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Extraterritorial Application of American Criminal Law

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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 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 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.

This report is available in an abridged version, stripped of its attachments, bibliography, footnotes, and most of its citations to authority, as CRS Report RS22497, *Extraterritorial Application of American Criminal Law: An Abbreviated Sketch*, by Charles Doyle.

Contents

Introduction 1
Constitutional Considerations 1
Legislative Powers 1
Constitutional Limitations 5
Statutory Construction 9
International Law 11
Current Extent of American Extraterritorial Criminal Jurisdiction 15
Federal Law 15
State Law 21
Investigation and Prosecution 23
Mutual Legal Assistance Treaties and Agreements 23
Letters Rogatory 25
Cooperative Efforts 26
Search and Seizure Abroad 27
Self-Incrimination Overseas 28
Statute of Limitations: 18 U.S.C. §3292 and Related Matters 29
Extradition 31
Venue 33
Testimony of Witnesses Outside the United States 35
National Security Concerns 40
Admissibility of Foreign Documents 40
Conclusion 42
Attachments 42
Federal Criminal Laws Which Enjoy Express Extraterritorial Application 42
Special Maritime & Territorial Jurisdiction 42
Special Aircraft Jurisdiction 44
Treaty-Related 44
Others 48
Federal Crimes Subject to Federal Prosecution When Committed Overseas 52
Homicide 52
Kidnaping 56
Assault 56
Property Destruction 59
Threats 60
Theft 62
Counterfeiting 62
Piggyback Statutes 62
Model Penal Code 62
Restatement of the Law Third: Foreign Relations Law of the United States 63
18 U.S.C. §7. Special Maritime and Territorial Jurisdiction of the United States (text) 65
18 U.S.C. §3261. Military Extraterritorial Jurisdiction (text) 66
18 U.S.C. §3271. Trafficking in Persons (Text) 67
Bibliography 67

Contacts

Author Information..... 69

Introduction

Crime is ordinarily 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.[2] 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 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.[3]

More specifically, it grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations";[4] the power "[t]o regulate commerce with foreign Nations";[5] and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[6]

The power to define and punish felonies on the high seas and the power under the Necessary and Proper Clause have been referenced in the past as the source of Congress's authority to enact extraterritorial criminal legislation primarily in a maritime context.[7] The powers have been

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[1] "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." Am. Banana Co v. United Fruit Co., 213 U.S. 347, 356 (1909).

[2] In the parlance of international law, the term "states" ordinarily refers to nation states. Here and hereinafter, however, the term refers to the several states of the United States, unless otherwise indicated or apparent from the context found within a quotation.

[3] U.S. CONST. art. I, §8, cls. 10, 3; art. VI, cl. 2. *Cf.*, United States v. Baston, 818 F.3d 651, 666-67 (11th Cir. 2016) ("Congress's power to enact extraterritorial laws is not limited to the Offenses Clause").

[4] U.S. CONST. art. I, §8, cl. 10; *see generally* Note, *The Offences Clause After* Sosa v. Alvarez-Machain, 118 HARV. LAW REV. 2378 (2005); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish ... Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447 (2000).

[5] U.S. CONST. art. I, §8, cl.3.

[6] U.S. CONST. art. I, §8, cl.18.

[7] United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378-379 (11th Cir. 2011)(upholding application of the Drug Trafficking Vessel Interdiction Act (18 U.S.C. §2285) under the piracy, high seas, and law of nations clause); United States v. Motos-Luchi, 627 F.3d 1, 3 (1st Cir. 2010)(noting Congress's invocation of the clause to enact the Maritime Drug Law Enforcement Act (46 U.S.C. §§70501 et seq.)); United States v. Shi, 525 F.3d 709, 721-22 (9th Cir. 2008)(noting Congress's authority under the clause and under the necessary and proper clause (U.S. CONST. art. I, §8, cl.18)(with respect to legislation carrying into execution the President's treaty powers) to enact 18 U.S.C. §2280 (continued...)

understood to permit overseas application of federal criminal law, even extending to an American vessel at anchor well within the territory of another nation.[8]

Congress's commerce powers are three; one, that vests it with power "[t]o regulate Commerce with foreign Nations,"[9] affords it apparent authority to enact criminal statutes with extraterritorial application. The other two Commerce Clause powers permit Congress to regulate interstate commerce and commerce with the Indian tribes. The courts often speak of these two in exceptionally sweeping terms.[10] The Foreign Commerce Clause may be even more far-reaching,[11] although there is certainly support for a contrary view.[12]

(...continued)

(relating to maritime violence)).

