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## **SARBANES-OXLEY WRIT LARGE: SARBANES-OXLEY AND THE FOREIGN COMMERCE CLAUSE**

*Karl T. Muth\**

“The Congress shall have power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]”<sup>1</sup>

“The Courts of no country execute the penal laws of another[.]”<sup>2</sup>

### INTRODUCTION

It is easy to imagine the brilliant young CEO of Startup Corporation in the country of Hypothistan. He runs a successful technology startup that recently went public on the NYSE. He has never visited the United States, was educated at Hypothetical University, and has no contacts at all with the United States aside from his company being listed on the NYSE. Still, when an accounting irregularity is discovered at Startup Corporation that the Securities Exchange Commission (SEC) deems to be financial fraud rather than acceptable earnings management, the young CEO – who has been personally signing the financials for Startup Corporation as required by Sarbanes-Oxley<sup>3</sup> (and, with that, has been taking on personal civil and criminal liability in the United States) – may well be summoned into court in the United States and even sent to an American prison.

The possibility of jail time is very real for any executive whose stock trades on an American exchange. The CEO and the CFO of Worldcom, Bernie

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\* © Karl T. Muth 2008. M.B.A. Candidate, The University of Chicago Booth School of Business; J.D., The John Marshall Law School, Chicago, Illinois. I am grateful to Professor Randal C. Picker of The University of Chicago Law School for allowing me to explore the initial idea for this Article on his blog. Thanks also to Professor Arnold Rochvarg for piquing my interest in wide-reaching implications of the Foreign Commerce Clause during my time at Universiteit Nederlandse Ant. This Article would not have been possible without the help of my dear friend Angela Ewald. Elizabeth M. Schutte contributed thoughtful comments on earlier drafts.

<sup>1</sup> U.S. CONST. art. I § 8, cls. 1, 3.

<sup>2</sup> The Antelope, 23 U.S. 66, 123 (1825).

<sup>3</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); *see, e.g.*, 18 U.S.C. § 1350 (Supp. V 2005) (as to conscious misrepresentations).

Ebbers and Scott Sullivan were sentenced to twenty-five<sup>4</sup> and five years,<sup>5</sup> respectively. Dennis Kozlowski, former CEO of Tyco, was sentenced to twenty-five years.<sup>6</sup> Jeff Skilling, formerly of Enron, has already served several years of his twenty-four-years-and-four-months sentence.<sup>7</sup> These convictions by the American court system encourage foreign executives to delist their companies from American stock exchanges, in part to avoid the mere possibility of gigantic civil and criminal penalties under United States securities laws, including Sarbanes-Oxley.<sup>8</sup>

The criminal penalties available for financial fraud under Sarbanes-Oxley, combined with Congress's authority to criminalize extraterritorial conduct, leads to a scenario where many of the world's non-American executives are subject to prosecution in American courts simply because their company's stock is traded on an American exchange.

### I. THE POWER OF THE FOREIGN COMMERCE CLAUSE

It is unclear, historically, whether the Framers expected the Foreign Commerce Clause to have criminal jurisdictional implications.<sup>9</sup> Until the late Nineteenth Century, the Foreign Commerce Clause was seen to grant general regulatory powers.<sup>10</sup> What is without a doubt, however, is that the Foreign

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<sup>4</sup> *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006).

<sup>5</sup> *Id.*

<sup>6</sup> *See Fed. Ins. Co. v. Tyco Int'l Ltd.*, 422 F. Supp. 2d 357, 361 (S.D.N.Y. 2006).

<sup>7</sup> *See Malcolm Gladwell, Open Secrets: Enron, Intelligence, and the Perils of Too Much Information*, NEW YORKER, Jan. 8, 2007; *Joshua v. Adams*, 231 Fed. App'x 592, 594 n.1 (9th Cir. 2007).

<sup>8</sup> Press Release, Canon Inc., *Canon Inc. to Delist Shares from the Frankfurt Stock Exchange* (Jan. 29, 2007), available at <http://www.canon.com/ir/release/2007/ir2007jan29e.pdf>. Strategic delisting likely already occurs, but is difficult to detect. At the January 29, 2007 board meeting of the Canon Board of Directors, the Directors voted to, rather suddenly, delist Canon from the Frankfurt Stock Exchange. Canon insists the lone motive for delisting was low volume in European trading rather than requirements to comply with European accounting standards and disclosure rules. It would be nearly impossible for an outside investor to discern whether this event was a delisting motivated by regulatory measures or trading volumes. *Id.*

<sup>9</sup> *See* Kenneth M. Casebeer, *The Power to Regulate "Commerce with Foreign Nations" in a Global Economy and the Future of American Democracy: An Essay*, 56 U. MIAMI L. REV. 25, 34 (2001); *see also* Daniel Bolia, Comment, *Policing Americans Abroad: The PROTECT Act, the Case Against Michael Lewis Clark, and the Use of the Foreign Commerce Clause in an Increasingly Flat World*, 48 S. TEX. L. REV. 797 (2007).

<sup>10</sup> *See* Peter Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 351 n.46 (2008) ("the federal power over immigration [w]as derived principally from the Foreign Commerce Clause").

Commerce Clause now empowers two separate streams of congressional commands: commercial regulation and criminal statutes.

