a U.S. military installation abroad”); id. at 37-38 & n.135 (detailing recent incidents not covered by legislation), id. at 41 (noting that “installations in foreign countries are not currently within the special maritime and territorial jurisdiction of the United States”); id. at 44 n.144 (discussing the fact that an incident involving drug distribution on a military base was not covered by existing federal legislation); U.S. DEP’T OF ARMY PAMPHLET NO. 27-21: ADMINISTRATIVE AND CIVIL LAW HANDBOOK para. 2-19c (Mar. 15, 1992) (noting that “based on the current definition of ‘special maritime and territorial jurisdiction,’ criminal jurisdiction would not extend to offenses that civilians commit abroad”); Susan S. Gibson, Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem, 148 MIL. L. REV. 114, 134-37 (1995) (noting that U.S. nationals “may escape punishment altogether” if they cannot be tried by country where crime is committed); Lisa M.
From the above, clearly § 7(3) does not reach conduct of U.S. civilians on a U.S. installation abroad and, a fortiori, does not reach conduct off a U.S. installation in a foreign country. This was actually the ruling in United States v. Rubenstein,76 where the U.S. Air Force Board of Review found that the accused was “‘without the territorial jurisdiction of the United States.’”77 The opinion stated that U.S.-controlled lands in Japan, which were controlled due to the U.S. military occupation that was in place before the Peace Treaty with Japan, are not territory of the United States and are not within the special maritime and territorial jurisdiction of the United States under 18 U.S.C. § 7(3).78 Rubenstein specifically addressed the first portion of 18 U.S.C. § 7(3) and rightly affirmed “that lands of a foreign country occupied by the United States after a military conquest, even if continued to be occupied under a military government, are not ‘acquired’ for the ‘use’ of the United States within any justifiable construction of 18 U.S.C. § 7(3).”79 The court added: “[o]n no rational basis can it be said that lands under military occupation . . . are territories ‘of the United States’ within the meaning of 18 U.S.C. § 7(3).”80 A similar recognition appears in Talbott v. United States ex rel. Toth,81 where the circuit court states that a “K-9 Air Base or any other land in South Korea used as an air base by the United States” is not “reserved for the use of the United States . . . or under its exclusive or concurrent jurisdiction” within the meaning of the statute and “[i]t does not appear, therefore, that the offenses . . . charged could be tried . . . within the jurisdiction of a District Court.”82

III. Distinguishing Erdos

In view of the above, Erdos and any related unreasoned dictum83 should be openly rejected and eventually overruled. Erdos rests on

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Schenck, Child Neglect in the Military Community: Are We Neglecting the Child?, 148 Mil. L. Rev. 1, 22 & n.117 (1995) (“Most scholars contend that "special maritime and territorial jurisdiction of the United States" does not extend federal court jurisdiction to foreign countries.” (citing U.S. DEP’R OF ARMY PAMPHLET No. 27-21, supra; Everett & Hourcle, supra note 64)).
77. Id. at 757.
78. Id. at 782–88.
79. Id. at 785.
80. Id. at 786; see also id. at 787 (stating that Japan was not “a territory of the United States within the meaning of 18 U.S.C. § 7(3)”).
81. 215 F.2d 22 (D.C. Cir. 1954).
82. Id. at 27; see also In re Di Bartolo, 50 F. Supp. 929, 933 (S.D.N.Y. 1943) (holding that whether on a military base or off base “within the same enemy territory occupied by the armies of the United States,” the accused was “outside the territorial jurisdiction of the United States”).
83. Unreasoned dictum is included in McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983), stating: “the prosecution of Erdos . . . was based on 18 U.S.C. § 7, which grants special territorial jurisdiction over federal crimes committed in United States embassies” and involves “an explicit statutory mandate.” Id. at 588. McKeel did not challenge Erdos but found that it was not controlling and held that the U.S. Embassy in Iran was not part of U.S. territory within the meaning of 28 U.S.C. § 1603(c), which reads: “The ‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.” Id. at 588–89. McKeel did
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erroneous assumptions and tests and can play havoc with U.S. interests abroad. Yet, Erdos can be distinguished from cases like Cory and Haywood. Its radical rewrite and expansion of legislation where Congress dared not go should at least be confined to embassies. The activist extension of supposed "territorial jurisdiction of the United States" from "a diplomatic compound" or embassy land to any apartment anywhere on the soil of any foreign country that happens to be rented by the U.S. government or to any military base on foreign soil should be opposed. Such an extension would be a radical claim in clear violation of international law concerning territorial jurisdiction claims. It was unimaginable by Congress and must not be accepted.

