



Extraterritorial Application of American Criminal Law: An Abbreviated Sketch

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Summary

Crime is usually territorial. It is a matter of the law of the place where it occurs. Nevertheless, a number of American criminal laws apply outside of the United States. Application is generally a question of legislative intent, expressed or implied. In either case, it most often involves crimes committed aboard a ship or airplane, crimes condemned by international treaty, crimes committed against government employees or property, or crimes that have an impact in this country even if planned or committed in part elsewhere.

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. Searches and interrogations carried out on our behalf by 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 the nation's 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 further 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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United States Crimes Abroad

The Constitution does not forbid the enactment of laws that apply outside the United States. Several passages suggest that the Constitution contemplates the application of American law beyond the geographical confines of the United States. For instance, it speaks broadly of “felonies committed on the high seas,” “offences against the law of nations,” “commerce with foreign nations,” and of the impact of treaties. Nevertheless, the powers granted by the Constitution are not without limit. The clauses enumerating Congress’s powers carry specific or 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 clauses. Yet, although American courts that try aliens for overseas violations of American law must operate within the confines of due process, the Supreme Court has observed that the Constitution’s due process commands do not protect aliens who lack any “significant voluntary connection with the United States.” Moreover, the Court’s more recent decisions often begin with the assumption that the issues of extraterritorial jurisdiction come without constitutional implications.

Statutory Construction

Thus, 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 will be construed to have only territorial application unless there is a clear indication of some broader intent. A second rule of construction states 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. The Supreme Court’s emphatic endorsement of the domestic presumption in a civil context in *Morrison* may cast doubt on the continued vitality of this last rule, but to date the courts and commentators have been unwilling to go that far. 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, unless it indicates otherwise, intends its laws to be applied within the bounds of international law. To what extent does international law permit a nation to exercise extraterritorial 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 involving: (1) the regulation of activities occurring within the territory of a country; (2) the regulation of the conduct of its nationals; (3) the protection of its nationals; (4) the regulation of activities outside a country which have an impact within it; and (5) the regulation of activities which are universally condemned. Legislation may reflect more than one interest or principle and there is little consensus of the precise boundaries of the principles. The American Law Institute’s Third Restatement of the Foreign Relations Law of the United States contains perhaps the most comprehensive, contemporary statement of international law in the area. It indicates that the latitude international law affords a country to enact, try and punish violations of its law

extraterritorially is a matter of reasonableness, and its assessment of reasonableness mirrors a balancing of the interests represented in the principles.

While the Restatement's views carry considerable weight with both Congress and the courts, the courts have traditionally ascertained the extent to which international law would allow extraterritorial application of a particular law by examining American case law, a source which historically has provided a more permissive view of extraterritorial jurisdiction than either the Restatement or the Harvard study.

Current American Extraterritorial Criminal Jurisdiction

Congress has expressly provided for the extraterritorial application of federal criminal law most often by proscribing conduct that occurs "within the special maritime and territorial jurisdiction of the United States." It supplies an explicit basis for the extraterritorial application of various federal criminal laws relating to: (1) air travel (special aircraft jurisdiction of the United States); (2) customs matters (customs waters of the U.S.); (3) U.S. spacecraft in flight; (4) overseas federal facilities and overseas residences of federal employees; (5) members of U.S. armed forces overseas and those accompanying them; and (6) overseas human trafficking and sex offenses by federal employees, U.S. military personnel, or those accompanying them.

The obligations and principles of various international treaties, conventions, or agreements to which the United States is a party supply a second common ground for explicit extraterritorial application of federal criminal statutes. Members of the final class 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 federal courts have found extraterritorial application implicit in instances where the purpose for enactment might otherwise be frustrated. Thus they have held that American extraterritorial criminal jurisdiction includes a wide range of statutes designed to protect federal officers, employees and property, to prevent smuggling and to deter the obstruction or corruption of the overseas activities of federal departments and agencies. A logical extension would be to conclude that statutes enacted to prevent and punish the theft of federal property apply worldwide. And there seems to be no obvious reason why statutes protecting the United States from intentional deprivation of its property by destruction should be treated differently than those where the loss is attributable to theft.

Investigation and Prosecution

Using the terminology of international law in which countries are referred to as states, the Restatement 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.

Consequently, investigations within another country of extraterritorial federal crimes without the consent or at least acquiescence of the host country are extremely rare.

Mutual Legal Assistance Treaties and Agreements

Congress has endorsed diplomatic efforts to increase multinational cooperative law enforcement activities. The United States has over 60 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. In the last few decades the United States has taken steps to facilitate cooperative efforts. Federal law enforcement agencies have assigned an increasing number of personnel overseas. For example, the Justice Department's Criminal Division has resident legal advisors in 37 countries abroad; and the Federal Bureau of Investigation now operates legal attache offices in 75 foreign cities; the Drug Enforcement Administration has offices in 85; the U.S. Immigration and Customs Enforcement agency in 70; the Secret Service in 20.

A few regulatory agencies with law enforcement responsibilities have working arrangements with their foreign counterparts. The Securities and Exchange Commission, for instance, has bilateral enforcement memoranda of understanding with 20 foreign securities commissions and, with 62 others, is a signatory of the International Organization of Securities Commissions' multilateral memorandum of understanding (IOSCO MMOU).

