NOTES

SOLVING THE EXTRATERRITORIALITY PROBLEM: LESSONS FROM THE HONEST SERVICES STATUTE

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INTRODUCTION: *UNITED STATES V. GIFFEN*[1]

JAMES Giffen became the "oil consigliere" to the President of the Republic of Kazakhstan in the 1980s, when the Republic was still part of the Soviet Union.[2] Giffen, a California native and chairman of a New York-based merchant bank with offices in Kazakhstan, served as the liaison between foreign oil companies and the Kazakh government. As the representative of a country that is both advantageously located for U.S. military purposes and home to two of the largest oil fields in the world, Giffen enjoyed a posi-

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[1] 326 F. Supp. 2d 497 (S.D.N.Y. 2004). The prosecution against James Giffen is ongoing. This Note makes no intimations as to Mr. Giffen's actual guilt or innocence, but it assumes that Giffen committed the alleged conduct. The *Giffen* trial is tentatively scheduled to begin in October 2006, pending appeal of an interlocutory order to the Second Circuit on an issue unrelated to the Honest Services charges.

[2] See Robert Baer, See No Evil: The True Story of a Ground Soldier in the CIA's War on Terrorism 241 (2002) ("Jim Giffen was Mr. Kazakstan. If you wanted an oil concession in Kazakstan, you went to Giffen because his consulting company, Mercator Corporation, held all the keys to the kingdom."); Michael Dobbs et al., American at Center of Kazakh Oil Probe: Insider Linked to Payments to Foreign Officials, Wash. Post, Sept. 25, 2000, at A1 ("During the decade since the collapse of communism, Giffen . . . [has become] an indispensable intermediary for U.S. companies seeking to do business with the Kazakh government."). The Danny Dalton character in the movie *Syriana* was based on James Giffen. See Syriana (Warner Bros. 2005); Carola Hoyos, A Crude Conspiracy, Fin. Times (London), Feb. 25, 2006, at 22.

tion of enormous influence and power.[3] He was indicted on April 2, 2003.[4]

The U.S. government alleged that Giffen had diverted profits from oil deals into secret Swiss bank accounts under his control and provided Kazakh President Nursultan Nazarbayev and other high ranking Kazakh officials with an $80,000 speedboat and other personal gifts.[5] In total, Giffen routed more than $78 million worth of cash and extravagant gifts to Kazakh officials.[6] The government charged Giffen with sixty-five counts of tax fraud, wire fraud, conspiracy, money laundering, and violation of the Foreign Corrupt Practices Act ("FCPA").[7] The indictment also alleged that Giffen had violated 18 U.S.C. § 1346 (the "Honest Services Statute" or "HSS") by using the U.S. wires in a scheme to defraud the citizens of Kazakhstan of their intangible right to the honest services of their government officials.[8]

The Kazakh government diplomatically opposed the prosecution. It declared that Giffen had not broken any Kazakh laws and that Kazakh sovereign immunity protected Giffen against any

[3] The Kashagan field, found in 2000 and quickly recognized as the biggest oil field discovery since Alaska's Prudhoe Bay in 1970, is estimated to contain fifty billion barrels, second in the world only to the Ghawar field in Saudi Arabia. The Tengiz field is the sixth largest oil bubble in the world, estimated to contain up to twenty-five billion barrels. Lutz Kleveman, The New Great Game: Blood and Oil in Central Asia 74–80 (2003).

[4] Mobil Is Under Scrutiny in Bribe Inquiry, N.Y. Times, Apr. 5, 2003, at C2.

[5] *Giffen*, 326 F. Supp. 2d at 499–500. In December 2005, President Nazarbayev was reelected by a wide margin to serve another seven-year term. Alex Rodriguez, Incumbent far ahead in Kazakh vote: Strongman also nurtures prosperity, Chi. Trib., Dec. 5, 2005, § 1, at 3.

[6] *Giffen*, 326 F. Supp. 2d at 500.

[7] See id. at 499–500, 499 n.1 (describing the counts against Giffen). The charges against Giffen under the FCPA were pursuant to 15 U.S.C. § 78dd-2 (2000).

[8] See *Giffen*, 326 F. Supp. 2d at 504. *Giffen* seems to be the second in a new series of cases invoking the HSS as a tool to prosecute foreign corruption. In *United States v. Lazarenko*, the government indicted the former prime minister of Ukraine under similar honest services charges, but the Northern District of California dismissed the charges because the government failed to show that the defendant had violated any analogous provision of Ukrainian law. No. CR 00-0284 MJJ, 2004 U.S. Dist. LEXIS 19660, at *1, *8 (N.D. Cal. May 7, 2004). The author has uncovered no other charges brought under § 1346 for the deprivation of the intangible rights of a foreign people to the honest services of their government, and to date no court has allowed such charges to reach a jury.

charges brought in the United States.[9] Claiming to have acted under Kazakh sovereign authority, Giffen argued in federal district court that the act of state doctrine precluded the FCPA charges against him.[10] The district court rejected that argument, but it granted Giffen's motion to dismiss the HSS charges as an invalid extraterritorial application of the statute.[11]

* * *

Extraterritoriality doctrine creates a presumption against the application of domestic statutes to conduct committed abroad. It presumes that Congress intends to regulate only domestic conduct unless it specifies otherwise. The presumption is triggered when two criteria are met: (1) the alleged conduct is committed abroad and (2) the statute regulating that conduct does not specify whether it is intended to apply domestically or abroad. The Supreme Court formally articulated this "longstanding" presumption in the *Aramco* decision in 1991.[12] Since then, courts have successfully used the doctrine to prevent the government and private parties from extending the reach of federal statutes beyond U.S. borders.

Whether the presumption applies to a particular case does not depend on the existence of foreign elements or effects. Rather, it depends on the existence of these two preconditions. Because the presumption aims to reflect legislative intent, it does not apply when Congress explicitly indicates that a statute should apply to conduct committed beyond U.S. borders. Similarly, extraterritori-

[9] Dobbs, supra note 2, at A1 ("As for Giffen, Kazakh officials believe he is covered by the principle of 'sovereign immunity' . . . . Giffen, their argument goes, was acting under orders from the Kazakh government, and therefore not subject to the U.S. Foreign Corrupt Practices Act.").

[10] See Memorandum of Law in Support of Defendant James H. Giffen's Pretrial Motions, filed Mar. 16, 2004, at 7–19; *Giffen*, 326 F. Supp. 2d at 501–02.

[11] *Giffen*, 326 F. Supp. 2d at 503, 507–08. The court also found that the doctrines of unconstitutional vagueness and international comity barred the HSS charges. Id. at 506–08.

[12] EEOC v. Arabian Am. Oil Co. ("Aramco"), 499 U.S. 244, 246, 248 (1991). In two cases decided shortly after *Aramco*, the Court applied the presumption in accordance with the understanding that it requires these two preconditions. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173–74 (1993); Smith v. United States, 113 U.S. 197, 203–04 (1993). This understanding was also confirmed in *Small v. United States*, 125 S. Ct. 1752, 1754–56 (2005), discussed below.

ality doctrine does not apply when a statute explicitly regulates only domestic conduct, such as the use of the U.S. mails or the possession of a gun in the United States. This conduct element therefore creates an irony: Because statutes that explicitly apply only to domestic conduct do not trigger the presumption against extraterritorial application, they may be more likely to reach conduct that has significant foreign elements or effects than statutes that do not specify the location of the conduct to which they apply. The presumption against extraterritorial application is triggered only when Congress's intent with regard to whether the statute should apply to conduct committed abroad is ambiguous.

As a result of this irony, courts often encounter situations in which the two *Aramco* criteria are not met, yet the applicable statutes nonetheless may reach foreign elements or have other foreign effects that Congress may not have intended. In *Giffen*, for example, the defendant's conduct—use of the U.S. wires in a scheme to defraud—was domestic conduct, and the conduct element of the relevant wire fraud statute, 18 U.S.C. § 1343, explicitly regulates the use of only the U.S. wires. Neither of the trigger elements for extraterritoriality doctrine was met. Nevertheless, the *Giffen* court found that application of the HSS to a scheme to defraud a foreign citizenry was a step too far, and it dismissed the charges as an invalid extraterritorial application of the statute.[13]

The district court used this modified version of the presumption against extraterritoriality to avoid applying the HSS in a way that would require the court to define the underlying duty of honest services that a foreign government owes its citizens. When a foreign sovereign's law does not recognize a duty of honest services, its recognition in U.S. courts would violate the principles of international comity, respect for foreign sovereignty, and the understanding of judicial restraint that informs a range of legal doctrines.[14] Cracks in current extraterritoriality doctrine allow many suits, like *Giffen*, that violate these principles. The Supreme Court and lower federal courts have tried to fill the cracks by occasionally applying the presumption against extraterritoriality even in cases where formal extraterritoriality doctrine concededly did not apply.

[13] *Giffen*, 326 F. Supp. 2d at 507–08.
[14] See infra Section I.A.1.

Such cases appear with increasing frequency as the U.S. government becomes more aggressive in prosecuting foreign corruption,[15] but this practice requires statutory authorization in order to be legitimate. Haphazard prosecution of foreign corruption under any domestic criminal law other than that intended to address foreign corruption, if not treated properly in the courts, produces vague legal standards for all defendants and blatant intrusions on foreign sovereignty. It also threatens to impose a regime that defers to the U.S. Attorney's interpretation of criminal laws rather than one that reflects congressional intent. In this sense, the current extraterritoriality regime unsettles both domestic and international balances of power. Domestically, it shifts constitutional separation of powers by giving courts, instead of Congress, the ability to make law, and by giving the Executive, instead of courts, the role of interpreting federal statutes. Internationally, it shifts the role of defining a foreign sovereign's obligations to its citizens from the foreign sovereign to U.S. federal courts. Extraterritoriality doctrine should prevent these results, but, as this Note will demonstrate, the current doctrine fails to confront these problems. Reconsideration of extraterritoriality doctrine is therefore of pressing importance. This Note will present a refined approach to extraterritoriality that reevaluates the conflicting prongs of current extraterritoriality analysis and addresses its failings.

Part I will describe the history of the HSS and the district court opinion in *Giffen*. It will describe the traditional doctrine, under which courts assume that federal statutes apply only to domestic conduct unless Congress specifies otherwise. It will also identify

[15] See, e.g., Ellen S. Podgor, Globalization and the Federal Prosecution of White Collar Crime, 34 Am. Crim. L. Rev. 325, 326 (1997) (noting the "increase and anticipated growth in federal investigations and prosecutions involving international activities" (footnotes omitted)). Oscar S. Wyatt Jr., "one of the last legendary Texas oilmen," was indicted on October 21, 2005, for a kickback scheme similar to Giffen's, but based in Iraq. Julia Preston & Simon Romero, Oilman Charged With Kickbacks To Iraqi Regime, N.Y. Times, Oct. 22, 2005, at A1. Wyatt's indictment expanded on one brought against another Texas oil trader, David B. Chalmers, his company, and two of his associates. As a result of the same investigation, a South Korean lobbyist and a Russian diplomat were also indicted. Id.; see also United States v. Verdugo-Urquidez, 494 U.S. 259, 281 (1990) (Brennan, J., dissenting) ("[O]ur country's three largest exports are now 'rock music, blue jeans, and United States law.'" (quoting V. Rock Grundman, The New Imperialism: The Extraterritorial Application of United States Law, 14 Int'l Law. 257, 257 (1980))).

the core concerns raised by the application of vague statutes like the HSS to foreign corruption schemes: Such applications require courts to create legal obligations under foreign public law and shift the balance of power domestically and internationally. Part II will describe the development of extraterritoriality doctrine since its articulation in *Aramco* and will demonstrate that the Supreme Court's opinions in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* ("*Empagran*"),[16] *Pasquantino v. United States*,[17] and *Small v. United States*[18] reveal contradictory understandings of extraterritoriality doctrine as applied to cases involving the extraterritorial application of domestic criminal statutes like the HSS. These cases provide ambiguous guidance for courts facing the prospect of defining foreign legal obligations because they lack a coherent extraterritoriality doctrine. Part III will lay out a reconciliation of *Empagran*, *Pasquantino*, and *Small* and suggest a revitalized extraterritoriality presumption that would bar prosecutions that require U.S. courts to create foreign legal obligations.