[8] United States v. Flores, 289 U.S. 137, 159 (1933)(Flores, an American seaman, was convicted of murdering another American aboard an American ship moored 250 miles up the Congo River (well within the territorial jurisdiction of the then Belgian Congo) under the federal statute proscribing murder committed within the special maritime jurisdiction of the United States).

[9] U.S. CONST. art. I, §8, cl.3.

[10] United States v. Lara, 541 U.S. 193, 200 (2004)(quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989))("'The central function of the Indian Commerce clause,' we have said, 'is to provide Congress with plenary power to legislate in the field of Indian affairs'"); Gonzales v. Raich, 545 U.S. 1, 16-7 (2005)(internal citations omitted)("There are "three categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect, interstate commerce…. [W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence"); Nat'l Fed'n of Indep. Business v. Sebelius, 132 S. Ct. 2566, 2578 (2012)("The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher").

[11] Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 46 (1974)("the plenary authority of Congress over both interstate and foreign commerce is not open to dispute"); United States v. 12,200-Ft. Reels of Film, 413 U.S. 123, 125 (1973)("The Constitution gives Congress broad, comprehensive powers 'to regulate Commerce with foreign Nations'"); United States v. Baston, 818 F.3d 651, 668 (11th Cir. 2016)(quoting Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 434 (1932) and Japan Line, Ltd. v. County of Los Angeles)("Indeed the Supreme Court has suggested that 'the power to regulate commerce … when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce.' Although the Constitution grants Congress power to regulate commerce with foreign Nations and among the several States in parallel phrases,' the Supreme Court has explained, 'there is evidence that the Founders intended the scope of the foreign commerce power to be the greater'") .

[12] United States v. Yunis, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988)("Rather than relying on Congress's direct authority under Art. I Section 8 to define and punish offenses against the law of nations, the government contends that Congress has authority to regulate global air commerce under the commerce clause. U.S. CONST. art. I, §8, c. 3. The government's arguments based on the commerce clause are unpersuasive. Certainly Congress has plenary power to regulate the flow of commerce within the boundaries of United States territory. But it is not empowered to regulate foreign commerce which has no connection to the United States. Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States"). *See also* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L. J. 121, 149-50 (2007)(emphasis in the original) ("Furthermore, as a matter of original intent, the idea that the Foreign Commerce Clause might license Congress with the broad ability to extend U.S. laws extraterritorially into the jurisdictions of other nations would have been anathema to the founders given their driving belief in the sovereign equality of states and its accompanying rigid concept of territoriality—which to borrow yet again from Chief Justice Marshall held that 'no [state] can rightfully impose a rule on another[,] [each] legislates for itself, but its legislation can operate on itself alone.' Recall the reason why Congress was allowed to legislate extraterritorially over piracy absent a U.S. connection even though the act technically occurred within another state's territory: the conduct was prohibited as a matter of *the law of nations*, not of U.S. law, and thus the United States was not imposing its *own* rule on other nations, but merely enforcing (on their behalf) a universal norm when it prosecuted pirates. No such analysis applies to extraterritorial projections of Congress' Foreign Commerce Clause (continued...)

Courts in some of the more recent cases have opted for a middle ground. One found that Congress did indeed have the legislative power to proscribe illicit overseas commercial sexual activity by an American who had traveled from the United States to the scene of the crime.[13] Confronted with a vigorous dissent, the panel's majority expressly chose to avoid the issue of whether it would have reached the same result if the defendant had not agreed to pay for his sexual misconduct or some other commercial factor.[14] Another court elected to construe the statute before it narrowly and thereby avoided the necessity of ruling on the scope of Congress's power under the foreign commerce clause.[15] A third held that Congress's authority to regulate foreign commerce extended to the regulation of the channels of U.S. foreign commerce, but it left for another day the questions of whether the domestic effect on commerce prerogative has a foreign commerce counterpart or whether foreign commerce issues should be judged by standards of their own.[16]

Two other circuits, however, favor a more expansive view. The U.S. Court of Appeals for the Eleventh Circuit has held that Congress's foreign commerce power at least mirrors the "channels," "instrumentalities," and "substantive effect" components of its interstate commerce powers.[17] The U.S. Court of Appeals for the Fourth Circuit has gone even further and ruled that the Foreign Commerce Clause embodies not only the "channels" and "instrumentalities"

(...continued)

power").

