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Extraterritorial Application of American Criminal Law: An Abbreviated Sketch

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Summary

Criminal law is usually territorial. It is a matter of the law of the place where it occurs. Nevertheless, a number of American criminal laws apply extraterritorially outside of the United States. Application is generally a question of legislative intent, express or implied. There are two exceptions. First, the statute must come within Congress's constitutional authority to enact. Second, neither the statute nor its application may violate due process or any other constitutional prohibition.

Claims of implied extraterritoriality must overcome additional obstacles. Federal laws are presumed to apply only within the United States, unless Congress clearly provides otherwise. Moreover, the courts will also presume that Congress intends its statutes to be applied in a manner that does not offend international law.

Historically, in order to overcome these presumptions, the lower federal courts have read certain vintage Supreme Court cases broadly. The Supreme Court's recent pronouncements in *Morrison v. National Australia Bank, Ltd.* and *RJR Nabisco, Inc. v. European Community*, however, suggest a far more restrictive view.

Although the crimes over which the United States has extraterritorial jurisdiction may be many, so are the obstacles to their enforcement. For both practical and diplomatic reasons, criminal investigations within another country require the acquiescence, consent, or preferably the assistance, of the authorities of the host country. The United States has mutual legal assistance treaties with several countries designed to formalize such cooperative law enforcement assistance. It has agreements for the same purpose in many other instances. Cooperation, however, may introduce new obstacles. Searches and interrogations carried out jointly with foreign officials, certainly if they involve Americans, must be conducted within the confines of the Fourth and Fifth Amendments. And the Sixth Amendment imposes limits upon the use in American criminal trials of depositions taken abroad.

The nation's recently negotiated extradition treaties address some of the features of earlier agreements which complicate extradition for extraterritorial offenses, that is, dual criminality requirements; reluctance to recognize extraterritorial jurisdiction; and exemptions on the basis of nationality or political offenses. To facilitate the prosecution of federal crimes with extraterritorial application Congress has enacted special venue, statute of limitations, and evidentiary statutes. To further cooperative efforts, it enacted the Foreign Evidence Request Efficiency Act, P.L. 111-79, which authorizes federal courts to issue search warrants, subpoenas, and other orders to facilitate criminal investigations in this country on behalf of foreign law enforcement officials.

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Introduction

Crime is ordinarily proscribed, tried, and punished according to the laws of the place where it occurs. American criminal law applies beyond the geographical confines of the United States, however, under certain limited circumstances. A surprising number of federal criminal statutes have extraterritorial application, but prosecutions have been relatively few. This may be because when extraterritorial criminal jurisdiction does exist, practical and legal complications, and sometimes diplomatic considerations, may counsel against its exercise.

Constitutional Considerations

Legislative Powers: The Constitution does not forbid either congressional or state enactment of laws that apply outside the United States. Nor does it prohibit either the federal government or the states from prosecuting conduct committed abroad. In fact, several passages suggest that the Constitution contemplates the application of American law beyond the geographic confines of the United States. It speaks, for example, of "felonies committed on the high seas," "offences against the law of nations," "commerce with foreign nations," and of the impact of treaties.

Limitations: Nevertheless, the powers granted by the Constitution are not without limit. The clauses enumerating Congress's powers carry specific and implicit limits that govern the extent to which the power may be exercised overseas. Other limitations appear elsewhere in the Constitution, most notably in the due process clauses of the Fifth Amendment. A related due process challenge is based on notice. It is akin to the concerns over secret laws and vague statutes, the exception to the maxim that ignorance of the law is no defense.

Conceding this outer boundary, however, the courts fairly uniformly have held that questions of extraterritoriality are almost exclusively within the discretion of Congress; a determination to grant a statutory provision extraterritorial application—regardless of its policy consequences—is not by itself constitutionally suspect.

Statutory Construction

For this reason, the question of the extent to which a particular statute applies outside the United States has generally been considered a matter of statutory, rather than constitutional, construction. General rules of statutory construction have emerged that can explain, if not presage, the result in a given case. The first of these rules holds that a statute that is silent on the question of its application abroad will be construed to have only domestic application unless there is a clear indication of some broader intent. At least until recently, the second rule of construction stated that the nature and purpose of a statute may provide an indication of whether Congress intended a statute to apply beyond the confines of the United States. Although hints of it can be found earlier, the rule was first clearly announced in *United States v. Bowman*.

The Supreme Court's emphatic endorsement of the domestic presumption in a civil context in *Morrison* cast some doubt on *Bowman*'s continued vitality. Early indications were that the courts and commentators were unwilling to go that far. The Court in *RJR Nabisco*, another civil case, however, may have changed that. In *RJR Nabisco*, the Court seemed to take direct aim at *Bowman* without naming it. There may be some real question of the extent to which the Court still considers *Bowman* good law.