I. FOUNDATION OF THE ANALYSIS

This Part lays the groundwork for the analysis in the next two Parts, which will discuss the evolution of extraterritoriality doctrine and a recommendation for revitalizing it. Section A explains traditional extraterritoriality doctrine, grounded in the *Aramco* decision, which courts should apply when evaluating whether an ambiguous statute applies to conduct committed abroad. Because extraterritoriality is a doctrine of statutory interpretation that requires inquiry into congressional intent, Section B describes the history of the HSS. Section C applies traditional extraterritoriality doctrine to the HSS, assuming facts similar to those in the *Giffen* case, and concludes that traditional extraterritoriality doctrine does not even apply to the HSS because the conduct proscribed by that statute is entirely domestic. Section D identifies the core problems with this result: Not only has extraterritoriality doctrine faltered as a canon of statutory interpretation, but the current doctrine also fails to provide courts with a means to dismiss charges that would

[16] 542 U.S. 155 (2004).
[17] 125 S. Ct. 1766 (2005).
[18] 125 S. Ct. 1752 (2005).

require them to define the contours of the obligations that a foreign sovereign owes its citizens. As a consequence, applications of the HSS like the one proposed in *Giffen* allow shifts in domestic and international balances of power.

A. The Aramco *Presumption and the* Bowman *Exception*

The court in *Giffen* used a modified version of extraterritoriality doctrine as a limiting principle to prevent the HSS from reaching too far.[19] This Section describes the traditional understanding of extraterritoriality, which the court should have applied.

Questions about Congress's power to regulate conduct that takes place abroad—the issue of extraterritorial prescriptive jurisdiction—stand at the crossroads of federal common law and international law.[20] Domestic and international law have long recognized the territorial basis for prescriptive jurisdiction, justified by the understanding that territorial jurisdiction is a foundation of sovereignty.[21] The classic example of territorial jurisdiction in the ab-

[19] See supra note 11 and accompanying text.

[20] "Prescriptive jurisdiction" refers to the power to legislate. See Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law: Cases and Materials 527 (2003) (contrasting subject matter jurisdiction, "the court's power to hear a case," with prescriptive jurisdiction, "a nation's authority to regulate conduct").

Under international law, there are five generally acknowledged bases for exercising prescriptive jurisdiction, each accepted with varying degrees of controversy. They are, in order from least to most controversial: (1) territorial or effects-based jurisdiction, regulating acts committed in a state's territory or having effects in a state's territory; (2) nationality jurisdiction, regulating acts committed by a state's citizens; (3) protective jurisdiction, regulating foreign conduct that affects the security of the regulating state; (4) passive personality jurisdiction, regulating conduct aimed at a state's citizens; and, most controversially, (5) universal jurisdiction, regulating criminal offenses against international law. Barry E. Carter et al., International Law 649–54 (4th ed. 2003) (quoting I.A. Shearer, Starke's International Law 183–212 (11th ed. 1994)).

[21] See Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356–57 (1909) (Holmes, J.). Justice Holmes noted that the "almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done" lest there "be an interference with the authority of another sovereign, contrary to the comity of nations." Id. at 356; see also Restatement (Third) of Foreign Relations § 402(1)(a) (1987) ("[A] state has jurisdiction to prescribe law with respect to conduct that, wholly or in substantial part, takes place within its territory."); Carter, supra note 20, at 658–59. It is worth noting that while the Restatement is often used as an indication of international law, the accuracy of its treatment of limitations on prescriptive jurisdiction is somewhat debatable. See David B. Massey, Note, How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law, 22 Yale J. Int'l L. 419, 420

sence of effects-based jurisdiction is when a person stands in the United States and shoots a gun across the border into Canada, killing a Canadian. The United States—under both domestic and international law—may criminalize such behavior.[22] Similarly, it may criminalize a fraudulent mailing sent from the United States offering Canadians the opportunity to purchase a non-existent product by mail. This type of prescriptive jurisdiction is uncontroversial, and it includes Congress's power to regulate conduct committed by U.S. citizens, either domestically or abroad, that causes foreign harm.[23]

Domestically, Congress has prescriptive jurisdiction over, for example, regulation of the U.S. mails, but it does not have prescriptive jurisdiction over gun possession near schools, a local issue over which the states have prescriptive jurisdiction.[24] Because the federal government's powers are enumerated, whether Congress has domestic prescriptive jurisdiction is usually a question of constitutional law.

Whether Congress has exercised its extraterritorial prescriptive jurisdiction under U.S. law, in contrast, is a matter of statutory interpretation.[25] Congress has the power to regulate conduct committed by U.S. citizens, either domestically or abroad, that causes for-

(1997) (arguing that the Restatement's treatment of such limitations "did not reflect the state of customary international law when the treatise was published in 1987"). Whatever the limitations may be, however, the basic notion of prescriptive jurisdiction is itself uncontroversial. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) (relying on the Restatement for relevant principles of international law while recognizing that it may not "precisely reflect[] international law in every detail").

[22] After such an incident, there may be separate questions over which state would then prosecute the crime, as it would be illegal in both states. Such questions would probably be addressed diplomatically, under a comity of nations principle, rather than under a conflict of laws principle. In his dissent in *Hartford Fire*, Justice Scalia explains the difference between "comity of courts," whereby judges choose not to adjudicate a certain case, and the "comity of nations," whereby nations choose not to apply their laws in ways that interfere with the sovereignty of other nations. 509 U.S. at 817 (Scalia, J., dissenting).

[23] See, e.g., FCPA, 15 U.S.C. § 78dd-2 (2000); see also *Aramco*, 499 U.S. at 248. But see Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 Harv. L. Rev. 1217, 1223, 1262–63 (1992) (arguing that there are constitutional limits on congressional power to legislate extraterritorially).

[24] See United States v. Lopez, 514 U.S. 549, 567–68 (1995).

[25] *Aramco*, 499 U.S. at 248. But see Brilmayer & Norchi, supra note 23.

eign harm.[26] Statutory interpretation reveals whether Congress has chosen to exercise that power in a given statute.

While the principles underlying the presumption against extraterritoriality have long existed in American jurisprudence,[27] the Court announced the formal test for this issue of statutory interpretation in its *Aramco* decision in 1991.[28] *Aramco* involved an employment discrimination suit by a Lebanese citizen working for an American company in Saudi Arabia. The plaintiff claimed that the American employer had fired him because of his nationality, in violation of Title VII of the Civil Rights Act of 1964. The Supreme Court held that Title VII did not "appl[y] extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad."[29] The Court cited the "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' . . . [in order] to protect against unintended clashes between our laws and those of other nations which could result in international discord."[30] The Court has since explained that this purpose was not exclusive: "[T]he presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind."[31] Whatever the purposes underlying the presumption as a policy matter, as a canon of statutory construction, at some level it has clarity as its goal.[32]

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[26] See supra note 23.

[27] See Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356–57 (1909); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 631–33 (1818); William S. Dodge, Understanding the Presumption Against Extraterritoriality, 16 Berkeley J. Int'l L. 85, 85 (1998) ("The presumption against extraterritoriality has been around for nearly as long as there have been federal statutes.").

[28] 499 U.S. 244.

[29] Id. at 246–47.

[30] Id. at 248 (internal citation omitted).

[31] Smith v. United States, 507 U.S. 197, 204 n.5 (1993).

[32] "It ought to be elementary that the legitimacy of judicially-fashioned rules of statutory construction depends principally on their efficacy as guides to determining legislative intent." Gary B. Born, A Reappraisal of the Extraterritorial Reach of U.S. Law, 24 Law & Pol'y Int'l Bus. 1, 59 (1992) (citing Chancellor Kent). Because this Note is more concerned with the presumption's purposes as a canon of statutory interpretation than with its purposes as a policy matter, it accepts the Court's asserted rationales for the extraterritoriality presumption at face value. For a discussion of the multiple rationales underlying the presumption, see Curtis A. Bradley, Territorial In-

The *Aramco* presumption is thus a Court-developed rebuttable presumption that arises when alleged conduct occurs abroad and a statute is silent or ambiguous as to the location of the conduct Congress intended to regulate.[33] Within two years of *Aramco*, the Court twice reaffirmed the understanding that the *Aramco* presumption required these two preconditions, and it continues to use the *Aramco* framework to address questions of extraterritoriality in the most recent cases.[34]

There are two main exceptions to the *Aramco* presumption, that is, two situations in which the *Aramco* presumption does not bar application of a statute to conduct committed abroad, even when the statute does not expressly indicate congressional intent for the statute to apply extraterritorially. First, there are areas of law, such as antitrust, securities law, RICO, and bankruptcy law, in which the presumption is traditionally not applied.[35] Second, the "*Bowman* exception" directs the extraterritorial application of statutes "to criminal laws that are 'by their nature' concerned with extraterritorial conduct."[36] The Court articulated the *Bowman* exception in 1922, stating that the general presumption against extraterritoriality "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the [g]overnment's jurisdiction, but are enacted because of the [government's] right . . . to defend itself against obstruction, or fraud wherever perpetrated,

tellectual Property Rights in an Age of Globalism, 37 Va. J. Int'l L. 505, 513–14 (1997) ("[T]he Court has articulated at least five justifications for the presumption: international law, international comity, choice-of-law principles, likely congressional intent, and separation-of-powers considerations."); Larry Kramer, Vestiges of Beale: Extraterritorial Application of American Law, 1991 Sup. Ct. Rev. 179, 179–84; Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. Rev. 598, 656–59 (1990).

[33] See *Aramco*, 499 U.S. at 248; see also Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173–74 (1993). Additionally, courts are theoretically willing to eschew (or at least ignore) possible conflicts with international law when Congress explicitly (or reasonably, see, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164–65 (2004)) regulates foreign conduct, such as the bribery of foreign officials.

[34] *Sale*, 509 U.S. at 173–74; *Smith*, 507 U.S. at 203–04. This understanding was most recently confirmed in *Small v. United States*, 125 S. Ct. 1752, 1754–56 (2005), discussed below. Cf. Bradley & Goldsmith, supra note 20, at 528 (asking "when *should* courts invoke the presumption against extraterritoriality?" and citing cases that reveal that the "[l]ower [federal] courts appear confused").

[35] See Bradley & Goldsmith, supra note 20, at 528.

[36] Id.

especially if committed by its own citizens, officers or agents."[37] The *Bowman* exception demonstrates that prescriptive jurisdiction may rest on the nature of the offense prohibited even when the conduct takes place abroad. While extraterritorial applications under the first exception are often based on precedent,[38] both exceptions seem to be motivated by the understanding that in certain situations, the intent behind the law is best carried out when extraterritorial application is allowed.

B. History of the Honest Services Statute[39]

As a canon of statutory interpretation, extraterritoriality analysis begins by examining the applicable statute. The original mail fraud statute, enacted in 1872, criminalized "devis[ing] or intending to devise any scheme or artifice to defraud . . . by means of the post-office establishment of the United States."[40] Each time Congress has revised the statute, it has expanded its coverage.[41] The govern-

[37] United States v. Bowman, 260 U.S. 94, 98 (1922). Bowman was charged with conspiracy to defraud a corporation in which the United States was a stockholder. The question of the extraterritorial application of various criminal conspiracy statutes arose because the frauds occurred on the high seas and in foreign ports. The court below had determined that the criminal statute did not apply to conduct on the high seas, based on the generally accepted notion that "Congress had always expressly indicated it when it intended that its laws should be operative on the high seas." Id. at 97. The Supreme Court reversed even though the statutes were silent as to extraterritorial intent, on the basis of what became known as the "*Bowman* exception."

