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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 pronouncements in *Morrison v. National Australia Bank Ltd.* and *RJR Nabisco 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 more 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.

Despite these cooperative efforts, there has been a dearth of recent case law involving extraterritorial application of American criminal laws. The disappearance of case law suggests that the obstacles to extraterritorial investigation and prosecution may have become too substantial to overcome.

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Introduction

Crime is traditionally proscribed, tried, and punished according to the laws of the place where it occurs.[1] American criminal law applies beyond the geographical confines of the United States, however, under certain limited circumstances. State prosecution for overseas misconduct is limited almost exclusively to multi-jurisdictional crimes, that is, crimes where some elements of the offense are committed within the state and others are committed beyond its boundaries. A number of federal criminal statutes have extraterritorial application, but prosecutions have been relatively few. Extraterritorial application requires clear evidence of congressional intent. It must constitute the exercise of one or more of Congress's constitutionally enumerated powers, subject to any constitutional limitations on the exercise of such powers. And generally, it must be consistent with international law. Even when each of these obstacles can be overcome, the government may be reluctant to prosecute because of practical and legal complications, and sometimes diplomatic considerations.

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 geographical 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 which govern the extent to which the power may be exercised overseas. Other limitations appear elsewhere in the Constitution, most notably in the Due Process Clause of the Fifth Amendment. Due process requires notice. It rests on 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 which can explain, if not presage, the result in a given case. The first of these holds that a statute that is silent on the question of overseas

[1] This report is an abridged version, stripped of its attachments, footnotes, and most of its citations to authority or attribution, of CRS Report 94-166, *Extraterritorial Application of American Criminal Law*, by Charles Doyle.

application will be construed to have only territorial application unless there is a clear indication of some broader intent. At one time, another rule of construction stated that the nature and purpose of a statute might provide an indication of whether Congress intended a statute to apply beyond the confines of the United States. The rule was first clearly announced in *United States v. Bowman*.

The Supreme Court's emphatic rejection of implied extraterritorial application in *Morrison* cast doubt on *Bowman*'s continued vitality. In *RJR Nabisco* the Court seemed to take direct aim at *Bowman* without naming it. Thereafter there may be some real question of whether the Court still considers *Bowman* good law.

RJR Nabisco recognized two circumstances under which a statute may apply to a case involving conduct abroad. First, Congress may have expressly rejected the presumption against extraterritorial application. Second, a case may involve territorial application of the statute when the "focus" of the statute is conduct occurring within the United States, even though a particular case may also involve overseas conduct. For example, the wire fraud statute carries no expression of extraterritorial application. The focus of the statute, however, is the protection of wire communications in the United States, and the statute applies to wire communications within the United States even when initiated abroad.

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. Despite this, 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.

To what extent does international law permit a nation to exercise extraterritorial criminal jurisdiction? The question is essentially one of national interests. What national interest is served by extraterritorial application and what interests of other nations suffer by an extraterritorial application?

The most common classification of these interests dates to a 1935 Harvard Law School study which divided them into five categories or principles corresponding to the circumstances under which the nations of the world had declared their criminal laws applicable: (1) the territorial principle that involves crimes occurring or having an impact within the territory of a country; (2) the nationality principle that involves crimes committed by its nationals; (3) the passive personality principle that involves crimes committed against its nationals; (4) the protection principle that involves the crimes which have an impact on its interests as a nation; and (5) the universal principle that involves crimes which are universally condemned.

The American Law Institute's Fourth Restatement of the Foreign Relations Law of the United States mirrors a balancing of the interests represented in the Harvard study principles:

> Customary international law permits exercises of prescriptive jurisdiction if there is a genuine connection between the subject of the regulation and the state seeking to regulate. The genuine connection usually rests on a specific connection between the state and the subject being regulated, such as territory, effects, acting personality, passive personality, or protection. In the case of universal jurisdiction, the genuine connection rests on the universal concern of states in suppression of certain offenses.

The territorial principle of the Harvard study principles applies more widely than its title might suggest. It covers conduct within a nation's geographical borders. Yet, it also encompasses laws governing conduct on its territorial waters, conduct on its vessels on the high seas, conduct committed only in part within its geographical boundaries, and conduct elsewhere that has an impact within its territory. Congress often indicates within the text of a statute when it intends a provision to apply within its territorial waters and upon its vessels.

Although rarely mentioned in the body of a statute, the courts at one time acknowledged the "impact" basis for a claim of extraterritorial application. This is particularly so when the facts in a case have suggested other principles of international law, in addition to the territorial principle.

If the territorial principle is more expansive than its caption might imply, the protective principle is less so. It is confined to crimes committed outside a nation's territory against its "security, territorial integrity or political independence." As construed by the courts, however, it is understood to permit the application abroad of statutes which protect the federal government and its functions. And so, when Congress has made its intent to assert extraterritorial jurisdiction clear, the protective principle of international law covers the overseas murder or attempted murder of federal officers or those thought to be federal officers; acts of terrorism calculated to influence American foreign policy; conduct that Congress has characterized as a threat to U.S. national security; entering the United States as a stowaway; or overseas bribery in connection with the award of federal government contracts.

The nationality or active personality principle of international law acknowledges statutes asserting extraterritorial criminal jurisdiction based on the citizenship of accused. It is the principle mirrored in the Supreme Court's statements in *Blackmer v. United States*, following the contempt conviction of an American living in Paris who ignored a federal court subpoena. As in the case of *Blackmer*, which evidenced both the nationality and the protective principles, cases involving the nationality principle often involve other principles as well.

The passive personality principle recognizes international law compatibility of statutes asserting extraterritorial criminal jurisdiction based on the nationality of the victim of the offense. It, too, has been asserted most often in the presence of facts suggesting other principles.

