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Files
Mr. Kramer
Mrs. Copeland
Mr. Siegel

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MEMORANDUM TO THE ATTORNEY GENERAL

4 Re: Extraterritorial effect of criminal laws
of the United States upon its citizens
for acts committed outside the United
States -- bribery of a foreign official

Three questions have been raised:

1. Whether bribery of an official of a foreign government by an American citizen is a crime under our laws?
2. Whether there is any constitutional prohibition against such legislation?
3. Whether such legislation, if constitutional, is desirable in the public interest?

These questions will be dealt with in order.

1. There is no federal law which makes bribery of an official of a foreign government by an American citizen a crime.

2. There is, however, no constitutional bar to such a law operating on American citizens outside the territorial jurisdiction of the United States. Indeed, it is generally conceded that Congress may prescribe standards of conduct for American citizens and project the impact of its laws upon them beyond the territorial boundaries of the United States. /1/ Jurisdiction to prosecute and punish nationals for crimes committed anywhere has also been recognized in the resolutions and draft codes approved by various international bodies. /2/

44/1/ See, United States v. Bowman, 260 U.S. 94; Blackmer v. United States, 294 U.S. 421; Skiriotes v. Florida, 313 U.S. 69, 73; Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381; American Banana Co. v. United Fruit Co., 213 U.S. 347, 355-356.

44/2/ Report, "Jurisdiction with Respect to Crime," 29 Am. J. Int. L. 519, 521 (Supp. 1935).

FNa

A leading case is United States v. Bowman /3/ where Congress declared the following acts to be criminal: (1) making false claims against the United States government or any of its agencies; (2) making false representations for the purpose of obtaining payment of a claim against the Government or any of its agencies; (3) stealing or embezzling government property; and (4) conspiring to do any of these. The acts in question were committed in Brazil in part. In that case the Court said: /4/

10 "The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance."

In Blackmer v. United States, 5/ the Court upheld an act of Congress requiring a citizen of the United States residing in France to return to this country for the purpose of giving testimony, and also sustained personal service of a subpoena upon the defendant by an American Consul. Pointing out that international law was not breached by the federal law the Court said: 6/

10 "With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government."

Other illustrations are to be found in the federal statute relating to criminal correspondence with foreign governments, 1/ and the statute which imposes a tax upon income received by a citizen of the United States who was domiciled in a foreign country even though the income was derived from property located there. 8/ So too, the crime of treason committed by a citizen

3/ 260 U.S. 94.
4/1 Id. 102.
5/1 284 U.S. 421.
6/1 Id. 437.
7/1 18 U.S.C. Sec. 953.
8/1 Cook v. Tait, 265 U.S. 47.

of the United States while residing in enemy territory has been given extra-territorial scope. /9/

In these and other cases, the courts and writers on the subject /10/ have recognized that the question of whether the laws of Congress applied to citizens of the United States committing crimes in foreign countries was merely one of construction, not legislative power.

In the ordinary case, where there is direct injury to our government, the courts will infer that Congress intended a statute to apply to citizens abroad. /11/ But if the wrong committed by our citizen abroad is primarily directed against an individual, an express provision to apply the criminal sanction everywhere would appear to be necessary. In this connection the Court, speaking through Chief Justice Taft, declared in United States v. Bowman: /12/

10 "Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard."

Nor can there be any objection to the jurisdiction of our federal courts, as respects venue, over the trial of a defendant for alleged criminal acts committed outside the limits of the United States.

44/ 9/ Gillars v. United States, 132 F. 2d 962 (App. D.C. 1950).
44/ 10/1 Note, 41 Harv. L. Rev. 1067 (1928); 17 Corn. L. Q. 117 (1931);
44/ 40 Yale L. J. 1325 (1931); 48 Col. L. Rev. 1103 (1948); Delaume,
FN 10 "Jurisdiction Over Crimes Committed Abroad: French and American Law,"
21 Geo. Wash. L. R. 173 (1952).
44/ 11/1 United States v. Bowman, 260 U.S. 94.
FN 11 12/1 260 U.S. at 98.

The Sixth Amendment of the Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." It has been held, however, that this amendment applies only to cases of offenses committed within the limits of a State. /13/ The only provision in the Constitution relating to crimes committed outside the limits of a State is Article III, Section 2 of the Constitution which provides as follows:

10 "The trial of crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may, by law, have directed."

In the first crimes act passed in 1790, Congress provided that "the trial of crimes . . . in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought." (1 Stat. at Large 114). With minor revision, this is still the law today. /14/

It thus appears that no problem of jurisdiction would be presented provided the American citizen returned to the United States. If he refused to return to face prosecution, the question of extradition may arise. /15/ One way of avoiding this question where uncooperative foreign governments are involved, is to draw the statute in a way that will penalize an American citizen who refuses to return to the United States to stand trial. For example, in Blackmer v.

44/ United States v. Dawson, 15 How. 467, 488; Jones v. United States, 137 U.S. 202, 211.

44/ 14/ 18 U.S.C. Sec. 3238.

FN 14 The provision has led to curious consequences. In Chandler v. United States, 171 F. 2d 921 (1st. Cir. 1948) the defendant charged with committing treason in Germany was being taken by air for trial in Washington, D. C. When mechanical trouble required a landing in Massachusetts it was held that the proper district for trial was in the latter state.

44/ 15/ See, Levitt, "Jurisdiction over Crime," 16 J. Am. Inst. Crim. L. & C. 316, 351-352 (1926).