[38] See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–96 (1993) (discussing the antitrust exception to the presumption).

[39] 18 U.S.C. § 1346 (2000). The HSS defines "a scheme or artifice to defraud" as mentioned in the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (2000). Since "[t]he mail and wire fraud statutes share the same language in relevant part," Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987), this Note uses references to the mail and wire fraud provisions interchangeably to explain the implications of the HSS.

[40] Jed S. Rakoff, The Federal Mail Fraud Statute (Part I), 18 Duq. L. Rev. 771, 783 (1980) (quoting Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323).

[41] See Senior Citizens Against Marketing Scams Act of 1994 ("SCAMS Act"), Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (amending 18 U.S.C. § 1341); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346); Rakoff, supra note 40, at 772 (citing the revisions and expansions of the mail fraud statute since 1889); see also Carrie A. Tendler, Note, An Indictment of Bright Line Tests for Honest Services Mail Fraud, 72 Fordham L. Rev. 2729, 2738–40 (2004) (discussing recent enhancements to the mail fraud statute, including the White Collar Crime Penalty Enhancement Act, part of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903, 116 Stat. 745, 805 (amending 18 U.S.C. §§ 1341, 1343), which increased the maximum sentence for mail and wire fraud from five to twenty years,

ment has used the statute to prosecute a broad range of fraudulent activities, consistent with the legislative intent reflected in Congress's repeated expansion of the statute's scope.[42] The Honest Services provision, 18 U.S.C. § 1346, was added in 1988[43] to overturn the Supreme Court's decision in *McNally v. United States*.[44]

Before *McNally*, district and circuit courts consistently held that a "scheme or artifice to defraud" encompassed not only schemes that deprive another of money or property, but also those acts that deprive another of some "intangible" right, such as the right to honest government[45] and the right to a fair election.[46] In *McNally*, the Supreme Court reversed this trend and held that a scheme or artifice to defraud must deprive another of tangible rights to money or property.[47] Disregarding the circuit courts, the Court fol-

and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, § 961(i), 103 Stat. 183, 500, which also increased penalties for violations involving financial institutions).

[42] Rakoff, supra note 40, at 771 ("To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love . . . . [W]e always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity." (footnote omitted)).

[43] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508.

[44] 483 U.S. 350 (1987).

[45] See id. at 362–63 & n.1 (Stevens, J., dissenting) (citing cases in which both public and private defendants had "been convicted of devising schemes through which public servants defraud the public"). Cases cited involving public defendants included: *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987) (county judge); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (party leader); *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979) (Governor of Maryland). Cases involving private defendants included: *United States v. Lovett*, 811 F.2d 979 (7th Cir. 1987) (bribing mayor); *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975) (bribing state Secretary of State); *United States v. Faser*, 303 F. Supp. 380 (E.D. La. 1969) (scheming to bribe state officials).

[46] See *McNally*, 483 U.S. at 363 n.2 (Stevens J., dissenting) (citing United States v. Girdner, 754 F.2d 877 (10th Cir. 1985) (candidate for state legislature); United States v. Odom, 736 F.2d 104, 116 n.13 (4th Cir. 1984) (sheriff); United States v. Clapps, 732 F.2d 1148, 1153 (3d Cir. 1984) (party chairman); United States v. States, 488 F.2d 761 (8th Cir. 1973) (candidates for city office)).

[47] *McNally*, 483 U.S. at 360 (majority opinion). The case involved a former Kentucky public official and a private citizen who schemed to allow Wombwell Insurance Company to continue securing Kentucky's workmen's compensation policy on the condition that Wombwell share profits in excess of $50,000 with other insurance companies controlled and operated by defendants. Id. at 352–53. From 1975 to 1979,

lowed common law tradition, noting that the words "'to defraud' . . . refer 'to wronging one in his property rights by dishonest methods or schemes.'" The Court explained that the words "'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'"[48] This holding clarified and limited the scope of the broad mail fraud statute[49] and restricted courts' abilities to expand the statute's effect through the intangible rights doctrine.

Almost immediately after the *McNally* decision, however, Congress countered by enacting the HSS. The Congressional Record states:

> This section overturns the decision in *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change.[50]

By adding to the mail fraud statute the ambiguous phrases "intangible right" and "honest services," Congress reversed the Supreme Court's efforts to cabin the scope of the statute and opened the door for even broader interpretive discretion, whether judicial or prosecutorial. Indeed, since the enactment of the HSS, lower federal courts have interpreted "another" to include the citizenry of a

Wombwell funneled over $800,000 dollars to twenty-one such insurance companies, to the benefit of defendants. Id. at 353.

[48] Id. at 358 (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)). Common law fraud requires the deprivation of some tangible property right. See Geraldine Szott Moohr, Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us, 31 Harv. J. on Legis. 153, 163 (1994) (criticizing the courts for "dramatically expand[ing] the scope of the mail fraud statute by ignoring the principles of common-law fraud, which require a tangible loss, and, thereby, formulating the intangible rights doctrine").

[49] See supra note 42 and accompanying text.

[50] 134 Cong. Rec. 32,708 (1988). This report, however, was made *after* the amendment was adopted, and members of at least one court have disputed its validity as evidence of congressional intent to overrule *McNally*'s holding that mail fraud does not extend to the citizenry's right to honest and impartial government. See United States v. Brumley, 116 F.3d 728, 742–45 (5th Cir. 1997) (en banc) (Jolly & DeMoss, JJ., dissenting).

state or political subdivision;[51] "intangible right" to include rights to honest government and fair elections;[52] and "honest services" to describe the general duties of public officials and private fiduciaries.[53] Absent a limiting principle, the HSS can have extremely far-reaching implications, both domestically and internationally.

C. Extraterritoriality in United States v. Giffen

In light of the potential breadth of the HSS, this Section applies the traditional *Aramco* presumption to the statute, using the facts of the *Giffen* case. The *Giffen* prosecution illustrates the ways in which the inconsistencies of current extraterritoriality doctrine affect the resolution of cases. Rather than applying formal extraterritoriality doctrine, the district court in *Giffen* chose a different route: The court found, by evaluating congressional intent more generally, that the HSS charges were an invalid extraterritorial application of the statute. Following the Second Circuit's understanding of the HSS as a reinstatement of pre-*McNally* case law, the court refused to apply the HSS because it could find no prosecutions of foreign schemes like *Giffen*'s in that period, and only three foreign HSS prosecutions over the past twenty-five years.[54] This Section demonstrates that while the presumption against extraterritoriality should bar applications of the HSS like the one in *Giffen*, current extraterritoriality doctrine does not. In fact, because Giffen's alleged conduct, the use of the U.S. wires, was domestic conduct, the HSS charges in *Giffen* do not trigger the traditional presumption against extraterritoriality. The conduct proscribed by the HSS is entirely domestic, and thus within the United States' territorial jurisdiction. Indeed, the defense in *Giffen* did not dispute that the mail fraud statute territorially applied to the aspects

[51] See *Brumley*, 116 F.3d at 732.

[52] See, e.g., United States v. Spano, 421 F.3d 599, 602–03 (7th Cir. 2005) (honest government); United States v. Grubb, 11 F.3d 426, 435 (4th Cir. 1993) (fair election).

[53] See, e.g., United States v. Boscarino, 437 F.3d 634, 636 (7th Cir. 2006) (private fiduciary); United States v. Tanner, 121 Fed. App'x 213, 214 (9th Cir. 2005) ("'honest services' fraud is not limited to public officials"); United States v. Genova, 333 F.3d 750, 759 (7th Cir. 2003) (mayor).

[54] The Government claimed in its opposition brief that there had been previous prosecutions of American citizens under the HSS in situations similar to Giffen's, but cited only two grand jury indictments from 1978, neither of which had produced court decisions opining on the validity of the charges. *Giffen*, 326 F. Supp. 2d at 504.

of Giffen's scheme that defrauded foreign citizens of tangible rights to property.

In *Giffen* and its sister case, *United States v. Lazarenko*,[55] the U.S. government maintained that the domestic conduct proscribed by the HSS included conduct in pursuance of schemes to deprive foreign citizens of their intangible right to the honest services of their governments. Careful examination of the statute reveals that this result is technically correct. The mail fraud statute combines two elements—a jurisdictional element (establishing prescriptive jurisdiction) and an actus reus element (describing the proscribed conduct). The wire fraud statute, which is similar in structure and interpretation to the mail fraud statute,[56] states in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.[57]

The U.S. Code explains that "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[58] Both Giffen and his bank fit this definition. In his motion to dismiss, Giffen did not challenge the applicability of the statute to the charges alleging that he transmitted signals by wire "in interstate or foreign commerce."[59]

Notably, the conduct language from § 1343—not the definition of the scheme to defraud in § 1346—designates both the actus reus and the jurisdictional elements of the crime. The wire fraud statute creates two elements of the crime: (1) the intent to devise a scheme or artifice to defraud (mens rea), and (2) a wire transmission con-

[55] No. CR 00-0284 MJJ, 2004 U.S. Dist. LEXIS 19660, at *8 (N.D. Cal. May 7, 2004); see supra note 8 and accompanying text.

[56] See supra note 39.

[57] 18 U.S.C. § 1343 (2000).

[58] 1 U.S.C. § 1 (2000).

[59] The indictment lists a series of overt acts whereby Giffen caused Mercator to wire money from its New York accounts to specified accounts in Switzerland to benefit Kazakh officials. *Giffen*, 326 F. Supp. 2d at 499–500.

ducted in order to execute the scheme (actus reus/jurisdictional).[60] The wire's role in interstate or foreign commerce allows the federal government to regulate conduct to protect against abuses of the wires.[61] The definition of the "scheme or artifice to defraud" is best understood in the context of the first element, the mens rea element,[62] but neither that definition nor the mens rea element in general affects the determination of the statute's scope. As the Second Circuit described it, the mail and wire fraud statutes proscribe use of the U.S. mail and wires "in furtherance of a scheme whereby one intends to defraud . . . . The identity and location of the victim, and the success of the scheme, are irrelevant."[63] The Supreme Court recently affirmed this analysis in *Pasquantino v. United States*.[64]

[60] See Moohr, supra note 48, at 158–59 & n.15 (citing cases identifying these as the two elements of the crime and noting the elimination of a third element, intent to effect a fraud by using the mail, in the 1909 revision of the statute). Moohr further criticizes the judicial narrowing of "the 'use of the mail' element to a jurisdictional requirement, while [courts] expanded the definition of a 'scheme to defraud' to include the loss of intangible rights." Id. at 159.

[61] See U.S. Const. art. I, § 8 ("The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . . [and t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). The mail and wire fraud statutes themselves rest on separate constitutional premises—the postal power and the commerce power, respectively. See John C. Coffee, Jr., Modern Mail Fraud: The Restoration of the Public/Private Distinction, 35 Am. Crim. L. Rev. 427, 429 n.10 (1998). There is debate over whether the mail and wire fraud statutes and their use as federal anticorruption legislation aimed at state and local officials can also be justified constitutionally on the basis of the Guarantee Clause. Id. at 456–59; Adam H. Kurland, The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials, 62 S. Cal. L. Rev. 367 (1989).

[62] See Rakoff, supra note 40, at 775 ("The first element of federal mail fraud—devising a scheme to defraud—is not itself conduct at all (although it may be made manifest by conduct), but is simply a plan, intention, or state of mind, insufficient in itself to give rise to any kind of criminal sanctions.").