IV. THE U.S.-JAPAN AGREEMENTS DO NOT CREATE U.S. TERRITORIAL JURISDICTION WITHIN JAPAN

The Cory court concluded that agreements between the United States and Japan concerning U.S. military forces and installations result in land on which a military base is located being "reserved" to the United States within the meaning of § 7(3). The court demonstrates confusion on this point when it admits "that the United States does not own the land upon which Yokota Air Base lies" and that the Status of Forces Agreement with Japan does not confer jurisdiction on federal district courts, rather only on U.S. military authorities. Despite this acknowledgement, the court argues that the air base "is land reserved to the United States, and that the United States exercises... jurisdiction of the land." Yet, if the land is not owned by the United States, the land as such is not "reserved" or "acquired" by the United States within the ordinary meaning of those terms or the meaning clarified by legislative history and historical context, especially the special meaning of "reserved lands."

Further, the jurisdictional competence conferred by treaty is simply not territorial jurisdiction. Specifically, nothing in the agreements with Japan gives the United States "territorial jurisdiction" over acts occurring on a

affirm: "A United States embassy ... remains the territory of the receiving state, and does not constitute territory of the United States ... Thus, United States embassies are not within the territorial jurisdiction of the United States." Id. at 588 (citing Meredith v. United States, 330 F.2d 9, 10-11 (9th Cir. 1964)).

84. See Order Denying Defendant's Motion to Dismiss Indictment and Granting the Government's Motion in Limine, Apr. 16, 1998, at 11, United States v. Cory, CR No. 96-01019DAE (D. Haw.), writ of prohibition denied (9th Cir. 1998) (on file with The Yale Journal of International Law).

85. Id. at 8.
86. Id. at 10.
87. Id. at 9.
88. Id. at 11.
U.S. military base in Japan. The consistent expectation evident in the 1960 Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan,89 is that such facilities and areas are in Japan (not the United States),90 “in the territory of Japan,”91 and “within the territory of Japan.”92 Japan also retains jurisdiction in several sections within the Agreement.93 Indeed, the Supreme Court has recognized that Japan retains territorial jurisdiction over offenses committed within its borders and has granted only a “qualified jurisdiction” to the United States by agreement.94 The 1952 Administrative Agreement with Japan95 also expressly addressed the fact that U.S. forces are “in and about Japan.”96 Under international law, including the agreements with Japan, a U.S. military base in Japan is within the territorial jurisdiction of Japan, subject to certain agreed limitations and powers. A U.S. military base in Japan is simply not the territory of the United States, nor is a base on Japanese soil within the “territorial jurisdiction of the United States.” These same points are unavoidable even if the United States had obtained title to the land (which is not the case) and, to that extent, had “acquired” the land.

Significantly, the 1960 SOFA also does not grant jurisdictional competence to the United States as such, but only to “military authorities of the United States,” and then only the “jurisdiction conferred on them by the law of the United States.”97 Thus, Japanese land is not reserved or acquired by the United States, although U.S. military authorities have some control and jurisdictional competence granted by treaty. In addition, “the