[13] United States v. Clark, 435 F.3d 1100, 1103 (9th Cir. 2006)("Instead of slavishly marching down the path of grafting the interstate commerce framework onto foreign commerce, we step back and take a global, commonsense approach to the circumstances presented here: The illicit sexual conduct reached by the state expressly includes commercial sex acts performed by a U.S. citizen on foreign soil. This conduct might be immoral and criminal, but it is also commercial. Where, as in this appeal, the defendant travels in foreign commerce to a foreign country and offers to pay a child to engage in sex acts, his conduct falls under the broad umbrella of foreign commerce and consequently within congressional authority under the Foreign Commerce Clause").

[14] *Id.* at 1109-110 ("At the outset, we highlight that §2423(c) contemplates two types of 'illicit sexual conduct': non-commercial and commercial. Clark's conduct falls squarely under the second prong of the definition, which criminalizes 'any commercial sex act ... with a person under 18 years of age.' §2423(f)(2). In view of this factual posture, we abide by the rule that courts have a 'strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration, and limit our holding to §2423(c)'s regulation of commercial sex acts").

[15] United States v. Weingarten, 632 F.3d 60, 70-71 (2d Cir. 2011)(emphasis in the original)("We note, finally, that our determination that §2423(b) does not extend to travel occurring wholly between foreign nations and without any territorial nexus to the United States appropriately avoids the necessity of addressing whether such an exercise of congressional power would comport with the Constitution... We note, in addition, that the issue of statutory construction that this case represents would be substantially different if §2423(b) prohibited travel for the purpose of engaging in the defined sexual acts where such travel *affects* foreign commerce. Section 2423(b), however, prohibits travel *in* foreign commerce, and Count Three which involved simply a flight from Belgium, where the defendant resided, to Israel, his new home, did not constitute such travel").

[16] United States v. Pendleton, 658 F.3d 299, 308, 311 & n.7 (3d Cir. 2011)(here and elsewhere internal citations are generally omitted)("[B]ecause the jurisdictional element in §2423(c) ['travels in foreign commerce'] has an 'express connection' to the channels of foreign commerce, we hold that it is a valid exercise of Congress's power under the Foreign Commerce Clause. n.7. Having found that the statute is constitutional under the first prong of *Lopez*, we need not address Pendleton's contention that §2423(f)(1) does not survive *Morrison's* stringent 'substantial effects' test... ").

[17] United States v. Baston, 818 F.3d 651, 668 (11th Cir. 2016)("We need not demarcate the outer bounds of the Foreign Commerce Clause in this opinion. We can evaluate the constitutionality of [S]ection 1596(a)(2) by assuming, for the sake of argument, that the Foreign Commerce Clause has the same scope as the Interstate Commerce Clause. In other words, Congress's power under the Foreign Commerce Clause includes at least the power to regulate the 'channels' of commerce between the United States and other countries, the 'instrumentalities' of commerce between the United States and other countries, and activities that have a 'substantial effect' on commerce between the United States and other countries").

authority, but also encompasses the power to regulate any "activities that demonstrably affect [U.S. foreign] commerce."[18]

Its own enumerated powers aside, Congress has resorted on countless occasions to its authority to enact extraterritorial legislation in furtherance of the powers vested in one of the other branches or in reliance on powers it shares with one of the other branches—through the necessary and proper clause.[19] It has, for instance, regularly called upon the authority deposited with the President and Congress in the fields of foreign affairs and military activities,[20] powers which the courts have described in particularly wide-ranging terms.[21]

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[18] United States v. Bollinger, 798 F.3d 201, 215-16 (4th Cir. 2015)("We agree that the *Lopez* categories provide a useful starting point in defining Congress's powers under the Foreign Commerce Clause. Regarding the first two categories, Congress clearly may regulate (1) 'the use of the channels of [foreign] commerce,' and (2) 'the instrumentalities of [foreign] commerce, or persons or things in [foreign] commerce. We continue to believe, however that the third *Lopez* category—permitting the regulation of 'activities that substantially affect interstate commerce'—is unduly demanding in the foreign context. … Instead of requiring that an activity have a substantial effect on foreign commerce, we hold that the Foreign Commerce Clause allows Congress to regulate activities that demonstrably affect such commerce").

[19] U.S. CONST. art. I, §8, cl.18 ("The Congress shall have Power... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

[20] "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States... He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors... He... shall receive Ambassadors and other public Ministers; [and] he shall take Care that the Laws be faithfully executed ... " U.S. CONST. art. II, §§2, 3.

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises ... ; To establish an uniform Rule of Naturalization... ; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies... ; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; ... [and] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, §8, cls.1, 4, 11-14, 18.

See, e.g., United States v. Lawrence, 727 F.3d 386, 396-97 (5th Cir. 2013)(holding that enactment of extraterritorial applicable legislation proscribing importing or exporting controlled substances fall with the scope of Congress's authority to enact legislation necessary and proper for the implementation of the Single Convention on Narcotic Drugs).