[63] United States v. Trapilo, 130 F.3d 547, 552–53 (2d Cir. 1997) (upholding the mail fraud conviction of defendants who intended to and did commit a scheme to defraud a foreign government of tax revenue, since the intent to use the U.S. system to defraud the foreign government was at issue, rather than the validity of the foreign revenue rule).

[64] 125 S. Ct. 1766, 1771 (2005). *Pasquantino* held that the application of the wire fraud statute to a scheme to defraud a foreign victim, the Canadian government, was not an extraterritorial application because the conduct was entirely domestic. Id. at 1780. In resolving a circuit split, *Pasquantino* also agreed with *Trapilo*'s holding that the revenue rule did not bar prosecutions of schemes to defraud foreign governments of tax revenue brought under the wire fraud statute. Id. at 1771.

Thus, the contours of the "scheme or artifice to defraud" defined by the HSS are not dispositive in evaluating the second element of the crime, which covers both the actus reus and jurisdiction. The conduct itself—for example, in *Giffen*, causing an American bank to wire money from an account in New York to another account in Switzerland—is domestic, committed entirely within the United States.[65] The fact that some of the effects of the conduct are felt abroad, at the bank in Switzerland, does not undermine the conduct's domesticity. This domesticity establishes U.S. territorial jurisdiction. Having established the power of the United States to proscribe certain uses of its mail and wire services, one may then turn to the appropriate interpretation of a "scheme or artifice . . . to deprive another of the intangible right of honest services"[66] without further inquiry into prescriptive jurisdiction. Borrowing analysis from *United States v. Brumley* to define "another" as the citizenry of a state,[67] and interpreting the "intangible right of honest services" to include a right against bribery of government officials,[68] the territorial jurisdiction of the HSS reaches Giffen's alleged conduct,[69] unaffected by extraterritoriality doctrine.

[65] See *Giffen*, 326 F. Supp. 2d at 500. In a separate part of the *Giffen* opinion addressing the FCPA charges, the district court noted that "the [alleged] illicit activities occurred in the United States and Switzerland—not Kazakhstan." Id. at 503.

[66] 18 U.S.C. § 1346 (2000).

[67] See supra note 51 and accompanying text.

[68] See generally United States v. Sawyer, 85 F.3d 713, 726 (1st Cir. 1996) (stating the general rule that an underlying state law violation is not required for conviction of honest services fraud); United States v. Bryan, 58 F.3d 933, 940 n.1 (4th Cir. 1995) (noting the widely accepted view that an underlying state law violation is not required for conviction of honest services fraud and suggesting that any dicta in *McNally* that might undermine this view was weakened by the enactment of § 1346, which indicated congressional satisfaction with the pre-*McNally* scope of the mail fraud statute); James Lockhart, Annotation, Validity, Construction, and Application of 18 U.S.C.A. § 1346, Providing that, for Purposes of Some Federal Criminal Statutes, Term "Scheme or Artifice to Defraud" Includes Scheme or Artifice to Deprive Another of Intangible Right to Honest Services, 172 A.L.R. Fed. 109, § 11[b] (2001 & Supp. 2005).

[69] Other restrictions, such as the requirement of an underlying duty or criminal violation to define the framework of the scheme or artifice to defraud, might in turn implicate other principles, such as the act of state doctrine, that prevent this conduct from creating criminal liability, but these issues arise after the establishment of prescriptive jurisdiction.

D. Unbalancing of Powers

1. Internationally: A Foreign Right to Honest Services

Had the presumption against extraterritoriality been applied traditionally so that it did not bar the Honest Services charges in *Giffen*,[70] the charges would have required the district court to evaluate whether Giffen's scheme had deprived Kazakh citizens of their intangible right to the honest services of their government. This, in turn, would have forced the court to define Kazakh citizens' intangible right to honest services. In *Giffen*, the prosecution presented no evidence that Kazakh law recognized any comparable intangible right to honest services, and Kazakhstan, through diplomatic channels, had already asserted that Giffen had not violated any Kazakh laws.[71]

The prospect of defining the honest services right in the face of opposition from Kazakhstan presents two interrelated causes for concern. First, the court would have to identify some source of the right as well as the contours of the right, both likely to be based on American conceptions of the meaning of the "intangible right of honest services." The task of defining the duty of honest services is controversial even in domestic cases. Most courts agree that the intangible right of honest services derives from an underlying general duty of honest services, not from any particular state or local law.[72]

[70] The district court found two other independent grounds for dismissing the charges. *Giffen*, 326 F. Supp. 2d at 506–08. The validity of those grounds is beyond the scope of this Note, which argues that extraterritoriality doctrine is the proper doctrine to protect against the prospect of U.S. courts creating foreign legal obligations.

[71] See supra note 9 and accompanying text.

[72] This is the predominant view in most circuits. See, e.g., *Sawyer*, 85 F.3d at 723–24 (finding that public official's duties of honesty and loyalty owed to citizens and state for whom he acts as trustee create citizens' right to receive honest services); United States v. Sancho, 957 F. Supp. 39, 42 (S.D.N.Y. 1997), aff'd on other grounds, 157 F.3d 918 (2d Cir. 1998), cert. denied, 525 U.S. 1162 (1999) (holding that where defendant attempted to defraud an undercover officer, the underlying duty creating the right to honest services needed to be neither actual nor fiduciary); cf. United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997) (requiring the underlying duty to be fiduciary in nature). But see United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (requiring an underlying state law violation).

The HSS comes under criticism domestically for violating principles of federalism and infringing on state sovereignty, especially in cases alleging the corruption of state or local officials. It has also been criticized on many other grounds, including separation of powers and violations of the First Amendment. See Moohr, supra note 48, at 178–83. Additionally, though courts have been reluctant to hold that the statute is un-

Courts differ widely, however, over the definition of that general duty. As a result, in cases involving foreign corruption, the court must either identify a foreign honest services obligation, or engraft controversial and varying American conceptions of the meaning of "the intangible right to honest services" onto foreign obligations. When the law of the foreign government at issue does not recognize any comparable obligation, the court must employ the latter option. Accordingly, the second cause for concern is that whatever the particulars of the right the court identified, the right would define a legal relationship between a foreign sovereign and its own citizens.

The identification by a U.S. court of an obligation owed by a foreign sovereign to its own citizens, particularly in cases where the foreign sovereign does not recognize such an obligation,[73] requires

constitutionally vague on its face, they have sometimes held it to be unconstitutionally vague as applied. See, e.g., United States v. Handakas, 286 F.3d 92, 112 (2d Cir. 2002); *Giffen*, 326 F. Supp. 2d at 507. But see United States v. Rybicki, 287 F.3d 257, 264 (2d Cir. 2002) (holding, one month after *Handakas*, that the statute was not unconstitutionally vague as applied). The Supreme Court recently denied certiorari in a case that raised the question of whether the Honest Services Statute was unconstitutionally vague. See Petition for Writ of Certiorari, Loren-Maltese v. United States, 126 S. Ct. 1084 (2006), 2005 WL 3157384. The Seventh Circuit had resolved the case without addressing the vagueness issue. United States v. Spano, 421 F.3d 599 (7th Cir. 2005), cert. denied, 126 S. Ct. 1084 (2006). For the argument that the honest services provision has not been over-broadly applied and is an efficient tool for fighting corruption on a case-by-case basis, see Alex Hortis, Note, Valuing Honest Services: The Common Law Evolution of Section 1346, 74 N.Y.U. L. Rev. 1099, 1114 (1999).

[73] Some may argue that the United States should defer to some nations' determinations that criminal defendants have not committed any crimes in their jurisdictions, and not to others'. These ideas are not foreign to U.S. courts—the rules for recognizing foreign judgments reflect such principles. The Uniform Foreign Money-Judgments Recognition Act, for example, adopted in some form by most states, see, e.g., Society of Lloyd's v. Edelman, 2005 WL 639412, at *3 (S.D.N.Y. 2005); Tonga Air Servs., Ltd. v. Fowler, 826 P.2d 204, 208 (Wash. 1992); Restatement (Third) of Foreign Relations § 482(1)(a) (1987), provides that "[a] court in the United States may not recognize a judgment of the court of a foreign state if the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law." See also Uniform Foreign Money-Judgments Recognition Act § 4(a)(1) (1963), available at http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/ufmjra62.pdf. Kazakhstan's court system may or may not meet this standard. However, the HSS does not present a question of *which* nations' laws to recognize, or whether to recognize *any* particular nation's laws. The HSS does *not* depend on an underlying violation of local law. Thus, whether the charge is that a scheme defrauded the citizens of Britain or Kazakhstan or North Korea of their intangible right to the honest services of their governments, the HSS requires a U.S.

U.S. courts to go beyond traditional American judicial functions. Courts regularly apply foreign law in diversity cases[74] and determine the content of foreign law as a question of fact.[75] If the court in *Giffen* needed only to recognize a predicate Kazakh obligation, existing under Kazakh law, its task might parallel a court's determination of the content of foreign law as a question of fact, as when courts apply criminal statutes that explicitly require proof of a violation of foreign law as an element of the crime.[76] In contrast, the HSS, because it has been interpreted not to rest on proof of an underlying violation of local law, requires courts in a limited sense to create foreign law. Of course, only lower federal courts, and not foreign courts and political actors, would be bound by the U.S.

court to impose the American understanding of "honest services" onto that sovereign's relationship with its citizens. This Note does not dispute Congress's power to do this if it so intends; it emphasizes that whether Congress has chosen to do so through the HSS is a matter of statutory interpretation. A foreign country's internal chaos does not extend Congress's unintended extraterritorial prescriptive jurisdiction farther than it otherwise would reach into countries with stable, democratic governments.

[74] The Constitution contemplates suits between U.S. citizens and foreigners, some of which presumably involve issues of foreign law. See U.S. Const. art. III, § 2, cl. 1. In such cases, choice of law rules direct which law to apply. "There is no constitutional bar to the extraterritorial application of penal laws," but courts are reluctant to apply penal laws extraterritorially unless "congressional intent to give extraterritorial effect is clear." Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984) (applying 18 U.S.C. § 959 to conduct committed abroad, where the statute explicitly contemplates extraterritorial manufacture and distribution of controlled substances). The Ninth Circuit also requires inquiry into whether international law forbids a proposed extraterritorial application of penal laws. Id. at 1311–12.

[75] To determine the content of foreign law, U.S. courts hear evidence such as affidavits from foreign legal experts, even if such evidence would not be admissible in foreign courts or under the Federal Rules of Evidence. See 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 2441, 2444 (3d ed. 1995); Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 558 n.151 (2003) ("The Federal Rules of Civil and Criminal Procedure now formally categorize such questions as questions of law, but expert testimony about the meaning of foreign laws remains admissible and continues to be part of 'the basic mode of proving foreign law.'" (citation omitted)).