The universal principle is based on the premise that offenses against all nations may be punished by any nation where the offender is found. At a minimum, it applies to piracy and offenses committed on the high seas on "stateless" vessels.

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 class of federal criminal statutes with explicit extraterritorial application. Other federal criminal statutes that have explicit extraterritorial application either 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 *RJR Nabisco* Court, however, 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.

Investigation and Prosecution

Although a substantial number of federal criminal statutes have undisputed extraterritorial scope, prosecutions have been relatively few. Investigators and prosecutors face legal, practical, and often diplomatic obstacles that can be daunting. Some of these are depicted in the description that follows of some of procedural aspects of the American investigation and prosecution of a crime committed abroad. With respect to diplomatic concerns, the Restatement observes that "A [nation] may not exercise jurisdiction to enforce in the territory of another [nation] without the consent of the other [nation]."

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 similar clauses, with some variations, 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

Search and seizures conducted abroad occasionally have 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 property of foreign nationals outside the United States, unless the property owner has some "voluntary attachment to the United States."

The Fourth Amendment's application to U.S. citizens and foreign nationals with significant connections to the United States is less clear. Since *Verdugo-Urquidez*, the courts have held, as a general rule, that 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.

"Foreign searches of U.S. citizens conducted by U.S. agents are subject . . . to the Fourth Amendment's requirement of reasonableness." "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

The Fifth Amendment self-incrimination clause and its attendant *Miranda* warning requirements do not apply to statements made abroad 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 abroad by American officials regardless of the nationality of the defendant. Finally, as a general rule, to be admissible at trial in this country, any confession or other incriminating statements must have been freely made.

Statute of limitations, 18 U.S.C. § 3292 and Related Matters

As a general rule, prosecution of federal crimes must begin within five years after the commission of the offense. 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.

The complications associated with the investigation and prosecution of a multinational offense may also implicate the Sixth Amendment right to a speedy trial and the accompanying Speedy Trial Act. The Sixth Amendment right attaches on the first of the defendant's arrest or indictment. Failure to honor the right to a speedy trial entitles the defendant to dismissal of charges with prejudice, that is, without the possibility of the charges being refiled. Determining whether a failure has occurred involves weighing four factors: "[1] Length of the delay, [2] the reason for the delay, [3] the defendant's assertion of his right; and [4] prejudice to the defendant."

The Speedy Trial Act demands that trial begin within 70 days, but delays attributable to several factors toll the running of the clock. Failure to comply may result in the dismissal of charges, either with or without prejudice, depending on the nature of the failure.

Extradition

Prosecution in the United States generally requires the defendant's presence. Federal crimes committed outside the United States frequently involve defendants not present in the United States. Extradition is often the imperfect vehicle by which their presence here for trial must be accomplished. Extradition 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." The phrase "is arrested" refers to being taken into custody "in connection with the offense charged," and applies when the accused is initially taken into custody under an indictment that is subsequently dismissed. 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. On occasion, Congress will enact individual provisions covering venue for offenses committed abroad.

Presentation

Whether federal authorities arrest a defendant in the United States or abroad, Federal Rule of Criminal Procedure 5 requires that he be presented to a committing magistrate "without unnecessary delay." The Rule is a remnant of the Supreme Court's *McNabb-Mallory* Rule under which a defendant's incriminating statements secured during an unnecessary delay were subject to exclusion. A statutory supplement to Rule 5 permits "reasonable" delay: a trial judge may determine whether a delay in bringing a defendant before a magistrate judge or other officer beyond a six-hour period is reasonable. The court will consider "the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer." Unreasonable delays may preclude subsequent use of any statements made after his arrest but before presentation, if they are found to have been involuntary.

Testimony of Witnesses Outside the United States

A federal court may subpoena a United States resident or national found abroad to appear before it or the grand jury. Federal courts ordinarily have no authority to subpoena foreign nationals 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 in a foreign nation and in other instances to elicit assistance to encourage foreign nationals to come to this country and testify voluntarily.

Where the government is unable to secure the presence of witnesses who are foreign nationals, Rule 15 of the Federal Rules of Criminal Procedure permits federal courts to authorize depositions to be taken abroad, under "exceptional circumstances and in the interests of justice." They may admit such depositions into evidence in a criminal trial as long as the demands of the Federal Rules of Evidence and the Constitution's Confrontation Clause are also satisfied.

National Security Concerns

When witnesses and evidence are located in other countries, 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, and the right to a public trial. 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." The CIPA, however, does not create an independent right of discovery.

"As a supplement to CIPA, courts have fashioned what has been called the 'silent witness rule,' by which classified documents may, without redaction, be disclosed to both the defendant and the jury but not to the public." The Fourth Circuit has held that the government's compelling interest in precluding public disclosure of classified information outweighed the limited intrusion, if any, on the defendant's right to a public trial.

Admissibility of Foreign Documents

There is a statutory procedure designed to ease the evidentiary admission of foreign business records in federal courts, 18 U.S.C. § 3505. The section exempts qualified business records from the operation of the hearsay rule in federal criminal proceedings and permits their authentication upon foreign certification. Finally, it establishes a procedure under which the reliability of the documents can be challenged in conjunction with other pre-trial motions. While the prosecution's failure to provide timely notice of its intent to rely upon the section does not necessarily bar admission, its failure to supply a foreign certification of authenticity precludes admission under the section.

Conclusion

The Constitution grants Congress broad powers to enact laws of extraterritorial scope and imposes few limitations on the exercise of that power. The states enjoy only residual authority, but they too may and have enacted criminal laws which apply beyond the territorial confines of the United States. Prosecutions are relatively few, however, perhaps because of the practical, legal, and diplomatic obstacles that may attend such an endeavor.

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