[21] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-18 (1936); Ex parte Quirin, 317 U.S. 1, 28-9 (1942); Parker v. Levy, 417 U.S. 733, 756-57 (1974); United States v. Belfast, 611 F.3d 783, 805 (11th Cir. 2010) ("Congressional power to pass those laws necessary and property to effectuate the enumerated powers of the Constitution is nowhere broader and more important than in the realm of foreign relations... It follows generally that if a treaty is valid there can be no dispute about the validity of a statute passed under Article I, Section 8, as a necessary and proper means to execute the powers of the Government").

Some judicial authorities have suggested that in the area of foreign affairs the Constitution's establishment of the federal government as a sovereign entity vested it with authority, defined by standards recognized by the law of nations, beyond or in lieu of its constitutionally enumerated powers. United States v. Rodriguez, 182 F. Supp. 479, 490-91 (S.D. Cal. 1960), *aff'd sub nom*., Rocha v. United States, 288 F.2d 545 (9th Cir. 1961)("The powers of the government and the Congress in regard to sovereignty are broader than the powers possessed in relation to internal matters, *United States v. Curtiss-Wright Export Corp*., 1936, 299 U.S. 304: 'The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect to our internal affairs.' Id., 299 U.S. at page 315... 'It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. Id. 299 U.S. at page 318.'... To put it in more general terms, the concept of essential sovereignty of a free nation clearly requires the existence and recognition of an inherent power in the state to protect itself from destruction. This power exists in the United States government absent express provision in the Constitution and arises from the very nature of the government which was created by the Constitution").

Constitutional Limitations

Nevertheless, the powers granted by the Constitution are not without limit.[22] The clauses enumerating Congress's powers carry specific and implicit limits which govern the extent to which the power may be exercised overseas.[23] Other limitations appear elsewhere in the Constitution, most notably in the due process clauses of the Fifth Amendment.[24] Some limitations are a product of the need to harmonize potentially conflicting grants of authority. For example, although the Constitution reserves to the states the residue of governmental powers which it does not vest elsewhere, the primacy it affords the federal government in the area of foreign affairs limits the authority of the states in the field principally to those areas where they are acting with federal authority or acquiescence.[25]

In the area of extraterritorial jurisdiction, the most often cited limitation resides in the Due Process Clause of the Fifth Amendment. While the enumerated powers may carry specific limits which govern the extent to which the power may be exercised overseas, the general restrictions of the Fifth Amendment Due Process Clause have traditionally been mentioned as the most likely to define the outer reaches of the power to enact and enforce legislation with extraterritorial application.[26]

Unfortunately, many of the cases do little more than note that due process restrictions mark the frontier of the authority to enact and enforce American law abroad.[27] Even the value of this scant

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[22] *Curtiss-Wright* suggests that the same can be said of any sovereign-based legislative authority, 299 U.S. at 318 ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens; and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law... [T]he court recognized, and in each of the cases cited [involving the exercise of the sovereign power of the United States] found, the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations").

[23] *E.g.*, United States v. Belfast, 611 F.3d 783, 804 (11th Cir. 2010)(quoting United States v. Comstock, 560 U.S. 126, 134 (2010) and upholding Congress's authority under the necessary and proper clause to carrying into execution the President's treaty power by enacting the Torture Act (18 U.S.C. §§2340-2340B))("Thus, 'in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power'"); Toth v. Quarles, 350 U.S. 11, 13-4 (1955) (court martial trial of a civilian for crimes he allegedly committed in Korea while in the military exceeded the authority granted Congress by art. I, §8, cl.14 and art. III, §2); Kinsella v. Singleton, 361 U.S. 234, 247-48 (1960)(holding that congressional authority under art. I, §8, cl.14 to make rules and regulations governing the land and naval forces did not include authority for the court martial trial of civilian dependents for offenses committed overseas); consider, Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 891-92 (1989) (asserting that the creation of subject matter and personal jurisdiction over an alien defendant for an offense committed overseas and not otherwise connected to the United States by forcibly bringing him into the United States is "not clearly within any constitution grant of power to Congress, and in particular, ... does not, as written, come within the power to define and punish offenses against the law of nations").

[24] The Due Process Clause of the Fourteenth Amendment limits the legislative authority of the states.

[25] *Cf.*, Skiriotes v. Florida, 313 U.S. 69, 77 (1941)("[W]e see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress"); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003)("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the concern for uniformity in this country's dealing with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place").