[76] There are at least four such U.S. statutes: 16 U.S.C. § 1372(c)(1)(B) (2000); id. §3372(a)(2)(A) (Lacey Act); 18 U.S.C. § 1956(c)(1) (2000); id. § 2313(a); see also Justice Antonin Scalia, Keynote Address: Foreign Legal Authority in the Federal Courts, 98 Am. Soc'y Int'l L. Proc. 305 (2004) (citing as one legitimate situation for U.S. federal courts to use foreign legal materials cases where "a federal statute . . . directly or indirectly refer[s] to foreign law"); Matthew J. Spence, Policy Comment, American Prosecutors as Democracy Promoters: Prosecuting Corrupt Foreign Officials in U.S. Courts, 114 Yale L.J. 1185, 1192 n.36 (2005).

court's determination of the foreign actors' honest services duties. The extent to which the identification of the foreign sovereign's duty of honest services is truly the creation of foreign law depends to some extent on a philosophical definition of the meaning of "law," a discussion of which is beyond the scope of this Note.[77] Regardless, the fact that the U.S. court-created duty would not bind foreign courts or political actors demonstrates the illegitimacy of any attempt by the U.S. judiciary to define these duties. Similarly, international law is unlikely to allow one sovereign's prescriptive jurisdiction to intrude into the relationship between another sovereign and its citizens.[78]

Federal courts recognize the illegitimacy of creating foreign legal obligations in many situations. Several common law doctrines, such as foreign sovereign immunity,[79] head of state immunity,[80] the act of state doctrine,[81] and the revenue rule,[82] reflect the federal judiciary's reluctance to engage in determinations that may require it to

[77] See Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 689–90 (5th ed. 2003) (exploring the difficulty of this distinction and questioning whether "the interpretation of statutory provisions—especially very open-textured ones—[can] be distinguished from common lawmaking") (citing Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345, 347–48).

[78] A full analysis of the directives of international law on this point is beyond the scope of this Note. It is sufficient to note that the rules of international law regarding prescriptive jurisdiction call for an eight-factor balancing test, the results of which may be unpredictable in any particular application. See Restatement (Third) of Foreign Relations § 403 (1987). One of the factors in the test is "the extent to which another state may have an interest in regulating the activity," id. § 403(2)(g), and a foreign sovereign's interest in regulating its relationship with its own citizens may be controlling in this situation.

[79] In 1976, Congress passed the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (2000), codifying principles of foreign sovereign immunity. Before that, courts understood foreign sovereign immunity to be a matter of federal common law reflecting principles of international comity.

[80] See, e.g., Wei Ye v. Zemin, 383 F.3d 620, 624–27 (7th Cir. 2004).

[81] The act of state doctrine directs courts to regard as valid sovereign acts committed by foreign sovereigns on their own soil. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421–24 (1964), the Supreme Court articulated that the act of state doctrine originates in domestic concerns and the implied constitutional separation of powers, which would make the doctrine a part of federal common law. Originally, however, the doctrine was seen as stemming from international comity and it continues to reflect such concerns. Id.; see also Jennifer M. DeLeonardo, Note, Are Public and Private Political Risk Insurance Two of a Kind? Suggestions for a New Direction for Government Coverage, 45 Va. J. Int'l L. 737, 767 (2005).

[82] See infra Section II.A.1.

identify the contours of foreign sovereigns' relationships with their citizens. This reluctance is animated by the same ideals of comity, respect for international law, and judicial restraint that inform extraterritoriality doctrine.[83] Current extraterritoriality doctrine, however, fails to confront all the situations in which statutory elements or effects—not just proscribed conduct—may reach beyond the territorial boundaries of the United States and into foreign public law.

The risk that courts would be required to create and define foreign legal obligations singles out the HSS as a particularly troublesome criminal statute to apply to foreign corruption schemes furthered by use of the U.S. wires. Because the HSS's conduct element explicitly applies domestically, the application of the HSS to foreign corruption schemes avoids the traditional presumption against extraterritoriality. Moreover, another statutory element—the "intangible right to honest services"—is textually ambiguous as to restrictions on its territorial reach. Current extraterritoriality doctrine does not instruct courts to evaluate separately the intended territorial reach of each element of a statute, so it does not instruct courts to confine its understanding of the "intangible right to honest services" to domestic rights. Part III addresses this Note's proposed solution to this problem.

2. Domestically: Separation of Powers

Just as extraterritoriality doctrine's failure to prevent applications of the HSS abroad disturbs the traditional balance of power among sovereign nations in the international sphere, so too does it disturb the traditional separation of powers in the domestic sphere. If extraterritoriality doctrine does not offer courts a means to avoid creating foreign law through statutes like the HSS, it will allow for a shift in the balance of powers between the courts and Congress, between Congress and the Executive, and, within the executive branch, between the Department of Justice and the Department of State.

[83] See *Aramco*, 499 U.S. at 248 (stating that the purpose of the presumption against extraterritoriality is "to protect against unintended clashes between our laws and those of other nations which could result in international discord").

It is conventional wisdom that the Constitution establishes a system where the legislative branch makes the laws and the courts interpret them.[84] While Congress probably has the power to pass a domestic criminal law that abridges a foreign sovereign's right to define its own obligations to its citizens,[85] the courts should not have the power to interpret an ambiguous statute to do the same without specific instructions from Congress. In addition, separation of powers concerns counsel courts against creating foreign affairs conflicts without direction from the political branches. *Sabbatino* cited such concerns as a justification for recognizing a federal common law choice of law rule (the Act of State Doctrine) that would avoid having the courts put the United States in difficult foreign relations positions.[86] Extraterritoriality doctrine should similarly establish a rule that avoids having the courts create foreign relations conflicts.

If the courts were to defer to the Justice Department's interpretation of the HSS rather than apply its own direct interpretation of congressional intent, it would relinquish to the Executive its primary obligation as the interpreter of the laws. Moreover, if the court's interpretation of Congress's intent differs from the Justice Department's proposed interpretation of the statute, then the Justice Department may be acting without support from Congress. In such a situation, the executive power is at its lowest.[87]

Finally, courts should distinguish between deferring to the Executive's determination of foreign relations ramifications of certain judicial decisions and deferring to the Executive's interpretation of criminal statutes. Within the executive branch, foreign relations considerations are in the domain of the State Department, while the Justice Department's domain is the enforcement, not the interpretation, of the criminal laws. The former kind of deference may be justified in circumstances where foreign relations ramifications affect the substantive interpretation of the questions presented in

[84] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[85] Congress has the power to pass laws that fit into one of its enumerated powers, such as the regulation of foreign commerce. See Const. art I, § 8, cl. 3. But see Brilmayer & Norchi, supra note 23.

[86] See supra note 81.

[87] See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

the case. In such a case, the executive branch's expertise in foreign affairs[88] and its role as the "the sole organ of the federal government in the field of international relations"[89] would justify deference, but that deference would be most appropriate when the Justice Department could verify that it was acting in accordance with the State Department's directives. The latter kind of deference blatantly abdicates to the Executive the judicial branch's obligation to interpret the laws.[90]

All of these consequences would result in an unnecessary unbalancing of separation of powers that could be prevented by a revitalized presumption against extraterritoriality, as proposed in Part III.

[88] See, e.g., Coplin v. United States, 6 Cl. Ct. 115, 135–36 (1984) (Kozinski, C.J.) (listing several justifications for deference to the Executive for questions of treaty interpretation).

[89] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[90] An extension of the principles advocated in this Note would suggest that when courts do defer to the Executive's evaluation of foreign relations implications, they should afford greater deference to the State Department's evaluation of foreign relations ramifications of certain statutory interpretations than to the Justice Department's. The State Department, not the Justice Department, is the keeper of the executive branch's foreign relations expertise and is the particular organ within the executive branch that operates within the field of international relations. But see Henry J. Friendly, The Gap in Lawmaking: Judges Who Can't and Legislators Who Won't, 63 Colum. L. Rev. 787, 792 (1963) (criticizing situations where "the legislature has said enough to deprive the judges of power to make law even in . . . subordinate respects but has given them guidance that is defective in one way or another, and then does nothing by way of remedy when the problem comes to light," thus leaving a void); Dan M. Kahan, Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch, 61 Law & Contemp. Probs. 47, 47–48 (1998) (proposing that the Department of Justice should be entrusted with interpretative lawmaking power of criminal statutes, thus filling the void described by Judge Friendly). Increased coordination between the Department of Justice and other parts of the executive branch, which may be accomplished through the new National Security Division of the Department of Justice, may better align the interests and expertise of the Department of Justice and the Department of State. This development may either address or exacerbate some of these concerns about separation of powers within the executive branch. As of the time this Note went to print, the full effects of the reauthorization of the USA PATRIOT Act were still uncertain. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, § 509A, 120 Stat. 192, 249 (2006); Brian T. Yeh & Charles Doyle, USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis, CRS Report for Congress, Mar. 24, 2006, at CRS-51–53, available at http://www.fas.org/sgp/crs/intel/RL33332.pdf.

II. THE EVOLUTION OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Since 1991, when the *Aramco* decision formally announced the current extraterritoriality doctrine, the Supreme Court and lower courts have applied the presumption against extraterritoriality even in cases that lacked the required elements articulated in *Aramco*, creating confusion as to what triggers the presumption.[91] Three recent Supreme Court decisions offer contrasting answers to the question of whether conduct abroad, harmful effects abroad, or individual statutory terms that may apply abroad create the presumption that Congress did not intend the statute to reach the conduct at issue. These different triggers have, predictably, yielded contrasting results.

The Sections in this Part will discuss these important extraterritoriality cases to demonstrate how the Court has equivocated in its dedication to the *Aramco* framework. Section A describes *Pasquantino v. United States*,[92] in which the Court employed traditional extraterritoriality analysis to hold that Congress did intend for the general wire fraud statute, 18 U.S.C. § 1343, to reach a scheme to defraud a foreign government of tax revenues, and that such an application is not extraterritorial at all because the proscribed conduct, fraudulent use of the U.S. wires, did not occur abroad.[93] Section B discusses *Empagran*, in which the Supreme Court held that Congress did not intend for the Sherman Act to apply extraterritorially to foreign anticompetitive conduct that caused foreign harm independent of any domestic harm. The Court based its opinion not on the fact that the conduct took place abroad, but on the fact that the harmful effects did.[94] This form of extraterritoriality analysis is similar to that used in *Giffen*, regarding foreign harm, rather than foreign conduct, as the key to extra-

[91] This development disproved the intuitions of some early commentators, who predicted that the *Aramco* presumption, phrased so strictly, would also be strictly applied. See, e.g., Kramer, supra note 32, at 182.

[92] 125 S. Ct. 1766 (2005).

[93] Id. at 1780–81. Although the *Pasquantino* decision used traditional *Aramco* extraterritoriality analysis, it rejected the application of the common law's traditional understanding, embodied in the common law revenue rule, that federal courts should not recognize and enforce legal obligations between foreign sovereigns and their citizens. Id. at 1774; see infra Section II.A.1.

[94] 542 U.S. 155, 165–66 (2004).

territoriality analysis. Finally, Section C explores the decision in *Small v. United States*, which employed yet another version of the presumption against extraterritoriality.[95] In *Small*, decided on the same day as *Pasquantino*, the Court held that Congress did not intend the phrase "convicted in any court" in the criminal statute forbidding felons to possess firearms to refer to foreign convictions. *Small* evaluates the intended locus not of the proscribed conduct or of the conduct's harmful effects, but of individual terms in the statute. These three different approaches have confused extraterritoriality analysis and fail to give guidance to courts that may be called upon to identify foreign legal obligations.[96] The strengths and weaknesses of these decisions inform the revitalized extraterritoriality doctrine proposed in Part III.

A. Extraterritorial Conduct

The defendants in *Pasquantino v. United States* smuggled liquor from the United States into Canada in order to avoid Canada's high importation taxes on alcohol.[97] In the course of their scheme, the defendants ordered liquor over the telephone from an alcohol distributor in Maryland. The Supreme Court affirmed that in making this phone call, the defendants used the U.S. wires in violation of the wire fraud statute. Using traditional extraterritoriality analysis, the Court found that the application of the wire fraud statute to the defendants' conduct was not an extraterritorial application because the conduct, the use of the U.S. wires, was entirely domestic, and "complete the moment [the defendants] executed the scheme inside the United States."[98] The presumption did not apply even

[95] 125 S. Ct. 1752, 1758 (2005).

[96] *Pasquantino* and *Small* were very close decisions. *Pasquantino* was decided 5-4. Justice Thomas wrote the majority opinion, joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Kennedy. Justices Ginsburg, Breyer, Scalia, and Souter dissented. *Small* was 5-3, with Chief Justice Rehnquist not participating in the decision. Only Justice Stevens and Justice O'Connor voted with the majority in both cases.