The domestic commerce power grew in breadth during the Twentieth Century, with the Court in *Lopez* drawing a rare boundary line.<sup>11</sup> Today, Congress has sweeping power to regulate, tax, or criminalize nearly anything tangentially related to channels of interstate commerce, the instrumentalities of interstate commerce, or activities that substantially affect interstate commerce.<sup>12</sup> Congress also enjoys broad power to restrict, with criminal statutes, the behavior of individuals and corporate persons abroad.

For example, courts upheld in *Clark* and *Bredimus* the validity of a law under which individuals can be prosecuted for traveling abroad for the purpose of “sex tourism”<sup>13</sup> involving minors.<sup>14</sup> The *Clark* case is unusual because the defendant’s ties to the United States were unrelated to the underlying criminal act: Clark was a United States citizen residing in Cambodia who only visited the United States once per year.<sup>15</sup> While there is a presumption that Congress intends its laws to only have effect in the United States,<sup>16</sup> this presumption was overcome in *Clark* by explicit congressional intent that the statute apply extraterritorially.<sup>17</sup> In other words, where Congress explicitly intends to criminalize something globally, it likely can.

On some level, every act by a U.S. citizen abroad takes place subsequent to an international flight or some form of “travel[ ] in foreign commerce.” This cannot mean that every act with a bare economic component that occurs downstream from that travel is subject to regulation by the United States under its Foreign Commerce power, or the Commerce Clause will have

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<sup>11</sup> See *United States v. Lopez*, 514 U.S. 549 (1995) (Court invalidated 18 U.S.C. § 922(q), Gun Free School Zones Act, placing limits on exercise of Commerce Clause power for first time since World War II).

<sup>12</sup> *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005).

<sup>13</sup> “Sex tourism” as used here refers to the act or series of acts prohibited by 18 U.S.C. § 2423 and its subsections taken in aggregate. For the legislative history regarding the use of this term in the context of this legislation, see generally H.R. REP. NO. 108-66, at 51 (2003) (Conf. Rep.), as reprinted in 2003 U.S.C.C.A.N. 683, 686.

<sup>14</sup> *United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006) (Congress did not exceed authority in passing commercial sex act with minor law, 18 U.S.C. § 2423(c)); *United States v. Bredimus*, 352 F.3d 200, 207-08 (5th Cir. 2003) (conviction affirmed under 18 U.S.C. § 2423(b)).

<sup>15</sup> *Clark*, 435 F.3d at 1103.

<sup>16</sup> See *Small v. United States*, 544 U.S. 385, 388-89 (2005).

<sup>17</sup> *Clark*, 435 F.3d at 1106.

been converted into a general grant of police power.<sup>18</sup>

The Court noted in *Morrison* that in the context of American federalism, “[t]he concern . . . that Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority seems well founded,” but did not mention respect for local authority abroad.<sup>19</sup> For decades, scholars have wrestled with the question of whether – and to what extent – Congress should pass extraterritorial laws with criminal penalties that affect citizens (and non-citizens) abroad.

Regardless of one’s views on the subject, Congress has already created the legal framework within which to do so.<sup>20</sup> In *Georgescu*, a Romanian national aboard a Scandinavian Airlines flight allegedly sexually assaulted a female national of Norway.<sup>21</sup> The court found that the “Special Aircraft Jurisdiction” of the United States allowed the prosecution of a foreign national by the United States, despite the crime of sexual assault not having occurred in the United States.<sup>22</sup> It is unsettled whether this claim of jurisdiction is contrary to the Tokyo Convention.<sup>23</sup> Nevertheless, the United States has a twenty-five year history<sup>24</sup> of pushing the boundaries of its ability to prosecute foreign nationals located overseas for violating United States law.<sup>25</sup> Recently,

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<sup>18</sup> *Id.* at 1120 (Ferguson, J., dissenting) (internal citation omitted).

<sup>19</sup> *United States v. Morrison*, 529 U.S. 598, 615 (2000); *see also* *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434 n.13 (1979) (Federalism and state sovereignty concerns do not restrict Congress’s power over foreign commerce).

<sup>20</sup> *See, e.g.*, 18 U.S.C.S. § 2241(c) (2009); 49 U.S.C. § 1472(k)(1) (Supp. V 1987) (current version at 49 U.S.C.S. § 46506 (2009)).

<sup>21</sup> *United States v. Georgescu*, 723 F. Supp. 912 (E.D.N.Y. 1989).

<sup>22</sup> *Id.* at 913.

<sup>23</sup> Article 3 of the Tokyo Convention seems to allow a broad exercise of jurisdiction on airplanes. *See* Convention on Offences and Certain Other Acts Committed on Board Aircraft art. 3, Sept. 4, 1963, 20 U.S.T. 2941, 2944 [hereinafter Tokyo Convention]. However, Article 4 of the Convention specifically limits authority in cases that involve authorities trying to “interfere with an aircraft in flight . . . to exercise . . . criminal jurisdiction.” *Id.* at art. 4.

<sup>24</sup> *See, e.g.*, *Chua Han Mow v. United States*, 730 F.2d 1308 (9th Cir. 1984) (Malaysian defendant located in Malaysia successfully prosecuted under drug charges stemming from violations of 21 U.S.C. §§ 846, 963 and 21 U.S.C. § 959 while residing in Malaysia in the 1970s); *United States v. Roberts*, 1 F. Supp 2d 601 (E.D. La. 1998) (Defendant had sex with a minor roughly sixty miles off the coast of Mexico in international waters, while living aboard a ship registered in Liberia which flew a Liberian flag and was successfully prosecuted for violating 18 U.S.C. §§ 2243(a), 2244(a) where primary link to United States was victim’s citizenship).