Congress has enacted several measures to assign foreign law enforcement efforts in this country in anticipation of reciprocal treatment. For instance, the Foreign Evidence Request Efficiency Act of 2009, P.L. 111-79, authorizes Justice Department attorneys to petition federal judges for any of a series of orders to facilitate investigations in this country by foreign law enforcement authorities. The authorization extends to the issuance of

- search warrants;
- courts orders for access to stored electronic communications and to communications records;
- pen register or trap and trace orders; and
- subpoena authority, both testimonial and for the production of documents and other material.

Search and Seizure Abroad

The Fourth Amendment governs the overseas search and seizure of the person or property of Americans by American law enforcement officials. The Supreme Court's *Verdugo-Urquidez* decision holds that "the Fourth Amendment [does not] appl[y] to the search and seizure by United

States agents of property that is owned by a nonresident alien and located in a foreign country,” 494 U.S. at 261. Otherwise, neither the Fourth Amendment nor its exclusionary rule are considered applicable to overseas searches and seizures conducted by foreign law enforcement officials, except under two circumstances. The first exception covered foreign conduct which “shocked the conscience of the court.” The second reached foreign searches or seizures in which American law enforcement officials were so deeply involved as to constitute “joint ventures” or some equivalent level of participation.

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. Of course as a general rule to be admissible at trial in this country, any confession must have been freely made.

Statute of Limitations—18 U.S.C. 3292 and Related Matters

Federal capital offenses and certain federal terrorist offenses may be prosecuted at any time. With some exceptions, prosecution of other federal crimes must begin within five years. 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. Finally, Section 3292 authorizes the federal courts to stay the running of a statute of limitations in order to await the arrival of evidence requested of a foreign government. Section 3292 suspensions may run for no more than six months if the requested foreign assistance is provided before the time the statute of limitations would otherwise have expired and for no more than three years in other instances. The suspension period begins with the filing of the request for foreign assistance and ends with final action by the foreign government upon the request. Because of the built-in time limits, the government need not show that it acted diligently in its attempts to gather overseas evidence.

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. Venue over extraterritorial crimes is a matter of statute, 18 U.S.C. 3238. Section 3238 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.

Testimony of Overseas Witnesses

Federal courts may subpoena a United States resident or national found abroad to appear before them or the grand jury. They have no authority to subpoena foreign nationals located in a foreign country. Mutual legal assistance treaties and agreements generally contain provisions to facilitate a transfer of custody for 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 overseas witnesses, federal courts may authorize depositions to be taken abroad, under “exceptional circumstances and in the interests of justice”; 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 a subsequent criminal trial in this country, notwithstanding the fact that one or more of these optimal conditions are not present. In the case of some of those nations whose laws might not otherwise require or even permit depositions under conditions considered preferable under our law, a treaty provision addresses the issue.

Yet, the question of admissibility of overseas depositions rests ultimately upon whether the confrontation clause demands can be satisfied. The cases thus far have relied upon the Supreme Court’s decisions either in *Ohio v. Roberts* or in *Maryland v. Craig*. Faced with the question of whether trial witnesses might testify remotely via a two-way video conference, *Craig* held that the confrontation clause’s requirement of physical face-to-face confrontation between witness and defendant at trial can be excused under limited circumstances in light of “considerations of public policy and necessities of the case.” *Roberts* dealt with the question of whether the admission of hearsay evidence violated the confrontation clause, and declared that as long as the hearsay evidence came within a “firmly rooted hearsay exception” its admission into evidence in a criminal trial constituted no breach of the clause.

More recent decisions might be thought to call into question any continued reliance on *Roberts* and *Craig*. At a minimum, the Supreme Court’s *Crawford v. Washington* repudiates the

suggestion that *Roberts* permits anything less than actual confrontation in the case of “testimonial” hearsay. And at least one appellate panel has concluded that the prosecution’s need for critical evidence does not alone supply the kind of public policy considerations necessary to qualify for a *Craig* exception.

On the other hand, since the pre-*Crawford* cases required a good faith effort to assure the defendant’s attendance at overseas depositions, it might be argued that *Crawford* requires no adjustment in the area’s jurisprudence. Moreover, the *Craig* analysis implied that it thought the use of overseas depositions at trial more compatible with the confrontation clause than the use of video trial testimony.

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 covers “foreign record[s] of regularly conducted activity” in virtually any form, i.e., any “memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country,” 18 U.S.C. 3505(c)(1). It 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.

Early appellate decisions upheld Section 3505 in the face of confrontation clause challenges, as in the case of depositions drawing support from *Ohio v. Roberts*. *Crawford* cast doubt upon the continued vitality of the *Roberts* rule (hearsay poses no confrontation problems as long as it falls within a “firmly rooted hearsay exception”) when it held that only actual confrontation will suffice in the case of “testimonial” hearsay. Although it left for another day a more complete definition of testimonial hearsay, *Crawford* did note in passing that “[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example business records.” At least one later appellate panel has rejected a confrontation clause challenge to Section 3505 on the basis of this distinction.

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. 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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