[97] *Pasquantino*, 125 S. Ct. at 1770.

[98] Id. at 1780. The Court continued to explain that an evaluation of foreign law in the course of the application of a domestic criminal statute to the alleged conduct is not equivalent to an extraterritorial application of the U.S. statute. "In any event, the wire fraud statute punishes frauds executed 'in interstate or foreign commerce,' 18 U.S.C. § 1343 (2000 ed., Supp. II), so this is surely not a statute in which Congress had only 'domestic concerns in mind.'" Id. at 1780–81 (quoting *Small*, 125 S. Ct. at 1755).

though the scheme was intended to defraud a foreign government of its tax revenues, and thus the defendants could be prosecuted under the statute.

The fact that the victim and the harmful effects of the conduct were both outside the United States did not alter the Court's analysis or conclusion. Similarly, the Court did not consider in its extraterritoriality analysis the prudential considerations embodied in the common law revenue rule that U.S. courts should not enforce foreign public law.[99] Traditional extraterritoriality analysis gave the Court a precise answer: *Aramco* did not apply. The majority's summary dismissal of the defendants' extraterritoriality arguments indicate that the same reasoning would probably apply to HSS cases, which would incorporate the same conduct element as the general wire fraud statute.[100]

Although there was little detailed analysis in *Pasquantino*'s determination that the proposed application was not extraterritorial, the other major issues in the case raise significant points to be considered when evaluating how to revitalize extraterritoriality doctrine.

1. The Common Law Revenue Rule

The primary holding in *Pasquantino* was that the common law revenue rule did not bar the wire fraud prosecution. The Court distinguished the *Pasquantino* facts from the typical revenue rule scenario, in which a foreign government brings a civil suit in U.S. court to enforce the foreign government's tax judgment. In such cases, the common law revenue rule instructs U.S. courts to decline to enforce the foreign government's tax laws for much the same reason that they traditionally decline to enforce a foreign government's criminal law[101]—essentially for lack of jurisdiction. The Court in *Pasquantino* argued that a criminal prosecution brought by the U.S. government, in contrast to a civil suit brought by a for-

[99] Cf. United States v. Boots, 80 F.3d 580, 587 (1st Cir. 1996) (discussing the rationale of the revenue rule).

[100] *Pasquantino*, 125 S. Ct. at 1780 n.12 ("As some indication of the novelty of the dissent's 'extraterritoriality' argument, we note that this argument was not pressed or passed upon below and was raised only as an afterthought in petitioners' reply brief, depriving the Government of a chance to respond.").

[101] See The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

eign sovereign, is "[a]n action by a domestic sovereign [to] enforce[] the sovereign's own penal law."[102] At issue is the United States' "independent interest in punishing fraudulent domestic criminal conduct,"[103] not a foreign government's interest in collecting the taxes it believes it is due.

The Court's ruling is consistent with other courts' criticisms that the revenue rule is outdated "[i]n an age when . . . instantaneous transfer of assets can be easily arranged."[104] The revenue rule's rationale, however, if not its rule of decision, involves important considerations, reflected in several other common law doctrines,[105] that should inform the revitalized extraterritoriality doctrine. The revenue rule calls for judicial non-interference in enforcement of foreign tax laws because "[t]ax laws embody a sovereign's political will[,] . . . affect each individual's relationship to his or her sovereign[, and] . . . mirror the moral and social sensibilities of a society."[106] The rule rests on a distinction between public and private rights and duties, and a belief that U.S. courts have no role in determining the public rights and duties of foreign citizens and their sovereigns.[107]

It is unclear, right now, exactly what proposition *Pasquantino* will come to represent in future cases. It may stand for the proposition that the common law revenue rule does not apply in criminal cases, or at least in federal criminal cases. It may stand for the slightly but significantly different proposition that the Executive, acting pursuant to congressional authorization in a criminal statute, has the power to overcome the revenue rule.[108] It does not mean

[102] *Pasquantino*, 125 S. Ct. at 1776.

[103] Id. at 1777.

[104] Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, 268 F.3d 103, 125 (2d Cir. 2001) (citing Restatement (Third) of Foreign Relations § 483 rep. n.2).

[105] See supra notes 79–82.

[106] *R.J. Reynolds*, 268 F.3d at 111. The *Reynolds* court dismissed a civil RICO suit brought by Canada against cigarette manufacturers for an alleged conspiracy to smuggle cigarettes into Canada and avoid Canadian taxation. Id. at 103–04.

[107] "The rule appears to reflect a reluctance of courts to subject foreign public law to judicial scrutiny . . . combined with reluctance to enforce law that may conflict with the public policy of the forum state." Restatement (Third) of Foreign Relations § 483 rep. n.2.

[108] In civil cases, the revenue rule still applies. The Second Circuit reconsidered its decision in *European Community v. RJR Nabisco* in light of *Pasquantino* and reaffirmed that the revenue rule barred civil RICO suits brought by foreign sovereigns to

that the principles informing the revenue rule, which restrain U.S. courts from interfering with foreign public legal regimes, have lost their validity. These principles may continue to inform decisions about which crimes to prosecute and to prevent foreign sovereigns from enforcing their tax judgments in U.S. courts. These principles should be included in the body of values that generate the revitalized extraterritoriality doctrine so that courts can consider them unless Congress explicitly overrides them.

2. Deference to the Executive

The Supreme Court declined to apply the revenue rule in *Pasquantino* for two principal reasons. First, it found that the revenue rule, as conceived in 1952 when the current version of § 1343 was passed, would not have prevented the prosecution. Second, it found that the prosecution did not pose the risks that the revenue rule was intended to avoid: "[T]he principal evil against which the revenue rule was traditionally thought to guard . . . [was] judicial evaluation of the policy-laden enactments of other sovereigns."[109] Since the foreign relations ramifications of criminal prosecutions, however, were the domain of the executive branch, "'the sole organ of the federal government in the field of international relations,'"[110] the Court in *Pasquantino* asserted that

> we may assume that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction. We know of no common-law court that has applied the revenue rule to bar an action accompanied by such a safeguard, and neither petitioners nor the dissent directs us to any. The greater danger, in fact, would lie in our judging this prosecution barred based on the foreign policy concerns animating the revenue rule, con-

recover law enforcement costs and tax revenue lost to smuggling. European Cmty. v. RJR Nabisco, 424 F.3d 175, 177 (2d Cir. 2005).

[109] *Pasquantino*, 125 S. Ct. at 1779.

[110] Id. (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).

> cerns that we have "neither aptitude, facilities nor responsibility" to evaluate.[111]

Whereas the *Aramco* presumption looks to congressional intent to determine the territorial limits of the application of a federal statute, *Pasquantino*, by looking to executive intent, seems capable of generating an exception to this analysis for potentially all criminal cases. Read narrowly, *Pasquantino* may affect only revenue rule issues, and mean simply that the Executive's decision to prosecute trumps a common law comity rule. Read broadly, the Court deferred to a presumed Executive evaluation of foreign relations implications that, following the same logic, lies behind every criminal prosecution. If allowed to extend, this presumption could go farther than other cases in which courts defer to the Executive's explicit determinations of foreign relations issues.[112] By assuming—without any indication from the government—that the government thoroughly considers international comity and foreign relations concerns before bringing any prosecution, the Court imputes coordination and unanimity between the Justice Department and the State Department without any indication that the latter, which has its own interests, communicates its preferences to the former.[113]

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[111] *Pasquantino*, 125 S. Ct. at 1779 (quoting Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

[112] For example, courts usually give binding deference to the Executive's recognition of foreign governments, see, e.g., Mingtai Fire & Marine Ins. Co. v. United Parcel Service, 177 F.3d 1142, 1147 (9th Cir. 1999); Lafontant v. Aristide, 844 F. Supp. 128, 132–33 (E.D.N.Y. 1994), and persuasive deference to the Executive's interpretation of treaties, see, e.g., United States v. Lombera-Camorlinga, 206 F.3d 882, 887 (9th Cir. 2000).

[113] The Departments of State and Justice sometimes have conflicting interests and points of view. The two departments sometimes sign court briefs together, see, e.g., Brief for the United States as Amicus Curiae, El Al Israel Airlines v. Tseng, 525 U.S. 155 (1999) (No. 97-485), but sometimes they do not. Most recently and prominently, the two departments differed over the application of the Geneva Conventions in the war on terrorism, which was revealed by an exchange of internal memos that are now public. See Michael Isikoff, Memos Reveal War Crimes Warnings, Newsweek.com, May 19, 2004, http://www.msnbc.msn.com/id/4999734 (providing links to Attorney General Alberto Gonzales's memorandum and to Secretary of State Colin Powell's response); Chronology: The New Rules of War, Frontline, Oct. 18, 2005, http://www.pbs.org/wgbh/pages/frontline/torture/paper/cron.html. The coordination among the President, the Secretary of State, and the Attorney General in developing the Executive's strategy in the recent Supreme Court case of *Medellin v. Dretke*, 125 S. Ct. 2088 (2005), was a notable exception to common executive branch practice. See Brief for the United States as Amicus Curiae Supporting Respondent at 39–43,

Moreover, such unquestioning deference to the Executive compromises the judiciary's role as the primary interpreter of criminal statutes.[114] If extended beyond the revenue rule context, *Pasquantino*'s reasoning could place the entire responsibility for interpreting criminal statutes with the Executive when foreign nations are involved, and could displace all international comity rules when applied to federal criminal law. Deference to the Executive under such circumstances would go beyond even the *Chevron* framework. Under *Chevron* analysis, courts relinquish their interpretive obligations to executive departments only in situations where the agencies make reasonable interpretations of ambiguous language in the statutes the agencies administer.[115] But the Justice Department ordinarily does not receive *Chevron* deference for its interpretation of criminal statutes.[116] In addition, deference to Executive silence goes beyond the bounds of *Chevron* by not even requiring the decision to be judged against an arbitrary and capricious standard.[117] Court inquiries into congressional intent to apply criminal statutes extraterritorially should not be so completely and implicitly deferential to the Executive so as to exceed the *Chevron*

Medellin v. Dretke, 125 S. Ct. 2088 (2005) (No. 04-5928), 2005 WL 504490 (signed by the Justice Department and the State Department, and supporting the President's unusual executive order recommending providing relief for the fifty-one individuals involved in the ICJ *Avena* case); see also Posting of Marty Lederman to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2005/03/notable_sg_amic.html (Mar. 1, 2005, 05:51 EST). In *Giffen*, the district court specifically asked the Assistant U.S. Attorney in oral argument for the State Department's position regarding the prosecution. Oral Argument Transcript, 326 F. Supp. 2d 497 (S.D.N.Y. 2004) (No. 1:03CR00404) (on file with the Virginia Law Review Association).

[114] Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[115] Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[116] See Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."); cf. Kahan, supra note 90, at 47 (arguing that interpretive power should rest within the Department of Justice).

[117] Having passed the two-step *Chevron* test, to receive *Chevron* deference, agency decisions must also pass the arbitrary and capricious review required by the Administrative Procedure Act ("APA"). See 5 U.S.C. § 706(2)(A) (2000); United States Telecom Ass'n v. FCC, 227 F.3d 450, 460 (D.C. Cir. 2000).

framework and its underlying rationales.[118] This potentially broad deference to the Executive is not incorporated into the revitalized extraterritoriality doctrine suggested in Part III. Rather, extraterritoriality analysis should continue to be a question of congressional intent, and criminal statutory interpretation should continue to be a question for the judiciary.