[26] "No person shall... be deprived of life, liberty, or property, without due process of law ... " U.S. CONST. amend. V. " ... [N]or shall any State deprive any person of life, liberty, or property, without due process of law ... " U.S. CONST. amend. XIV, §1.

[27] *See, e.g.*, United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003); United States v. Thomas, 893 F.2d 1066, 1068 (9th Cir. 1990); United States v. Quemener, 789 F.2d 145, 156 (2d Cir. 1986); United States v. Henriquez, 731 F.2d 131, (continued...)

illumination is dimmed by the realization that the circumstances most likely to warrant such due process analyses are the very ones in which the least process is due. Although American courts that try aliens for overseas violations of American law must operate within the confines of due process,[28] the Supreme Court has observed that the Constitution's due process commands do not protect aliens who lack any "significant voluntary connection[s] with the United States."[29] Moreover, the Court's more recent decisions often begin with the assumption that the issues of extraterritorial jurisdiction come without constitutional implications.[30]

Nevertheless, due process issues have surfaced in a handful, but growing number, of lower court decisions relating to extraterritoriality. A few courts describe a due process requirement that demands some nexus between the United States and the circumstances of the offense.[31] Occasionally, they look to international law principles to provide a useful measure to determine

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134-35 n.4, 5 (2d Cir. 1984); United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1983); United States v. Howard-Arias, 679 F.2d 363, 371 (4th Cir. 1982).

[28] United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) ("I do not mean to imply, and the Court has not decided, that persons in the position of the respondent have no constitutional protection. The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant").

[29] "The global view... of the Constitution is also contrary to this Court's decisions in the *Insular Cases*, which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power... [I]t is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its power. Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 U.S. at 268-71.

[30] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)(internal citations omitted)("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate"); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)("Both parties concede, as they must that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised that authority in this case is a matter of statutory construction").

[31] United States v. Baston, 818 F.3d 651, 669-70 (11th Cir. 2016)(internal citations omitted)("The Due Process Clause requires at least some minimal contact between a State and the regulated subject"); United States v. Rojas, 812 F.3d 382, 393 (5th Cir. 2016); United States v. Medjuck, 156 F.3d 916, 918 (9th Cir. 1998)("to satisfy the strictures of due process, the Government [must] demonstrate that there exists a sufficient nexus between the conduct condemned and the United States such that the application of the statute [to the overseas conduct of an alien defendant] would not be arbitrary or fundamentally unfair to the defendant") (citing United States v. Davis, 905 F.2d 245, 248-49 (9th Cir. 1990)); *see also* United States v. al Kassar, 660 F.3d 108, 118 (2d Cir. 2011)("In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair"); United States v. Perlaza, 439 F.3d 1149, 1160-161 (9th Cir. 2006); United States v. Moreno-Morillo, 334 F.3d 819, 828 (9th Cir. 2003); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1256 (9th Cir. 1998); United States v. Greer, 956 F. Supp. 531, 534-36 (D.Vt. 1997); United States v. Aikens, 946 F.2d 608, 613-14 (9th Cir. 1990); United States v. Robinson, 843 F.2d 1, 5-6 (1st Cir. 1988); United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987); United States v. Gonzalez, 776 F.2d 931, 938-41 (11th Cir. 1985).

These "subject matter" or "legislative" jurisdiction due process questions have arisen more often from attempts to impose civil liability or regulatory obligations, particularly at the state level, *see, e.g.*, Gerling Global Reinsurance Corp. v. Gallagher, 267 F.3d 1228, 1234-238 (11th Cir. 2001)(due process precludes application of Florida's Holocaust Victims Insurance Act to insurance policies issued outside the state, to persons outside the state, and covering individuals outside the state); *see also* Gerling Global Reinsurance Corp. v. Low, 240 F.3d 739, 753 (9th Cir. 2001); Watson v. Employers Liability Assurance Corp., 348 U.S. 66, 70-1 (1954)("because the policy was bought, issued and delivered outside of Louisiana, Employers invokes the due process principle that a state is without power to exercise 'extra territorial jurisdiction' that is, to regulate and control activities wholly beyond its boundaries").

whether the nexus requirement has been met.[32] On other occasions, they consider the principles at work in the minimum contacts test for personal jurisdiction.[33] At the heart of these cases is the notion that due process expects that a defendant's conduct must have some past, present, or anticipated locus or impact within the United States before he can fairly be held criminally liable for it in an American court. The commentators have greeted this analysis with some hesitancy,[34] and some courts have simply rejected it.[35]

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.[36] Here, indicia

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[32] United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990) ("International law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States so that application of the statute in question would not violate due process. However, danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?"); *see also Baston*, 818 F.3d at 669 ("Compliance with international law satisfies due process because it puts a defendant 'on notice' that he could be subjected to the jurisdiction of the United States"); United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1379 (11th Cir. 2011); *cf.*, United States v. Caicedo, 47 F.3d 370, 372-73 (9th Cir. 1995).