90. See id. arts. I, II(1)(a), XIII(1), XIV, XVI.
91. Id. art. I(a).
92. Id. art. XVII(8).
93. See, e.g., id. arts. XI, XIV(8), XVI, XVII(3), (8).
94. See Wilson v. Girard, 354 U.S. 524, 529-30 (1957) (“A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction. . . . Japan’s cession to the United States of jurisdiction to try American military personnel . . . was conditioned . . . [There was a] qualified jurisdiction granted by Japan.”); see also Reid v. Covert, 354 U.S. 53, 1 (Frankfurter, J., concurring) (“Of course the power sought to be exercised in Great Britain and Japan [on a U.S. military installation] does not relate to ‘Territory.’”).
96. See id. pmbl.
97. SOFA, supra note 89, art. XVII(1)(a); see also id. art. XVII(3)(a) (granting jurisdictional competence to “military authorities of the United States”). The district court in Cory admitted that the SOFA does not confer jurisdiction on the federal district courts. See Order Denying Defendant’s Motion to Dismiss Indictment and Granting the Government’s Motion in Limine, Apr. 16, 1998, at 10, United States v. Cory, CR No. 96-01019DAE (D. Haw.), writ of prohibition denied (9th Cir. 1998) (on file with The Yale Journal of International Law). But see id. at 12 (arguing incorrectly that the SOFA “provides for jurisdiction to the United States, through its military authorities located in Japan”).
Administrative Agreement was intended to define the rights and obligations of the signatory governments rather than to prescribe the conduct of individuals or organizations subject to their authority" and, thus, cannot create an offense or enlarge the federal criminal code. Further, the Administrative Agreement and a 1952 Security Agreement with Japan were replaced in 1960.

V. OCCUPIED CUBAN TERRITORY IS DISTINGUISHABLE

Cases addressing Guantanamo Bay, Cuba are inapposite to analysis of situations presented by cases like Cory and Haywood. Such territory is sui generis; Guantanamo is a territory specially occupied during the Cold War with Cuba, in a context where the U.S. government has refused to recognize the Cuban regime, has engaged in acts of war with Cuba since the Bay of Pigs invasion, and has retained the territory as a military occupier. Moreover, the federal district court in Haitian Centers Council, Inc. v. McNary recognized an additional reason why Guantanamo Bay has a unique status. Under a 1903 agreement, modified and continued in 1934, between Cuba and the United States, “Guantanamo Bay is a military installation that is subject to the exclusive control and jurisdiction of the United States.” To emphasize the territory’s unique status, the court quoted from the agreement and italicized the following language: “the United States shall exercise complete jurisdiction and control within the said areas.” As noted above, that is not the case with respect to embassy or


100. The prosecutor raised such cases in Cory and the district judge simply did “not agree [with defense counsel] that Guantanamo Bay is a ‘unique’ case.” See Order Denying Defendant’s Motion to Dismiss Indictment and Granting the Government’s Motion in Limine, Apr. 16, 1998, at 11–12, Cory, CR No. 96-01019DAE (on file with The Yale Journal of International Law). The judge addressed such cases, but how they are actually relevant is unclear from the district court’s opinion.

101. The 1903 agreement between Cuba and the United States at one point noted a purpose of the agreement to allow U.S. control for “coaling and naval stations only, and for no other purpose.” See Haitian Ctr. Council, Inc. v. McNary, 969 F.2d 1326, 1342 (2d Cir. 1992) (citing the Agreement for the Lease of the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418). To the extent that the use of Guantanamo Bay by the United States over the last 40 years has exceeded such purposes, U.S. control backed by the exercise of military power has been functionally equivalent to territorial occupation, creating related territorial competencies and responsibilities.

102. 969 F.2d 1326 (2d Cir. 1992).

103. Id. at 1342 (emphasis partly added).

104. Id.; see also United States v. Rogers, 388 F. Supp. 298 (E.D. Va. 1975). In Rogers, the court held:
consulate properties or military bases in Japan. In each instance, territorial jurisdiction remains with the territorial or host state, and in each instance enforcement of that competence can occur in certain circumstances. Further, in United States v. Rogers, a Fourth Amendment case, there was simply no attention paid to 18 U.S.C. § 7(3) or the tests and issues concerning extraterritoriality. Likewise, in United States v. Lee, there was only a terse reference in a footnote to § 7 (and none to paragraph three) and there was simply no attention paid to the tests and issues concerning extraterritoriality.

VI. CONCLUSION

Under international and domestic law, Congress can easily proclaim its will to reach the conduct of U.S. nationals abroad. With respect to 18 U.S.C. § 7(3), Congress has not chosen to do so. Section 7(3), addressing "territorial jurisdiction of the United States," cannot rightly be applied to acts committed in foreign state territory in an embassy compound or on a military base, much less in any apartment anywhere within a foreign state that happens to be rented by the U.S. Government. Erdos, the one case concluding that § 7(3) reaches U.S. embassies abroad, is based on several errors, must not be followed, and certainly should not be expanded.