B. Extraterritorial Effects

In *Empagran*,[119] the Supreme Court deviated from the traditional rules of extraterritoriality doctrine explained in the previous Section. In *Empagran*, domestic and foreign purchasers of vitamins brought an antitrust class action against domestic and foreign vitamin manufacturers and distributors. The class alleged the existence of an international price-fixing conspiracy that adversely affected American and foreign customers. Although some of the alleged conspiratorial conduct had occurred abroad and one of the relevant statutes, the Sherman Act,[120] did not explicitly apply to foreign conduct, the *Aramco* presumption still did not apply because antitrust is one of the areas of law considered an exception to the presumption.[121] The Court nevertheless applied a variation on the presumption against extraterritoriality. It held that where foreign anticompetitive conduct results in domestic and foreign harms independent of each other, the antitrust statutes do not apply to the claims arising from the independent foreign harm.[122] *Empagran* concedes that the *Aramco* presumption does not apply to antitrust actions, so it uses a different approach to extraterritoriality analy-

[118] See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511 (discussing the different rationales for the *Chevron* doctrine).

[119] 542 U.S. 155 (2004). Justice Breyer wrote the majority opinion. Justice Scalia filed a concurring opinion in which Justice Thomas joined. Justice O'Connor did not participate. *Empagran*, decided on June 14, 2004, was announced two weeks before the district court announced *Giffen* on July 2, 2004.

[120] The case also involved the interpretation of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2000), an amendment to the Sherman Act, which is more explicit about its extraterritorial application. *Empagran*, 542 U.S. at 158.

[121] See supra note 35 and accompanying text; see, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986) (quoting Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962)); United States v. Aluminum Co. of Am. ("Alcoa"), 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.).

[122] *Empagran*, 542 U.S. at 159.

sis—it looks to the locus of the effects of the proscribed conduct rather than to the locus of the conduct.

The Court based its restyled presumption against extraterritoriality on the supposition that Congress considered other nations' legitimate sovereign interests when passing legislation.[123] It explained that courts find an exception to that supposition when a certain extraterritorial application of the statute is reasonable, for example when the Sherman Act applies to foreign anticompetitive conduct that causes domestic effects.[124] In contrast, an unreasonable application, such as an application of U.S. laws to domestic conduct that is "intertwined with foreign conduct that causes independent foreign harm,"[125] would not justify finding an exception to the presumption, because such an application would result in "worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier"[126] and "an act of legal imperialism[] through legislative fiat."[127]

The *Empagran* decision reflects important prudential considerations that counsel against applying the statute extraterritorially even though *Aramco* generally does not bar antitrust actions—but it does not reflect a coherent extraterritoriality doctrine as a matter of statutory interpretation. These prudential considerations, however, should be built into a clear doctrine of extraterritoriality.

[123] Id. at 164.

[124] Id. at 165 (citing *Alcoa*, 148 F.2d at 443–44; 1 Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 236 (1978)). "Reasonable" here means "justifiable" according to the factors in Restatement (Third) of Foreign Relations § 403. *Empagran*, 542 U.S. at 165. The Court explained:

> But why is it reasonable to apply those laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim? Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial.

Id. (emphasis omitted).

[125] Id. at 166.

[126] Id. (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 273 (Supp. 2003)).

[127] *Empagran*, 542 U.S. at 169.

C. Individual Statutory Terms

The revitalized presumption capitalizes on the contributions of both *Empagran* and *Small v. United States*.[128] Gary Small served five years in a Japanese jail after a Japanese court convicted him of weapons smuggling offenses. Upon his release, he returned to the United States and bought a gun. He was convicted of violating 18 U.S.C. § 922(g)(1), which forbids "any person . . . *convicted in any court* . . . of a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm."[129] He challenged his conviction on the ground that his prior conviction in a Japanese court did not satisfy the prior conviction element of the statute.

The Supreme Court agreed with Small that the term "convicted in any court" referred only to domestic, and not foreign, convictions. Justice Breyer, writing for the Court, explained that "although the presumption against extraterritorial application does not apply directly to this case [because the conduct, the gun possession, did not occur abroad], we believe a similar assumption is appropriate when we consider the scope of the phrase 'convicted in any court' here."[130] This "ordinary assumption" is based on the "commonsense notion that Congress generally legislates with domestic concerns in mind."[131]

The Court rejected the argument that Congress intended to include foreign courts in its understanding of "any court" because foreign convictions may not mirror domestic convictions in terms of the type of conduct prohibited, the extent of punishment, and the fairness and due process afforded in reaching the conviction. Accordingly, the Court assumed that Congress did not intend the phrase "convicted in any court" to apply extraterritorially—a step beyond the *Aramco* presumption that Congress did not intend the statute to apply to conduct committed abroad. The "*Small* presumption," like the *Aramco* presumption, is rebuttable by "statu-

[128] 125 S. Ct. 1752 (2005).

[129] Id. at 1754 (quoting 18 U.S.C. § 922(g)(1) (2000)) (emphasis added by Court). Justice Breyer wrote the majority opinion, joined by Justices Stevens, O'Connor, Souter, and Ginsburg. Justice Thomas wrote the dissenting opinion, joined by Justices Scalia and Kennedy. Chief Justice Rehnquist did not participate in the decision.

[130] *Small*, 125 S. Ct. at 1755.

[131] Id. (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).

tory language, context, history, or purpose show[ing] the contrary."[132] The Court found no such counter-indications in *Small*.[133]

The circuit split that precipitated Supreme Court review in *Small*, the close vote among the Justices, and the persuasive arguments in both the majority and dissenting opinions all illustrate that *Small* is emblematic of the confused and confusing state of extraterritoriality analysis. The decision has further shortcomings. Like *Empagran*, it extends a version of the *Aramco* presumption to a situation in which the Court admits the presumption does not apply (because the proscribed conduct occurred domestically).[134] The decision is nevertheless correct—it is consistent with extraterritoriality doctrine's structural purpose of reflecting congressional intent, and with the doctrine's goals of restricting extensions of domestic statutes to foreign contexts and of preventing international discord. In future cases, *Small* may be confined to the narrow context of statutory references to court decisions, or it may be extended to encompass *Aramco* and beyond, by applying the presumption against extraterritoriality to both conduct and nonconduct statutory elements. As such, the "extended" *Small* presumption could articulate the presumption against extraterritoriality more clearly than *Aramco*, providing better guidance for future courts and Congress.

Indeed, *Small* potentially resolves a number of the difficulties arising from other recent Court encounters with extraterritoriality doctrine. The *Small* holding is not explicitly based on considerations of international law or comity. Nor does it include dicta advocating deference to the executive branch for questions involving foreign relations. *Small*, like *Giffen*, effectively checks the Executive's power to bring criminal charges by interpreting the scope of a legislative enactment to be purely domestic. The *Small* presumption does not require courts to address the extent to which the Executive can carry out its foreign relations powers through criminal

[132] *Small*, 125 S. Ct. at 1755–56.

[133] Id. at 1756. The dissent did find such counter-indications. In addition to rejecting the application of a presumption against extraterritoriality in a case where the majority admitted that the *Aramco* presumption did not apply, Justice Thomas in dissent reiterated the extraterritoriality analysis he used in *Pasquantino*. "In prosecuting Small," he wrote, "the Government is enforcing a domestic criminal statute to punish domestic criminal conduct." Id. at 1761 (Thomas, J., dissenting).

[134] Id. at 1755 (majority opinion).

prosecutions because it finds that Congress never granted the Executive the power to prosecute such a crime in the first place. Such analysis acknowledges that the court-created presumption against extraterritoriality has always been a presumption about congressional intent.[135]

III. THE FUTURE OF EXTRATERRITORIALITY

Giffen, *Empagran*, *Pasquantino*, and *Small* together demonstrate the shortcomings of current extraterritoriality doctrine. Such cases, standing on the frontier between domestic and extraterritorial regulation,[136] are increasingly familiar as the boundaries among nations grow fainter and as the U.S. government continues to use domestic statutes to prosecute foreign corruption.[137] *Giffen* in particular illustrates the problems with an extraterritoriality doctrine that fails to reach all of the statutory applications that should be presumed to be domestic. Some claim that, in light of increasing globalization, the presumption against extraterritoriality should be restrained rather than revitalized,[138] but *Giffen* supports arguments for a more robust extraterritoriality doctrine.

The Supreme Court seems to have recognized what the examples of *Giffen*, *Empagran*, and *Small* demonstrate: The conduct focus of the *Aramco* presumption is inadequate to restrict certain unintended extensions of domestic law abroad, especially in the criminal context. The Court continues to use the conduct trigger to reject extraterritoriality challenges in some cases, as it did in *Pasquantino*, but in *Empagran* and *Small*, the Court turned to other variations on the presumption against extraterritoriality in cases where it technically did not apply. The results of applying each variation on the presumption will not necessarily conflict in every future context. However, as Part II showed, the three cases designate three separate triggers for the presumption against extra-

[135] See *Aramco*, 499 U.S. at 248.

[136] Professor Lea Brilmayer describes this overlap in conflict of laws terms as involving cases with "an international flavor." Lea Brilmayer, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal, 50 Law & Contemp. Probs. 11, 12 (1987).

[137] See supra note 15.

[138] See, e.g., supra note 32.

territoriality, which creates excessive confusion for an effective doctrine of statutory construction.

The doctrine should be revitalized to incorporate the values identified throughout this Note and to guard against the perpetuation of its current shortcomings. First, as a doctrine of statutory interpretation, the doctrine should aim to be clear so that it can effectively communicate to Congress, courts, and parties how courts will interpret statutes. Second, the doctrine should reflect the courts' role as the primary interpreter of criminal statutes, deferential to congressional intent and to foreign relations concerns raised by the State Department that affect substantive decisions, but not to prosecutors' interpretation of criminal statutes. Third, in order "to protect against unintended clashes between our laws and those of other nations which could result in international discord,"[139] the doctrine should incorporate principles of international comity and respect for foreign sovereignty, such as those behind the revenue rule, by erring more on the side of presuming domesticity, particularly of criminal statutes.

This Note supports the *Small* approach as the foundation of the presumption against extraterritoriality. In applying *Small*, however, courts should be wary of interpreting away reasonable inferences that incorporate foreign elements into the meaning of the statute. Where statutes explicitly require, for example, the commission of a foreign crime as an element of the offense,[140] determining whether the foreign offense was committed as a question of fact is clearly required. In the harder cases, however, such as *Small* itself, evaluating each phrase of the statute rather than just the conduct elements, as *Aramco* analysis dictates, would ensure that the court both respected congressional intent and established a broader default presumption of domesticity.

A. The Revitalized Extraterritoriality Presumption: How It Works

Extraterritoriality doctrine should embrace the *Small* presumption and allow it to consume the *Aramco* presumption. When evaluating whether a federal criminal statute applies extraterritori-

[139] *Aramco*, 499 U.S. at 248.
[140] See supra note 76.

ally, a court should examine the terms of the statute individually, as per *Small*, and then determine whether the nature of the statute requires the court to create foreign legal obligations without a congressional mandate. This second step is consistent with the second step under the preexisting *Aramco* doctrine, which asks, pursuant to the *Bowman* exception, whether the nature of the crime itself is extraterritorial.[141]

For the first part of the inquiry, a court employs a presumption that Congress intends to legislate domestically in terms of both the language it uses and the conduct it regulates. This presumption may be rebutted by evidence of legislative intent, context, history, or other indications that Congress had other intentions.[142] It may also be rebutted by the second inquiry, which may suggest that the nature of the criminal statute is either domestic, as in the HSS, or extraterritorial, for example because of the particular U.S. interests that the statute seeks to protect from foreign assault, as in *Bowman* itself. The investigation into the territorial nature of the criminal statute should also involve an inquiry into whether the proposed application of the statute requires the court to create foreign law, or identify a foreign legal obligation not recognized by the foreign sovereign. Courts should assume that Congress did not intend such a result absent specific evidence to the contrary. The implication from *Pasquantino* is that the Court would give more weight to the Executive's decision to bring a prosecution than to common law comity considerations, such as the common law revenue rule, that advise against application of a statute that might require a court to create, recognize, and enforce foreign public law. It is necessary to incorporate a specific presumption against the creation of foreign law in order to rebut this implication.