[33] United Sates v. Clark, 435 F.3d 1100, 1108 (9th Cir. 2006)("Although Clark's citizenship alone is sufficient to satisfy due process concerns, his U.S. investments, ongoing receipt of federal retirement benefits and use of U.S. military flights also underscore his multiple and continuing ties with this country"); United States v. Zakharov, 468 F.3d 1171, 1177 (9th Cir. 2006)("Nexus is a constitutional requirement analogous to 'minimum contacts' in personal jurisdiction analysis"); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)); United States v. Aikens, 946 F.2d 608, 613-14 (9th Cir. 1990); United States v. Robinson, 843 F.2d 1, 5-6 (1st Cir. 1988); United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987); United States v. Gonzalez, 776 F.2d 931, 938-41 (11th Cir. 1985).

[34] Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992); A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?* 35 COLUM. J. TRANSNAT'L L. 379 (1997); Bret A. Sumner, Comment, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 46 CATH. U. L. REV. 907 (1997); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L. J. 121 (2007).

[35] *Ibarguen-Mosquera*, 634 F.3d at 1378-379 (internal citations omitted)("In determining whether an extraterritorial law comports with due process, appellate courts often consult international law principles... In the past we have held that [these]... principles have no applicability in connection with stateless vessels because such vessels are international pariahs that have no internationally recognized right to navigate freely on the high seas. Indeed, the law places no restrictions upon a nation's right to subject stateless vessels to its jurisdiction"); United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002)("[T]o the extent the Due Process Clause may constrain the MDLEA's extraterritorial reach, that clause does not impose a nexus requirement, in that Congress has acted pursuant to the Piracies and Felonies Clause"); United States v. Perez-Oviedo, 281 F.3d 400, 403 (3d Cir. 2002)(internal citations omitted)("[N]o due process violation occurs in an extraterritorial prosecution under MDLEA when there is no nexus between the defendant's conduct and the United States. Since drug trafficking is condemned universally by law-abiding nations... there is no reason for us to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of a person apprehended with narcotics on the high seas... Perez-Oviedo's state of facts presents an even stronger case for concluding that no due process violation occurred. The Panamanian government expressly consented to the application of the MDLEA... Such consent from the flag nation eliminates a concern that the application of the MDLEA may be arbitrary or fundamentally unfair"); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) ("[D]ue process does not require the government to prove a nexus between a defendant's criminal conduct and the United States in a prosecution under the MDLEA when the flag nation has consented to the application of United States law to the defendants"); *see also* United States v. Ali, 718 F.3d 929, 943-44 (D.C. Cir. 2013)(describing the divide but finding it unnecessary to stake out a position).

[36] "The rule that ignorance of the law will not excuse is deep in our law, as is the principle that of all the powers of local government, the police power is one of the least limitable. On the other hand, due process places some limits on its exercise. Ingrained in our concept of due process is the requirement of notice... As Holmes wrote in the Common Law, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.' Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where [as here] a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted (continued...)

of knowledge, of reason to know, of an obligation to know, or of reasonable ignorance of the law's requirements—some of which are reflected in international standards—seem to be the most relevant factors. Citizens, for instance, might be expected to know the laws of their own nation; seafarers to know the law of the sea and consequently the laws of the nation under which they sail; everyone should be aware of the laws of the land in which they find themselves and of the wrongs condemned by the laws of all nations.[37] On the other hand, the application of American criminal statute to an alien in a foreign country under whose laws the conduct is lawful would seem to evidence a lack of notice sufficient to raise due process concerns.[38]

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

(...continued)

consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or *in a language foreign to the community*." Lambert v. California, 355 U.S. 225, 228-30(1957)(emphasis added); accord, United States v. Vasarajs, 908 F.2d 443, 448-49 (9th Cir. 1990); Griffin v. Wisconsin, 483 U.S. 868, 875 n.3 (1987); United States v. Shi, 525 F.3d 709, 722 (9th Cir. 2008)("The Due Process Clause requires that a defendant prosecuted in the United States should reasonably anticipate being haled into court in this country"); United States v. Murillo, 826 F.3d 152, (4th Cir. 2016)(citing United States v. al Kassar, 660 F.3d 108, 119 (2d Cir. 2011) and United States v. Ali, 718 F.3d 929, 944 (D.C. Cir. 2013)("What appears to be the animating principle governing the due process limits of extraterritorial jurisdiction is the idea that no man shall be held criminally responsible for the conduct which he could not reasonably understand to be proscribed. Simply put, a defendant is not ensnared by a trap laid for the unwary when he has engaged in conduct that is self-evidently criminal")).