United States, /16/ the court sustained the validity of a statute requiring a citizen abroad to aid in the administration of justice by attending court and giving testimony when properly summoned. Jurisdiction was exercised in personam by selecting the consul in the foreign country to make service of the subpoena upon the defendant, and this procedure was held to satisfy procedural due process. In order to enforce the statute, the court was authorized to adjudge the recusing witness guilty of contempt and to subject him to a fine not exceeding \$100,000 which judgment could be satisfied by a sale of his seized property. Although it was argued that a criminal proceeding cannot go to judgment in the absence of the defendant, the contempt proceeding was held not to be a criminal prosecution within the Sixth Amendment. /17/ Another possible remedy in the instant case might be revocation of the wrongdoer's passport in event that he refused to return to the United States to answer criminal charges filed against him.

From the foregoing, it would appear that Congress is not restricted by the Constitution from making it unlawful for a United States citizen while abroad to bribe a foreign official. Also, a statute may be drafted in such a way that the citizen abroad who committed the crime charged could be reached and brought to trial in this country.

3. The problem that remains is whether it is in the public interest to make it a crime for an American citizen abroad to bribe a foreign official. /18/ Persuasive arguments can be mustered in support of such a statute.

FN16
16/ 234 U.S. 421.

17/ Id. at 440.

18/ Cf. Oscanyan v. Arms Co., 103 U.S. 261, where the Court refused to enforce a contract for commissions on the sale of arms to the Turkish government in consideration for influence exerted by the Turkish consul-general upon the Turkish purchasing agent in this country, saying (p. 277):

10 "A contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country, -- not from any consideration of the interests of that government or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people."

First, the United States is primarily interested in and affected by the conduct of its nationals. Their conduct abroad, good or bad, reflects upon the Government. One could foresee what the repercussions would be, world-wide, for example, if there were disclosures that our corporations and individuals operating abroad have secured valuable concessions through large-scale bribery of foreign government officials. Their misconduct would inevitably be identified by malicious propagandists as the base and shameful action of the Government itself. Since the Government is often an indirect beneficiary of these concessions, it would be difficult to dispel the charges, however untrue they were.

Beyond the immediate misunderstanding and embarrassment that is almost bound to ensue from such disclosures, there is the moral problem of whether there should be a double standard in effect -- one controlling bribery of our own officials here, another callous and indifferent to bribery of foreign officials abroad. In addition, we are more likely to generate a higher sense of integrity and public responsibility at home, if there is an insistence on a single standard of honesty for citizens regardless of where they conduct their business. The business man who has found bribery of officials to be so profitable and easy abroad may be as casual about it in his dealings with officials at home. In a world shrunk in size by modern transportation and communication, an offense committed by a national abroad is likely to disturb the social and moral order in the State of his allegiance.

There are other reasons that may be cited for a single standard in business morality; that the national knows his own State's penal laws best; that he is more likely to be fairly and effectively tried under his own State's law and in his own State's courts; and that without the exercise of such jurisdiction many crimes may go unpunished. /19/

There are arguments on the other side.

Stimson has advanced two chief reasons for not applying our criminal jurisdiction to crimes committed by our citizens abroad where no direct injury is done to the Government: /20/

10 "(1) The government has no interest in the conduct of its citizens abroad except when that conduct results in injury to it, because the

44/ 7/ 44/ FN19
19/ Report, "Jurisdiction with Respect to Crime," 29 Am. J. Int. L. 519-520 (Supp. 1935).

44/ 20/ 44/ FN20
Stimson, Conflict of Criminal Laws (1936 Ed.) 1, 2.

1 peace and good order of its territory is not disturbed; (2) it would subject its citizens to the possibility of double punishment for the same act, because in most cases the citizen's foreign act or omission would be a violation of the criminal law of the sovereignty in whose territory he was at the time, and a conviction of violating the foreign law would not bar proceedings for a violation of the domestic law."

In American Banana Co. v. United Fruit Co., 21/ Mr. Justice Holmes speaking for the Court expressed the view that to superimpose the standards of our country in another land might be resented there as an interference with the foreign country's sovereignty. As he said: 22/

10 " . . . the general and 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. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."

It could be argued that in some foreign lands it is common to bribe a foreign official, and that the bribery is generally conducted with the knowledge, acquiescence and even participation of a nation's rulers. Prosecution under American law then might be looked upon as undue meddling, and tend to impair the conduct of our foreign affairs.

The American businessman abroad could also argue that to subject him to this criminal sanction then would place him at a disadvantage in obtaining valuable concessions, and ultimately not only deprive the United States of strategic resources but may permit them to fall into the hands of our enemies who are

44/ 21/ 213 U.S. 347.
44/ 22/ Id. 356.

FN 21
FN 22

not handicapped by corresponding legal restrictions and moral scruples.

In addition to these objections, there are also considerations related to the proper administration of justice. For example, one is the difficulty and expense of securing witnesses for both the prosecution and defense. Without them a fair trial could not be had. Another is the possibility that a foreign power would refuse to prosecute for any number of reasons. Under those circumstances the likelihood of a conviction by an American jury may be remote.

To sum up this point:

The critical factor may be the extent to which bribery of foreign officials does directly or indirectly injure the United States Government. Since the probable injury would be the resulting impact upon our foreign relations and affairs, or upon our national defense needs, it may be desirable to obtain the views of the State Department and of the Department of Defense in this matter.

3 Conclusions

1. Bribery of a foreign official by an American citizen while abroad is not a criminal offense now under our laws.
2. There is no constitutional bar to enactment of a statute which would have that effect.
3. As a matter of policy, there are conflicting considerations which should be carefully weighed and perhaps discussed with the State and Defense Departments before proposing enactment of a statute making such bribery a criminal offense under our laws.

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