Those areas of the law that were exceptions to the *Aramco* presumption, such as antitrust, securities fraud, and RICO, would still be exceptions to the revitalized presumption. These areas often involve conduct committed abroad that nonetheless generates significant domestic harm that Congress intends to regulate. Congress has known about these exceptions since well before the Court ar-

[141] See supra notes 36–37 and accompanying text.
[142] Small v. United States, 125 S. Ct. 1752, 1756 (2005).

ticulated the particulars of the current presumption in *Aramco*.[143] Disrupting the expectation that statutes in this area are exempt from extraterritoriality analysis would undermine, rather than further, the progression towards increased clarity of the extraterritoriality doctrine. Moreover, these exceptions resolve some of the criticisms that the presumption against extraterritoriality is overly strict by allowing for the extraterritorial application of statutes in areas that are particularly prone to involving multinational situations.[144] For foreign conduct that results in independent foreign harm, however, the revitalized presumption should incorporate *Empagran* so that the presumption against extraterritoriality would still apply to that conduct.[145]

The revitalized presumption also operates under the existing scheme of deference to the Executive, but it specifically rejects expanding the circumstances under which the courts defer to the De-

[143] See, e.g., United States v. Aluminum Co. of Am. ("Alcoa"), 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.) (finding that the Sherman Act implicitly applies extraterritorially).

[144] Cf. Kramer, supra note 32, at 182 (predicting that the *Aramco* decision would reestablish the presumption "across the board").

[145] See supra Section II.B. It may be that specific extraterritoriality tests should be adopted for each of the areas that are traditional exceptions to the *Aramco* presumption. For example, Professor Sprigman suggests a limited international comity-based jurisdictional standard for determining whether U.S. courts have jurisdiction over antitrust cases involving foreign cartels. Christopher Sprigman, Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels, 72 U. Chi. L. Rev. 265, 279–87 (2005). Professor Sprigman also notes that the *Empagran* "'effects' test is theoretically simple, but difficult to apply," and that *Empagran* itself did not apply the test. Id. at 265, 276–77. Insofar as these (correct) observations are relevant to the independent foreign effects test proposed in this paragraph, it is important to note that while Professor Sprigman may be correct that it is difficult to separate domestic effects from foreign effects when they are both present, the inverse is not necessarily true. That is, courts may still be able to separate out cases where there are only foreign effects, and they can therefore apply the revitalized presumption against extraterritoriality in those cases. See id. at 278. Thus, antitrust may require its own specific extraterritoriality rules. See, e.g., Calvin S. Goldman et al., Comity after *Empagran* and *Intel*, Antitrust, Summer 2005, at 6 (discussing the role of comity in antitrust jurisdictional rulings). The Securities Exchange Act may require its own rules. See W. Barton Patterson, Note, Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions, 74 Fordham L. Rev. 213 (2005). RICO may also be its own animal. See European Cmty. v. RJR Nabisco, 424 F.3d 175, 177 (2d Cir. 2005). In proposing a general revitalized extraterritoriality doctrine, this Note does not try to devise the perfect extraterritoriality regime for each of these areas; it emphasizes, however, that the presumption against extraterritoriality should be applied to conduct in any of these areas that produces only foreign harm.

partment of Justice to include the interpretation of criminal laws. Currently, a court may extend binding, persuasive, or no deference to the executive branch's recommendations about how to rule on certain issues.[146] The courts extend persuasive deference, for example, to the Executive's views on issues such as the interpretation of treaties[147] and the interpretation of statutes that executive agencies administer.[148] However, they do not defer to the Executive's determination of constitutional and non-*Chevron* statutory interpretation issues, even when foreign relations are involved.[149] The revitalized presumption affords no deference to the Justice Department's interpretation of criminal statutes, but courts could take into consideration the State Department's determinations of foreign relations ramifications of certain outcomes. It also reflects the appropriate alignment of Congress, the courts, the Justice Department, and the State Department, by ensuring that Congress makes the laws, the judiciary interprets them, and the State Department, not the Justice Department, makes the primary decisions about how to carry out United States foreign policy.

Under this analysis, a tangible rights wire fraud case like *Pasquantino* still does not involve an invalid extraterritorial application because the nature of wire fraud is such that the U.S. interest in criminalizing the conduct is best served when the statute reaches as far as the wires reach. A court would reach this result not by looking exclusively at the locus of the prohibited conduct, but by determining that the individual terms of the statute describe

[146] See supra note 112.

[147] See, e.g., Factor v. Laubenheimer, 290 U.S. 276, 295 (1933) (stating that the government's interpretation of treaties, while not dispositive, "is nevertheless of weight"); United States v. Lombera-Camorlinga, 206 F.3d 882, 887 (9th Cir. 2000) (deferring to the State Department's interpretation of the Vienna Convention on Consular Rights); see also Tim Wu, When Do American Judges Enforce Treaties?, 93 Va. L. Rev. (forthcoming Apr. 2007) (discussing different levels of deference in judicial decisions to enforce treaties).

[148] See Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[149] For example, the Court does not defer to the executive branch's interpretation of the meaning of the Due Process Clause in the Constitution, see, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 536–38 (2004), or to the executive branch's interpretation of statutes that do not fall into the *Chevron* framework. See United States v. Mead Corp., 533 U.S. 218, 221 (2001); Cass R. Sunstein, *Chevron* Step Zero, 92 Va. L. Rev. 187 (2006).

conduct that is presumed to be domestic, that is, use of the U.S. wires. The nature-of-the-statute analysis would reason that the nature of the wire fraud statute requires the law to have some extraterritorial effects, but those would not constitute an invalid extraterritorial reach of the statute.

The application of the presumption as articulated in this Note to the next *Small*-type case would obviously track the application in *Small* itself. A court would evaluate each phrase in the statute as having domestic reach. Specifically, *Small*'s analysis regarding the ramifications of the extraterritorial understanding of the term "any court" parallels the analysis the next court might use to evaluate the nature-of-the-statute.

This revitalized presumption also allows the court in *Giffen* to find that the application of the HSS to Giffen's conduct is an invalid extraterritorial application of the statute. In applying the revitalized presumption to the *Giffen* facts, a court would first investigate the territoriality of each of the terms of the statute. To discover the nature of the ambiguous phrase "the intangible right of honest services," the court would look to the legislative history of the HSS and to the pre-*McNally* precedent that Congress sought to reinstate through the statute. This precedent involves entirely domestic explorations of the nature of the duty of honest services, and the statute was enacted with these explorations in mind. Moreover, the nature of honest services itself, as conceived by courts pre- and post-*McNally*, is specifically American. There is no indication that Congress also contemplated schemes to defraud foreign citizens of a foreign intangible right to honest services.[150] Second, a court would determine as a part of the nature-of-the-statute analysis that the proposed application of the HSS required the court to create foreign law. Therefore, a court would reject the proposed application. This analysis would admittedly reach the same result as the district court in *Giffen*, but it would do so using the proper doctrine, one which addresses the problem of foreign law creation raised by the application of the HSS to foreign bribery

[150] This result would not necessarily undermine the *Pasquantino* decision because it is grounded in the interpretation of § 1346's phrase "intangible right of honest services."

statutes. As such, it better guarantees consistent application and resolution.

B. The Revitalized Extraterritoriality Presumption: Why It Works

The revitalized presumption synthesizes—rather than revolutionizes—the currently confused state of extraterritoriality doctrine. It creates a context in which *Small* can rise to its appropriate prominence. The purpose of the presumption is not only to reflect presumed congressional intent after statutes have been written, but also to communicate to Congress the way in which courts will interpret future statutes. Lower federal courts also appreciate clarity in Supreme Court doctrine so that they can properly apply it. Any presumption is least effective when it is unclear—as *Pasquantino*, *Empagran*, *Small*, and *Giffen* demonstrate, this is the current condition of the extraterritoriality presumption.

Rethinking the presumption with *Small* as the focal point reflects that the expansions of and exceptions to the *Aramco* conduct inquiry have become the foundations of extraterritoriality analysis and have eclipsed *Aramco*'s focus on the conduct element. Accordingly, the revitalized presumption takes emphasis away from the *Aramco* decision. Rather than differentiating between conduct and non-conduct elements of a statute, as a separate *Aramco-Small* presumption would require, this Note points out that a *Small*-based inquiry into each phrase of the statute would encompass the *Aramco* conduct element.

Moreover, the second prong of the presumption uses the preexisting *Bowman* exception as a means to incorporate the consideration of whether an extraterritorial application of a domestic statute would require U.S. courts to create foreign law. The addition of the "creation of foreign law" inquiry candidly acknowledges that the *Aramco* doctrine furtively includes the *Bowman* exception for criminal statutes that are "by nature" extraterritorial. This inquiry may sometimes be more challenging than it is in *Giffen*, where the charges clearly threaten to force U.S. courts to create foreign law. Potential future difficulties do not undermine the benefits of a revitalized doctrine, however. With the increasing use of domestic

criminal laws to prosecute foreign corruption,[151] both prongs of the revitalized presumption are of pressing importance if the courts are to respect congressional intent above the Justice Department's interpretation of the criminal laws.[152]

The revitalized presumption also addresses both the international and the domestic unbalancing of powers problems identified in Section I.D. The specific inquiry into the possibility of creating foreign law protects the foreign sovereign's interest in defining its own relationship with its citizens. The reinvigorated deference to congressional intent—encompassing both proscribed conduct and individual statutory terms—buttresses extraterritoriality doctrine's dedication to maintaining Congress as the primary lawmaker in the federal constitutional system. Finally, the revitalized extraterritoriality doctrine emphatically rejects deference to the Justice Department's interpretation of the criminal laws, while maintaining respect for the State Department's domain over foreign relations issues. The revitalized doctrine thus maintains both the constitutional separation of powers among the three branches of the federal government, and the appropriate balance of powers within the executive branch.

CONCLUSION

As the U.S. Government increasingly employs a variety of domestic criminal laws to prosecute foreign corruption—acts committed by U.S. citizens and foreign officials alike—a proper understanding of the extraterritorial scope of U.S. criminal laws assumes corresponding importance. Three conflicting Supreme Court decisions, *Pasquantino*, *Empagran*, and *Small*, demonstrate that current extraterritoriality doctrine is in a state of flux. *Giffen* further demonstrates the effects this flux can have on real cases. As the purpose of extraterritoriality doctrine is to reflect congressional intent, the courts should refine the presumption they created to reflect congressional intent and restrain inappropriate extensions of domestic law into the international sphere. A combination of *Small*'s "common sense understanding" that Congress legislates with domestic concerns in mind and a presumption against U.S.

[151] See supra text following note 15.
[152] See supra notes 113–17 and accompanying text.

courts creating foreign law, in the context of the *Bowman* exception's inquiry into the extraterritorial nature of the criminal statute, provides a framework for courts to analyze congressional intent in such criminal statutes. The framework avoids the pitfalls of the current doctrine's formalism, which prevents courts from looking beyond the conduct element of the statute, toward the individual terms and the nature of the statute as a whole, and conflicting precedents that provide more confusion than guidance. This approach respects the Executive's key role in foreign affairs without deferring excessively to the Executive so as to delegate to the Justice Department the courts' obligation to interpret criminal statutes and Congress's power to make the laws. Finally, it allows courts to use extraterritoriality doctrine to refrain from creating and enforcing foreign law.