<sup>25</sup> An explicit example of an “overseas” provision appears in the Hostage Taking Act, 18 U.S.C. § 1203(a) (1996):

[W]hoever, whether *inside or outside* the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to

jurisdictional restraints at common law have been largely disregarded; for instance, the United States contravened the common law rule that domestic courts should not enforce foreign tax law in *Pasquantino*.<sup>26</sup>

### Applicability to Sarbanes-Oxley

“[C]riminal statutes which are, as a class, not logically dependent on their locality for the government’s jurisdiction” will not be read with a presumption against extraterritorial application.<sup>27</sup> Securities laws with penal implications, by virtue of today’s global markets, are almost certainly not limited by the presumption against extraterritorial application: “[C]ongress is presumed to intend extraterritorial application of criminal statutes where the nature of the crime does not depend on the locality of the defendants’ acts and where restricting the statute to United States territory would severely diminish the statute’s effectiveness.”<sup>28</sup> Sarbanes-Oxley affects any CEO or CFO, regardless of geography, who signs a financial statement in his or her executive capacity.<sup>29</sup> This is true without the United States’ having signed any treaty or having engaged in any bilateral agreement.<sup>30</sup>

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compel a third person or a governmental organization to do or abstain from doing any act . . . shall be punished by imprisonment for any term of years or for life . . . . (emphasis added).

<sup>26</sup> See *Pasquantino v. United States*, 544 U.S. 349, 352 (2005).

<sup>27</sup> *United States v. Bowman*, 260 U.S. 94, 98 (1922).

<sup>28</sup> See *United States v. Yousef*, 327 F.3d 56, 87 (2d Cir. 2003).

<sup>29</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 § 302(a), 116 Stat. 745, 777. See also Irina Shirinyan, *The Perspective of U.S. Securities Disclosure and the Process of Globalization*, 2 DEPAUL BUS. & COM. L.J. 515, 555 (2004). Oddly, other provisions of Sarbanes-Oxley have been hobbled with substantial geographical limitations. For instance, the whistleblower protection provision of the Act provides no appreciable protection for whistleblowers in foreign offices, even if the company involved is an American company traded on an American exchange. See *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2005) (Boudin, C.J., on behalf of unanimous panel) (Argentine whistleblower employee unshielded by Act; extraterritorial effects question presented case of first impression in First Circuit). Yet, though the whistleblower him- or herself receives no protection from the Act, the overseas executive upon whom the whistle is blown is subject to the entire range of criminal penalties and prosecutorial procedures described in the Act. This type of asymmetry is highly unusual and problematic from a policy perspective.

<sup>30</sup> The mechanism for this is the requirement, under Sarbanes-Oxley, is essentially one of privity rather than treaty: that the CEOs and CFOs of the companies in question sign a statement guaranteeing the legitimacy of the financial information conveyed to the United States government. This also guarantees that proper internal controls are in place and have been examined by the CEO and CFO within ninety days of the reporting date. Sarbanes-Oxley Act of 2002 § 302(a)(4). This includes that all significant deficiencies or material weaknesses in the company’s internal controls have been identified and that the audit committee is aware of such deficiencies and weaknesses. See

## II. GLOBAL PROSECUTION

There seems little doubt at this moment in American jurisprudence that Congress may attach extraterritorial effect to criminal statutes, so long as this does not offend the Due Process Clause of the Fifth Amendment.<sup>31</sup> The Ker-Frisbie Doctrine<sup>32</sup> allows the abduction of foreign executives for purpose of delivering them to the United States for prosecution, even where the abduction itself is illegal.<sup>33</sup> Under the Doctrine, the warrantless seizure of people and chattel needed for such a prosecution is likely allowable.<sup>34</sup> As the Supreme Court wrote in *Frisbie*, “the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a ‘forcible abduction.’”<sup>35</sup> The Ker-Frisbie Doctrine is presumptively

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*id.* § 302(a)(5); Brian Kim, *Sarbanes-Oxley Act*, 40 HARV. J. ON LEGIS. 235, 247-48 (2003). This set of documents is personally attested-to by the company’s executives and, hence, has high evidentiary utility in later prosecutions.

<sup>31</sup> See *United States v. Larsen*, 952 F.2d 1099, 1100 (9th Cir. 1991).

<sup>32</sup> *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952).