[37] United States v. Belfast, 611 F.3d 783, 809 (11th Cir. 2010)("The Supreme Court made clear long ago that an absent United States citizen is nonetheless personally bound to take notice of this laws of the United States that are applicable to him and to obey them"); United States v. Bin Laden, 92 F.Supp.2d 189, 218 (S.D.N.Y. 2000)("Odeh argues that application of Sections 844(f), (h), and (n); 924(c); 930(c); and 2155 to the extraterritorial conduct he is alleged to have engaged in would violate his due process right to a fair warning... The Government responds that while Odeh may not have known that breadth of the statutory framework that would serve as the basis for the charges against him... there is no room for him to suggest that he has suddenly learned that mass murder was illegal in the United States or anywhere else... The Government also argues that Odeh cannot be surprised to learn that his conduct was criminal under the laws of every civilized nation, and thus he has no right to complain about the particular forum in which he is brought to trial. We likewise find this argument persuasive"); United States v. Saac, 632 F.3d 1203, 1210 (11th Cir. 2011)("In as much as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is fundamentally unfair for Congress to provide for the punishment of persons apprehended with narcotics on the high seas"); (United States v. Campbell, 798 F.Supp.2d 293, 306-307 (D.D.C. 2011)("Whether the test for due process in such a circumstance requires a 'sufficient nexus' to the United States, commonly understood as real effects or consequences accruing in this country, or prosecution that is neither arbitrary or capricious has split the circuits. One line of cases reasons that '[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States so that such application would not be arbitrary or fundamentally unfair.' ... In contrast, several circuits require only that extraterritorial prosecution be neither arbitrary nor fundamentally unfair, and are not concerned with whether a sufficient nexus exists").

[38] *Consider, e.g.*, United States v. Henriquez, 731 F.2d 131, 134 n.5 (2d Cir. 1984)("It is also argued that 21 U.S.C. §955a(a) as applied [possession of marijuana with intent to distribute by Colombian nationals aboard a non-American vessel in international waters] violates the notice requirement of the due process clause of the Fifth Amendment. *See Lambert v. California*... The argument is based not only on the claim that the statute is unprecedented in international law and the proposition that marijuana trafficking itself is not universally condemned, but also on the alleged vagueness of the definition of 'vessel without nationality' in 21 U.S.C. §955b(d) [upon which federal jurisdiction was based]. On this point, however, we agree with the Eleventh Circuit... that the term 'vessel without nationality' clearly encompasses vessels not operating under the authority of any sovereign nation"); United States v. Alvarez-Mena, 765 F.2d 1259, 1267 n.11 (5th Cir. 1985) ("[n]evertheless, we observe that we are not faced with a situation where the interests of the United States are not even arguably potentially implicated. The present case is not remotely comparable to, for example, the case of an unregistered small ship owned and manned by Tanzanians sailing from that nation to Kenya on which a crew member carries a pound of marihuana to give to a relative for his personal consumption in the latter country")(example offered in discussion of presumption of Congressional intent).

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.[39] 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 application will be construed to have only territorial application unless there is a clear indication of some broader intent.[40] Moreover, "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms."[41]

At one time, 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,[42] the rule was first clearly announced in *United States v. Bowman*.[43]

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[39] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991); Foley Brothers v. Filardo, 336 U.S. 281, 284-85 (1949)("The question before us is not the power of Congress to extend the eight hour law to work performed in foreign countries. Petitioners concede that such power exists. The question is rather whether Congress intended to make the law applicable to such work"); United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003)("It is beyond doubt that, as a general proposition, Congress has the authority to enforce its laws beyond the territorial boundaries of the United States").