The final rule declares that unless a contrary intent is clear, Congress is assumed to have acted so as not to invite action inconsistent with international law. International law supports rather than

dictates decisions in the area of the overseas application of American law. Neither Congress nor the courts are bound to the dictates of international law when enacting or interpreting statutes with extraterritorial application. Yet Congress looks to international law when it evaluates the policy considerations associated with legislation that may have international consequences. For this reason, the courts interpret legislation with the presumption that Congress or the state legislature intends its laws to be applied within the bounds of international law, unless it indicates otherwise.

Current Extent of American Extraterritorial Criminal Jurisdiction

Congress has expressly provided for the extraterritorial application of federal criminal law most often by outlawing various forms of misconduct when they occur "within the special maritime and territorial jurisdiction of the United States." The obligations and principles of various international treaties, conventions, or agreements to which the United States is a party supply the theme for a second category of federal criminal statutes with explicit extraterritorial application. Members of another category of explicit extraterritorial federal criminal statutes either cryptically declare that their provisions are to apply overseas or describe a series of jurisdictional circumstances under which their provisions have extraterritorial application, not infrequently involving the foreign commerce of the United States in conjunction with other factors.

The Supreme Court in *RJR Nabisco* did endorse implied extraterritoriality in the case of "piggyback" statutes—conspiracy, attempt, aiding and abetting, among them—whose provisions are necessarily predicated on some other crime and whose overseas application matches that of its predicates.

Obstacles to Investigation and Prosecution

Federal crimes committed abroad present investigators and prosecutors with legal, practical, and often diplomatic obstacles that can be daunting. With respect to diplomatic concerns, the Third Restatement of Foreign Relations Law observes:

> It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent. Thus, while a state may take certain measures of nonjudicial enforcement against a person in another state, ... its law enforcement officers cannot arrest him in another state, and can engage in criminal investigation in that state only with that state's consent.

Failure to comply can result in strong diplomatic protests, liability for reparations, and other remedial repercussions, to say nothing of the possible criminal prosecution of offending foreign investigators.

Mutual Legal Assistance Treaties and Agreements: Congress has endorsed diplomatic efforts to increase multinational cooperative law enforcement activities. The United States has over 70 mutual legal assistance treaties in force. They ordinarily provide clauses for locating and identifying persons and items; service of process; executing search warrants; taking witness depositions; persuading foreign nationals to come to the United States voluntarily to present evidence here; and forfeiture-related seizures.

Cooperative Efforts: American law enforcement officials have historically used other, often less formal, cooperative methods overseas to investigate and prosecute extraterritorial offenses. Over

the last few decades the United States has taken steps to facilitate cooperative efforts. In addition to the more traditional presence of members of the Armed Forces and State Department personnel and contractors, federal civilian law enforcement agencies have assigned an increasing number of personnel overseas.

Search and Seizure Abroad: Overseas cooperative law enforcement assistance occasionally has Fourth Amendment implications. The Supreme Court's *United States v. Verdugo-Urquidez* decision makes it clear that the Fourth Amendment does not apply to the search of the overseas property of foreign nationals unless the property owner has some "previous significant voluntary connections with the United States."

The Fourth Amendment's application abroad to U.S. citizens and foreign nationals with significant connections to the United States is less clear. Prior to *Verdugo-Urquidez*, neither the Fourth Amendment nor its exclusionary rule were considered applicable to foreign searches and seizures conducted by foreign law enforcement officials, except under two circumstances. The first covered foreign conduct that "shocked the conscience of the court." The second reached foreign searches or seizures in which U.S. law enforcement officials were so deeply involved as to constitute "joint ventures" or some equivalent level of participation. Since *Verdugo-Urquidez*, the courts have held as a general rule the Fourth Amendment is inapplicable to searches or seizures of U.S. citizens by foreign officials in other countries, but have continued to acknowledge the "joint venture" and "shocked conscience" rarely found exceptions to the general rule. Nevertheless, "the Fourth Amendment's reasonableness standard applies to United States officials conducting a search affecting a United States citizen in a foreign country." On the other hand, even under such circumstances, "a foreign search is reasonable if it conforms to the requirements of foreign law," and "such a search will be upheld under the good faith exception to the exclusionary rule when United States officials reasonably rely on foreign officials' representations of foreign law."

Self-Incrimination Overseas: Like the Fourth Amendment protection against unreasonable searches and seizures, the Fifth Amendment self-incrimination clause and its attendant *Miranda* warning requirements do not apply to statements made overseas to foreign officials subject to the same "joint venture" and "shocked conscience" exceptions. The Fifth Amendment and *Miranda* requirements do apply to custodial interrogations conducted overseas by American officials regardless of the nationality of the defendant. As a general rule to be admissible at trial in this country, however, any confession or other criminating statements must have been freely made.