<sup>33</sup> In the context of this Article, I use “abduction” and “kidnapping” interchangeably where both describe the taking of a living person by force from one jurisdiction to another where the removal of the person from the first jurisdiction is neither in accordance with the laws of that jurisdiction, nor supported by bilateral accord or treaty. See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (district court not required to affirmatively divest jurisdiction upon learning defendant was forcibly kidnapped and brought to United States for trial); *accord United States v. Cordero*, 668 F.2d 32 (1st Cir. 1981); *United States v. Reed*, 639 F.2d 896 (2d Cir. 1981) (holding same in case involving securities fraud); *Virgin Islands v. Ortiz*, 427 F.2d 1043 (3d Cir. 1970); *United States v. Toro*, 840 F.2d 1221 (5th Cir. 1988); *United States v. Valot*, 625 F.2d 308 (9th Cir. 1980) (holding same as to defendant kidnapped by DEA agents in Thailand); *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986), *modified*, 801 F.2d 378 (11th Cir. 1986) (holding same as to defendant accused of operating large-scale drug smuggling operation). The district courts that have had occasion to examine the issue in the context of extreme fact patterns in recent years have held in accord. See *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (same as to military invasion by United States armed forces used to seize defendant); *accord Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F. Supp. 1040 (S.D. Ill. 1988) (same as to defendant kidnapped from his home in Honduras); *United States v. Wilson*, 565 F. Supp. 1416 (S.D.N.Y. 1983) (same as to defendant abducted from Libya in absence of extradition treaty with Libya, though possibly weakened in light of Second Circuit’s decision in *Reed*).

<sup>34</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding no Fourth Amendment protection applies to search and seizure by United States of property owned by non-resident alien in foreign country). Or allowable in any case where the sovereignty of another nation is not violated, according to some scholars. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* § 295 (H. Lauterpacht ed., 8th ed., 1955).

<sup>35</sup> *Frisbie*, 342 U.S. 519. *But see* A. Abramovsky & S. J. Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?*, 57 OR. L. REV. 51, 71 (1977) (noting that one country’s abduction of person on land of another may constitute de facto violation of international law principles).

applicable to Sarbanes-Oxley defendants in view of the *Tarkoff* case.<sup>36</sup> In *Tarkoff*, there was no violent crime and arguably no American victim. Rather, Mr. Tarkoff engaged in money laundering by implementing two questionable monetary transactions outside the United States involving bank accounts in Willemstad, Curaçao and Tel Aviv, Israel.<sup>37</sup> The only tie between the Israeli bank account and the United States was that “the Israeli bank [was] a financial institution which, by communicating with parties in the United States and providing banking services to United States citizens, was a financial institution that was engaged in, or the activities of which affected, foreign commerce in any way or degree.”<sup>38</sup> Despite both transactions having occurred outside the United States, Mr. Tarkoff’s conviction for conspiring to violate, and in fact violating 18 U.S.C. § 1956(a)(1)(B)(i), was affirmed by the Eleventh Circuit.<sup>39</sup>

Even prior to Sarbanes-Oxley, wholly extraterritorial prosecutions of foreign corporations were considered and carried out.<sup>40</sup> In *Nippon Paper*, the Sherman Act was used to prosecute a Japanese corporation in a case of price-fixing in the fax machine paper market.<sup>41</sup> *Nippon Paper*’s conduct, whether criminal or not, took place “entirely in[side] Japan.”<sup>42</sup> Despite there being no question as to *Nippon Paper*’s nationality or the extrajurisdictional geography of its acts, the First Circuit reversed the district court’s decision that applying the Sherman Act to a foreign corporation’s activities in its home country was improper.<sup>43</sup>

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<sup>36</sup> *United States v. Tarkoff*, 242 F.3d 991 (11th Cir. 2001).

<sup>37</sup> *Id.* at 992. Tarkoff was convicted of conspiring to commit money laundering under 18 U.S.C. § 1956(h) and two counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). *Id.*

<sup>38</sup> *Id.* at 995. This argument that the destination for funds (or something else) could have been the United States appears in a variety of cases on the periphery of jurisdictional analysis. *See, e.g.*, *United States v. Ricardo*, 619 F.2d 1124 (5th Cir. 1980) (only link between ship in international waters and United States was presence of nautical charts that would, in theory, allow ship to navigate to the United States). It is worth noting that under the “nautical ability” theory, any ship with a laptop and a GPS receiver is within the ambit of American jurisdiction. Or, by extension, anyone with a vague idea of where the United States is located, a wristwatch, a sextant, a compass, and basic maritime navigational know-how.

<sup>39</sup> *Tarkoff*, 242 F.3d 991.

<sup>40</sup> The most common justification for this under international law has been the objective territorial principle. Put simply, a given nation may exercise jurisdiction, for purpose of enforcing its criminal laws, over conduct that occurs outside the nation’s borders where that conduct has or the actor intends it to have a substantial effect within the nation’s borders. *See United States v. Yousef*, 327 F.3d 56, 91 (2d Cir. 2003) (citing *In re Marc Rich & Co.*, 707 F.2d 663, 666 (2d Cir. 1983)).

<sup>41</sup> *United States v. Nippon Paper Indus.*, 109 F.3d 1 (1st Cir. 1997).

<sup>42</sup> *Id.* at 2.

<sup>43</sup> This is a controversial holding and essentially holds in accord with *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) but contradicts *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), which may still be good law as to the proposition that a business occurrence

Wholly or partly state-controlled large corporations pose a particularly difficult question. While prosecution of the CEO or CFO of such a company may be proper under the Foreign Commerce Clause and Sarbanes-Oxley, it is likely not proper to the extent that the executives in question are also “foreign officials.”<sup>44</sup> Where two executives are accused of similar wrongdoing, the “foreign official” exception may well create a different outcome for one versus the other.

### III. NULLUM CRIMEN SINE LEGE<sup>45</sup>

This leads to a difficult situation for foreign executives. Suppose a Chinese CEO or CFO, who is not a “foreign official”, is minding his own business (literally and figuratively) and ensures that his company’s accounting complies with Chinese GAAP.<sup>46</sup> The executive has never left China and his company’s only link to the United States is that a small percentage of its total outstanding shares are traded on the NASDAQ.<sup>47</sup> Chinese GAAP (and the Chinese version of IFRS)<sup>48</sup> does not include a section on related-party transactions akin to the section in United States GAAP.<sup>49</sup> As a result, there may

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overseas that has no substantial effect on the United States cannot be subjected to the scrutiny of American courts on the basis of potential Sherman Act violations.

<sup>44</sup> “Foreign officials” are defined in a variety of ways, but a representative piece of legislation is the Foreign Corrupt Practices Act of 1977, which exempts foreign officials from prosecution. Foreign Corrupt Services Act, 15 U.S.C. § 78dd-1(f)(1)(A) (2009). For the most recent and relevant interpretation of the statute by an appellate court see *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991).

<sup>45</sup> “Nullum crimen sine lege, nulla poena sine lege,” the Latin translates, “No crime without law, no punishment without law.” In other words, the scope of criminalized conduct must be formally established and the actor-defendant must have been on notice of the crime and its penalties prior to the state’s undertaking a criminal prosecution. See Marc Ancel & Louis B. Schwartz, *The Collection of European Penal Codes and the Study of Comparative Law*, 106 U. PA. L. REV. 329, 345-46 (1958).

<sup>46</sup> The GAAP acronym (pronounced “gap”) stands for Generally Accepted Accounting Principles, which vary from country to country. See FASB: Financial Accounting Standards Board, <http://fasb.org/> (last visited Mar. 8, 2009).

<sup>47</sup> This link is sufficient to require the CEO to sign any United States tax returns for the company under Title X of The Sarbanes – Oxley Act of 2002, Pub. L. No. 107-205 (2002). Such a company is also bound to comply with Section 13 of the Securities Exchange Act of 1934 as to reporting. Pub. L. No. 110-455 § 13, 15 U.S.C. § 78m (2008). Additionally, the company is bound by Section 401 of The Sarbanes-Oxley Act of 2002 as to disclosures. Pub. L. No. 107-204 § 401, 116 Stat 745 (2002).

<sup>48</sup> INTERNATIONAL FINANCIAL REPORTING STANDARDS (Int’l Accounting Standards Bd. 2008).

<sup>49</sup> The two sections are not comparable because Chinese GAAP exempts state-owned enterprises (SOEs) from the reporting requirements for related-party transactions. As many of the largest

be scenarios where this Chinese businessperson, adhering to Chinese GAAP or the Chinese version of IFRS, is still exposed to criminal liability under Sarbanes-Oxley despite following all of the applicable laws of his own country. In light of the Ker-Frisbie Doctrine, if such an executive were to be abducted by American law enforcement and “found” in the United States, he or she could be prosecuted in American courts, and ultimately sent to an American prison.<sup>50</sup>

Such an executive is caught in a regrettable legal paradox. If he or she follows Chinese law and Chinese accounting rules, to the extent that they conflict with American law and the expectations of American investors, he or she will enjoy the protection of domestic law, but the specter of jeopardy before American courts will persist. Similarly, if he or she follows American law and American accounting rules, local officials and investors will be dissatisfied, perplexed, and litigious. Further, it should not be required that the hypothetical Chinese executive be on constructive notice of the minutiae of American securities law at all times.

Without legislative provisions that are manageable for executives, understood by stakeholders, and limited to a reasonable scope, foreign executives will be unwitting victims of the American legal system. It is unreasonable to expect all foreign executives to abide by two separate, occasionally conflicting, sets of laws. It is unjust to expect the same group of individuals to submit to the jurisdiction of alien courts and foreigners’ arbitrary rules where their livelihood and freedom will no doubt be threatened. The number of CEOs and CFOs of major, publicly-traded enterprises is finite. Hence, there persists a small, yet unmanageable, risk that Sarbanes-Oxley will be transformed into a bill of attainder<sup>51</sup> wielded against the least popular and most vulnerable among them. Whether such a prosecution – and the resulting feather in the cap of an ambitious Assistant U.S. Attorney – is worth causing an international incident is a question that deserves a policy analysis all its own.

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ventures in China are SOEs, a substantial portion of the Chinese economy need not report related-party transactions under Chinese GAAP. These discontinuities force Chinese companies to choose between domestic GAAP and American financial reporting standards. See Erica Fung, *Regulatory Competition in International Capital Markets: Evidence from China in 2004-2005*, 3 N.Y.U. J. L. & BUS. 243, 272 (“In some cases, it is nearly impossible to reconcile U.S. GAAP and Chinese GAAP; consequently, the Chinese company will decide to drop the U.S. component.”).

<sup>50</sup> See *United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007) (The Supreme Court “simply references ‘ the long-standing rule, known as the *Ker-Frisbie* doctrine, that illegal police activity affects only the admissibility of evidence; it does not affect the jurisdiction of the trial court[.]’”) (citing *United States v. Olivares-Rangel*, 458 F.3d 1104, 1110 (2006)).

<sup>51</sup> U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).