Statute of Limitations: 18 U.S.C. Section 3292 and Related Matters: As a general rule, prosecution of federal crimes must begin within five years. Federal capital offenses, certain federal sex offenses, and various violent federal terrorist offenses, however, may be prosecuted at any time. Prosecution of nonviolent federal terrorism offenses must begin within eight years. Moreover, the statute of limitations is suspended or tolled during any period in which the accused is a fugitive. Whatever the applicable statute of limitations, Section 3292 authorizes the federal courts to suspend it in order to await the arrival of evidence requested of a foreign government.

Extradition: Extradition is perhaps the oldest form of international law enforcement assistance. It is a creature of treaty by which one country surrenders a fugitive to another for prosecution or service of sentence. The United States has bilateral extradition treaties with roughly two-thirds of the nations of the world. Treaties negotiated before 1960 and still in effect reflect the view then held by the United States and other common law countries that criminal jurisdiction was territorial and consequently extradition could not be had for extraterritorial crimes. Subsequently negotiated agreements either require extradition regardless of where the offense occurs, permit extradition regardless of where the offense occurs, or require extradition where the extraterritorial laws of the two nations are compatible. More recent extradition treaties address other traditional

features of the nation's earlier agreements that complicate extradition, most notably the nationality exception, the political offense exception, and the practice of limiting extradition to a list of specifically designated offenses.

As an alternative to extradition, particularly if the suspect is not a citizen of the country of refuge, foreign authorities may be willing to expel or deport him under circumstances that allow the United States to take him into custody. In the absence of a specific treaty provision, the fact that the defendant was abducted overseas and brought to the United States for trial rather than pursuant to a request under the applicable extradition treaty does not deprive the federal court of jurisdiction to try him.

Venue: Federal crimes committed within the United States must be tried where they occur. Crimes committed outside the United States are tried where Congress has provided. Congress has enacted both general and specific venue statutes governing extraterritorial offenses. Section 3238, the general provision, permits the trial of extraterritorial crimes either (1) in the district into which the offender is "first brought" or in which he is arrested for the offense; or (2) prior to that time, by indictment or information in the district of the offender's last known residence, or if none is known, in the District of Columbia. The phrase "first brought" as used in Section 3238 means "first brought while in custody." As the language of the section suggests, venue for all joint offenders is proper wherever venue for one of their number is proper. Courts are divided over whether Section 3238 may be applied even though venue may have been proper without recourse to its provisions.

Testimony of Witnesses Outside the United States: Federal courts may subpoena a U.S. resident or national found abroad to appear before it or the grand jury. They ordinarily have no authority to subpoena a foreign national located in a foreign country. Mutual legal assistance treaties and similar agreements generally contain provisions to facilitate a transfer of custody of foreign witnesses who are imprisoned overseas and in other instances to elicit assistance to encourage foreign nationals to come to this country and testify voluntarily.

Unable to secure the presence of foreign witnesses located aboard, federal courts may authorize depositions to be taken abroad, under "exceptional circumstances and in the interests of justice," and under even more limited circumstances, they may admit such depositions into evidence in a criminal trial. When a deposition is taken abroad, the courts prefer that the defendant be present, that his counsel be allowed to cross-examine the witness, that the deposition be taken under oath, that a verbatim transcript be taken, and that the deposition be captured on videotape; but they have permitted depositions to be admitted into evidence at subsequent criminal trials in this country, notwithstanding the fact that one or more of these optimal conditions are not present. In nations whose laws might not otherwise require, or even permit, depositions under conditions considered preferable under U.S. law, a treaty provision sometimes addresses the issue.

National Security Concerns: When witnesses and other evidence are located abroad, a defendant's statutory and constitutional rights may conflict with the government's need for secrecy for diplomatic and national security reasons. Rule 16 of the Federal Rules of Criminal Procedure entitles a defendant to disclosure of any of his statements in the government's possession, but the prosecution's case may have evolved from foreign intelligence gathering. The Sixth Amendment assures a criminal defendant of "compulsory process for obtaining witnesses in his favor," but providing a witness who is also a terrorist suspect and in federal custody may have an adverse impact on the witness's value as an intelligence source. The Sixth Amendment promises a criminal defendant the right to confront the witnesses against him, even a witness who presents classified information to the jury.

Congress has provided the Classified Information Procedures Act (CIPA) as a means of accommodating the conflict of interests. The CIPA permits the court to approve prosecution-prepared summaries of classified information to be disclosed to the defendant and introduced in evidence, as a substitute for the classified information. The summaries, however, must be an adequate replacement for the classified information, because ultimately the government's national security interests "cannot override the defendant's right to a fair trial."

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