## A. Outcomes

“The Constitution is the source of Congress’ authority to criminalize conduct, whether here or abroad, and of the Executive’s authority to investigate and prosecute such conduct. But the same Constitution also prescribes limits on our Government’s authority to investigate, prosecute, and punish criminal conduct, whether foreign or domestic.”<sup>52</sup> There must be reasonable limits on the investigation, prosecution, and punishment of crimes that occur wholly outside the United States. No one argues that international criminal conspiracies should not be prosecuted by the United States where a substantial step or affirmative act is undertaken in the United States.<sup>53</sup>

The abduction and prosecution of foreign executives is politically and procedurally dangerous. Many scholars have wondered: “Will America become a rogue nation, abducting fugitives at will? Even if we accept Executive Branch assurances that abduction will be confined to extreme cases, there could be many such seizures.”<sup>54</sup> Indeed, abduction may increasingly be viewed by the United States as an alternative to traditional, ratified extradition arrangements in the case of foreign executives. This is, in part, because the international law principle of dual criminality<sup>55</sup> might allow extradition for other financial crimes, but is inapplicable to Sarbanes-Oxley. As of 2008, Sarbanes-Oxley is the farthest-reaching legislation of its kind worldwide, and contains more criminal penalties than regulations in other countries.<sup>56</sup> In the absence of roughly

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<sup>52</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 281 (1990) (Brennan, J., dissenting).

<sup>53</sup> *See, e.g., United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995) (international money-laundering scheme to legitimize proceeds of Cali drug cartel activity subject to United States prosecutorial power due to co-conspirator’s activities in Rhode Island, New York, and California).

<sup>54</sup> J. A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939, 969 (1993).

<sup>55</sup> “The principle of dual criminality dictates that, as a general rule, an extraditable offense must be a serious crime (rather than a mere peccadillo) punishable under the criminal laws of both the surrendering and the requesting state. . . . The principle of dual criminality does not demand that the laws of the surrendering and requesting states be carbon copies of one another. Thus, dual criminality will not be defeated by differences in the instrumentalities or in the stated purposes of the two nations’ laws. By the same token, the counterpart crimes need not have identical elements. Instead, dual criminality is deemed to be satisfied when the two countries’ laws are substantially analogous.” *Saccoccia*, 58 F.3d at 766.

<sup>56</sup> Most countries rely heavily upon investors’ private lawsuits as the primary means of enforcement of securities laws; this approach can be seen in the American 10b-5 framework. *See* John C. Coffee & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 291 (1981) (“[D]irect shareholder actions under [R]ule 10b-5 or [R]ule 14a-9 may be adequate to enforce the statute’s policies.”). Though Sarbanes-Oxley’s critics often call its criminal penalties “draconian” or “tragic,” many claim regulation without “teeth” will not deter corporate crime. *See* David Mills & Robert Weisberg, *Corrupting*

congruent legislation in other countries, the United States would be forced to act alone, relying solely on the largely-theoretical<sup>57</sup> extraterritorial applicability of Sarbanes-Oxley and the apparent propriety of defendant abduction under the expansive Ker-Frisbie Doctrine.<sup>58</sup>

The government has other powers that serve to bolster a case brought against foreign nationals. For instance, to deny a government motion to depose material witnesses overseas is likely an abuse of discretion by a trial court.<sup>59</sup> However, to compel a person to testify, to allow a deposition, or to encourage a foreigner to be present at a trial differ drastically from the abduction of foreign executives.<sup>60</sup> Centuries of jurisprudence suggest that the taking of person or property from a foreign land is not something to be done lightly.<sup>61</sup> In the current environment, where international tension often eclipses international cooperation, the abduction of foreign firms' executives is a particularly perilous enterprise. Nevertheless, the Ker-Frisbie Doctrine makes such abductions expedient, temptingly so.

Actions in the wake of the markets turmoil of 2008 suggest that the United States government may be compelled – politically, if not legally – to seize and prosecute foreign executives as part of routine market regulation.<sup>62</sup> It

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*The Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1442 (2008); see also Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 18-47 (2002). This concept of using criminal, rather than civil, remedies to deal with large-scale corporate fraud is very recent and almost uniquely American. See Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002) (issued by President Bush, creating Corporate Fraud Task Force which went on to establish guidelines for criminal prosecutions involving business organizations).

<sup>57</sup> See *Prosecutor v. Delalić, Mucić, Delić & Landžo*, Case No. IT-96-21-T, Judgment, ¶ 412 (Nov. 16, 1998) (“It has always been the practice of courts not to fill omissions in legislation when this can be said to have been deliberate. It would seem, however, that where the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended.”).

<sup>58</sup> Even military invasion of a foreign sovereign state to seize a prospective defendant was found to be proper as the Ker-Frisbie Doctrine expanded, rather than contracted, during the Twentieth Century. See *United States v. Noriega*, 117 F.3d 1206, 1214 (11th Cir. 1997) (“a defendant cannot defeat personal jurisdiction by asserting the illegality of the procurement of his presence”) (*Kravitch, P.*) (citing *United States v. Darby*, 744 F.2d 1508, 1530 (11th Cir. 1984)).

<sup>59</sup> See *United States v. Drogoul*, 1 F.3d 1546 (11th Cir. 1993) (ruling that trial court abused its discretion in denying government motion to depose Italian witnesses in wire fraud case).

<sup>60</sup> See generally F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 407 (Yoram Dinstein & Mala Tabory eds., 1989).

<sup>61</sup> See *The Apollon*, 22 U.S. 362 (1824).

<sup>62</sup> Abductions under Ker-Frisbie are generally permissible. However, such abductions are improper insofar as they violate express provisions of a self-executing treaty. See Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892,

was less than a month after Lehman Brothers failed that its CEO, Richard Fuld, was called to testify before Congress.<sup>63</sup> Had Lehman Brothers been a foreign firm with an uncooperative set of executives, would the Ker-Frisbie Doctrine's policy of abduction have been applied to foreign executives? What foreign and domestic policy problems would such an approach present?

## B. Policy Concerns

Prior to the enactment of the Eighteenth Amendment,<sup>64</sup> the general policy of the United States had been to only exercise its authority as to criminal statutes within the United States and within four leagues of its coastlines.<sup>65</sup> The United States had the authority to exercise its powers beyond this four-league nautical penumbra,<sup>66</sup> but chose a policy of restraint.<sup>67</sup> Congress broadened the policy incrementally by passing the Tariff Act of 1922,<sup>68</sup> which sanctioned the use of this authority to perform searches beyond this three-mile periphery and, in some cases, to seize the vessels involved in trafficking operations.<sup>69</sup>

Examining the shift in policy from the ratification of the Eighteenth Amendment in 1919 to the Tariff Act in 1922 is informative, as this expansion occurred after the Ker-Frisbie Doctrine had been contemplated and established.

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893-94 (1980) (ruling that abductions under Ker-Frisbie are generally permissible and only improper insofar as they violate express provisions of a self-executing treaty). *But see* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975). The only other check on the exercise of this power is a relatively obscure exception to the Ker-Frisbie Doctrine, known as the Toscanino Exception. Essentially, the Toscanino Exception requires a court to affirmatively divest itself of jurisdiction where the abducted defendant brought before it arrived under circumstances that shock the conscience and violate basic notions of due process. However, given the outrage among investors, scholars, jurists, and legislators aimed at executives in the financial turmoil of 2008, it seems unlikely to this author that the Toscanino Exception would realistically provide ample procedural protection for an executive abducted for purpose of prosecution under Sarbanes-Oxley and the Ker-Frisbie Doctrine.

<sup>63</sup> See Christian Plumb & Dan Wilchins, *Lehman CEO Fuld's Hubris Contributed to Meltdown*, REUTERS, Sept. 14, 2008, <http://www.reuters.com/article/reutersEdge/idUSN1341059120080914>; Andrew Clark & Elana Schor, *Your Company is Bankrupt, You Keep \$480M. Is that fair?*, GUARDIAN, Oct. 7, 2008, <http://www.guardian.co.uk/business/2008/oct/07/lehmanbrothers.banking>.

<sup>64</sup> U.S. CONST. amend. XVIII §§ 1-3 (repealed 1933), effective January 16, 1920.

<sup>65</sup> *Cook v. United States*, 288 U.S. 102, 112-13 (1933). Four leagues is equivalent to approximately 14 miles (22 kilometers).

<sup>66</sup> The Act of August 4, 1790, 1 Stat. 145, 164 (1790) seems to, in theory, allow searches of all inbound vessels, for instance. However, the execution of these searches was a rare practice.

<sup>67</sup> *Cook*, 288 U.S. at 112-14.

<sup>68</sup> See Tariff Act of 1922, 42 STAT. L. 858, 935-975.

<sup>69</sup> *Id.* § 581, 42 STAT. L. 979.

Despite this, no one in Congress seems to have advocated its use to kidnap and prosecute individuals involved in the violation of temperance provisions.<sup>70</sup> The Supreme Court contemporaneously noted in *Cook* the importance of a “‘definite fixing of the zone’”, wherein the United States would enforce its criminal laws and seize foreigners’ property despite the fact that the United States was able to search and seize beyond its territorial waters.<sup>71</sup>

The argument that the United States should vastly expand the principles and application of United States criminal law extraterritorially has been very successful, particularly during the last half-century.<sup>72</sup> This may be due, in part, to the “wars” taking place during that period, whether termed a War on Communism,<sup>73</sup> War on Drugs,<sup>74</sup> War on Crime,<sup>75</sup> or War on Terror.<sup>76</sup>

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<sup>70</sup> The policy appears to have been to treat any invasion of another sovereign’s ships, places, and people as a serious matter of international policy concern. See Hon. Charles E. Hughes, U.S. Sec’y of State, Recent Questions and Negotiations, Address Before Council of Foreign Relations (Jan. 23, 1924), in 18 AM. J. INT’L L. 229 (1924).

<sup>71</sup> *Cook*, 288 U.S. at 118.

<sup>72</sup> During the same time period, many leading scholars have raised concerns that incrementally less judicial review will inevitably lead to a decrease in the degree to which individuals in the broader society can exercise and enjoy their civil rights. See, e.g., Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013 (2004); see also Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005). Post hoc review of the decision to forcibly abduct, in a foreign land, an executive of a multi-billion-dollar corporation simply may not be sufficient in view of the damage already done to the integrity of international relations, foreign markets, and the reputation of the United States legal system as a fair arbiter of alleged securities law violations.

<sup>73</sup> Several cases take, essentially at face value, the idea that a “war” against communism was occurring at some point in the mid-Twentieth Century. See, e.g., *Petition of Elken*, 161 F. Supp. 823, 824 (1958); *McBride v. Roland*, 248 F. Supp. 459, 469 (1965) (suggesting United States “was at war against communism” generally, and that military engagement in Korea was part of that broader war).

<sup>74</sup> For information on sentences imposed upon enemies during the height of the War on Drugs, see generally William W. Wilkins, Jr., Phyllis J. Newton, & John R. Steer, *Competing Sentencing Policies in a “War on Drugs” Era*, 28 WAKE FOREST L. REV. 305 (1993). President Nixon declared a “[W]ar on [D]rugs” in 1969. *Gonzales v. Raich*, 545 U.S. 1, 10 (2005). The resulting legislation was called the Comprehensive Drug Abuse Prevention and Control Act of 1970 and now resides at 84 Stat. 1236.

<sup>75</sup> See *Florida v. Meyers*, 466 U.S. 380, 385 (1984) (discussing “the never-ending war against crime”); *Harris v. United States*, 331 U.S. 145, 157 (1947) (dissenting opinion) (contemplating whether Bill of Rights is a “nuisance” or “serious impediment” in war against crime); *On Lee v. United States*, 343 U.S. 747, 758 (1952) (Frankfurter, F., dissenting) (noting that “[I]oose talk about [the] war against crime too easily infuses the administration of justice with the psychology and morals of war.”).

<sup>76</sup> See Richard H. Fallon & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *al-Marri v. Pucciarelli*, 534 F.3d 213 (2008) (discussing “global war on terror” and what that might

However, expanding criminal jurisdiction under Sarbanes-Oxley raises policy concerns distinguishable from those seen, for instance, in fighting terrorism. The rise in the enforcement of United States law internationally occurred in a period during which United States financial markets were forced to share the stage with other major players. Today, few would argue a company's decision to list its stock on the NYSE or NASDAQ, rather than the London Stock Exchange or the Hang Seng, is clear-cut or simple. Young venture capitalists around the world and storied Wall Street firms alike have both demonstrated that it is not substantially more difficult to raise capital abroad than in New York.<sup>77</sup>

With the move toward an international marketplace where foreign exchanges are legitimate peers of the NYSE and the NASDAQ, questions of international law and policy arise.<sup>78</sup> Regulatory concerns already discourage many foreign companies from listing their stocks on American exchanges.<sup>79</sup> The political momentum in the United States appears to be oriented toward more, rather than fewer, regulatory measures. To add the threat of American authorities prosecuting foreign executives under Sarbanes-Oxley is likely to make the American environment particularly unattractive.

#### CONCLUSION

Congress must set reasonable limits on the degree to which the United States enforces its laws extraterritorially and must keep American markets attractive and competitive. In order to achieve these goals, Congress should pass, relative to Sarbanes-Oxley, a law similar to Section 6(a), which was meant to clarify the reach of United States antitrust law overseas.<sup>80</sup>

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entail); *Wilson v. Libby*, 535 F.3d 697, 712 (2008) (suggesting that interrogating foreign nationals is central to "duties [of] military officers charged with winning the war on terror").

<sup>77</sup> Ioannis Kokkoris & Rodrigo Olivares-Caminal, *Lessons from the Recent Stock Exchange Merger Activity*, 4 J. COMPETITION L. & ECON. 837 (2008).

<sup>78</sup> See SOFIA RAMOS, INT'L CTR. FOR FIN. ASSET MGMT. & ENG'G, *COMPETITION BETWEEN STOCK EXCHANGES: A SURVEY* 6 (2003), <http://www.swissfinanceinstitute.ch/rp77.pdf>.

<sup>79</sup> See Irina Shirinyan, *The Perspective of U.S. Securities Disclosure and the Process of Globalization*, 2 DEPAUL BUS. & COM. L.J. 515, 555-56 (2004).

<sup>80</sup> 15 U.S.C.A. § 6(a) (2007). See H.R. CONF. REP. No. 97-924, at 2431 (1982) (Conf. Rep.); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 814 n.8 (9th Cir. 1988) (explaining tripartite test for determining extraterritorial reach of antitrust laws (citing *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613, 615 (9th Cir. 1976))).

The proposed section would read:

No provision of Title VIII, Title IX, or Title XI of The Sarbanes-Oxley Act of 2002 shall create extraterritorial criminal liability outside the states, properties, and territories of the United States unless—

(1) the alleged conduct has a direct, substantial, and reasonably foreseeable effect—

(A) upon a corporation headquartered in or with substantial operations in the United States; or

(B) upon the viability or efficiency of a major equities market located in the United States; and

(2) such effect gives rise to a claim related to the provisions of Sections 802, 807, or 902 of The Sarbanes-Oxley Act of 2002; and

(3) a defendant person undertook to complete the criminal act while in the United States or upon its properties or within its territories.

“Fundamental human rights, the rights of minorities, and the rights of those unpopular in society should not depend on the wishes of the majority.”<sup>81</sup> The internal political pressures for criminal answerability in the United States that gave rise to the Sarbanes-Oxley Act of 2002 also fostered the metastasis of the Ker-Frisbie Doctrine. While accountability for criminal acts should not be prevented by accidents of geography, little guidance is provided to government agents and prosecutors by rules and doctrines that permit many behaviors but, in practice, prohibit none. The restraints outlined here serve to confine the solution put forward by the Act to the source of the problem it intended to resolve and return the nation to the concrete limits of its borders, rather than the uncertain boundaries of its markets.

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<sup>81</sup> Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013, 1025 (2004).