[40] RJR Nabisco, Inc. v. European Cmty, 136 S. Ct. 2090, 2100 (2016)("Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application"); *see also* Morrison v. Nat'l Australia Bank, Ltd, 561 U.S. 247, 255 (2010) (quoting *Arabian Am. Oil Co*., 499 U.S. at 248 ("It is a 'long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'"); Argentine Republic v. Amerada Hess Shipping, 488 U.S. 428, 440 (1989); Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 173 (1993); Smith v. United States, 507 U.S. 197, 203 (1993); Small v. United States, 544 U.S. 385, 388-89 (2005); *cf*., The Antelope, 23 U.S. 30, 53-4 (10 Wheat. 66, 123) (1825)("The courts of no country will execute the penal laws of another"); United States v. Ballestas, 795 F.3d 138, 143-44 (D.C. Cir. 2015)(quoting *Morrison*, 561 U.S. at 255 ("First… the presumption against extraterritorial… dictates that 'when a statute gives no clear indication of an extraterritorial application, it has none' Second… the so-call *Charming Betsy* canon… [states] that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.' Each of those 'principle[s]', however, 'represents a canon of construction, or a presumption about a state's meaning, rather than a limit upon Congress's power to legislation")). The principle has a corollary, the so-called revenue rule, which precludes judicial enforcement of a foreign tax laws, Pasquantino v. United States, 544 U.S. 349, 360-61 (2005). The rule, however, does not preclude enforcement of a federal criminal statute which proscribes defrauding a foreign country of its tax revenues, *id*. at 354-55 ("the common-law revenue rule, rather than barring any recognition of foreign revenue law, simply allow[s] courts to refuse to enforce the tax judgments of foreign nations, and therefore [does] not preclude the Government from prosecuting... ").

[41] *Ballestas*, 795 F.3d at144 (quoting Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1667 (2013) and *Morrison*, 561 U.S. at 265).

[42] *See, e.g*., Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355-56 (1909)("It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

"No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. They go further at times and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threat as to acts done within another recognized jurisdiction. An illustration from our statutes is found with (continued...)

The Supreme Court's emphatic endorsement of the domestic presumption in a civil context in *Morrison*[44] cast some doubt on *Bowman*'s continued vitality. Early indications were that the courts and commentators were unwilling to go that far.[45] 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.[46]

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regard to criminal correspondence with foreign governments ... ").

[43] 260 U.S. 94, 97-98, 102 (1922)("We have in this case a question of statutory construction. The necessary *locus*, when not specifically defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. 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 the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negate the purpose of Congress in this regard. We have an example of this in the attempted application of the prohibitions of the Anti-Trust Law to acts done by citizens of the United States against other such citizens in a foreign country. *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347. That was a civil case, but as the statute is criminal as well as civil, it presents an analogy.

"But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense... Clearly it is no offense to the dignity or right of sovereignty of Brazil [—where the fraud of which the United States government was the target occurred—] to hold [these American defendants] for this crime against the government to which they owe allegiance"). *See also* United States v. Delgado-Garcia, 374 F.3d 1337, 1344-350 (D.C. Cir. 2004); United States v. Villanueva, 408 F.3d 193, 197-98 (5th Cir. 2005); United States v. Lopez-Vanegas, 493 F.3d 1305, 1311-312 (11th Cir. 2007).

[44] *Morrison*, 561 U.S. at 261 ("The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption in all cases, preserving a stable background against which Congress can legislate with predictable results").

[45] United States v. al Kassar, 660 F.3d 108, 118 (2d Cir. 2011)(some internal citations omitted)("The presumption that ordinary acts of Congress do not apply extraterritorially does not apply to criminal statutes. *United States v. Bowman*"); United States v. Belfast, 611 F.3d 783, 811, 813-14 (11th Cir. 2010)(citing *Morrison* for the proposition that the presumption against extraterritoriality may only be overcome by clear expression of congressional intent, which may be inferred per *Bowman* from the nature of the offense and whether denying extraterritoriality would limit the scope and usefulness of the statute); United States v. Leija-Sanchez, 602 F.3d 797, 799 (7th Cir. 2010)("Whether or not... post-1922 decisions are in tension with *Bowman*, we must apply *Bowman* until the Justices themselves overrule it"); United States v. Abu Khatallah, 151 F. Supp. 3d 116, 129 (D.D.C. 2015)("In this Circuit, then, *Bowman* is satisfied when (1) a federal criminal offense directly harms the U.S. Government, and (2) enough foreseeable overseas applications existed at the time of a statute's enactment (or most recent amendment) to warrant the inference that Congress both contemplated and authorized prosecutions for extraterritorial acts"); *see also* Zachary D. Clopton, Bowman *Lives: The Extraterritorial Application of U.S. Criminal Law After* Morrison v. National Australia Bank, 67 NYU ANNUAL SURVEY AM. L. 137 (2011); *but see* United States v. Sidorenko, 102 F. Supp. 3d 1124, 1132 (N.D. Cal. 2015)(bribery associated with a U.N. entity which received support of more than $10,000 per year)("Because there is no clear indication of extraterritorial intent in either statute [18 U.S.C. §§666 (bribery) and 1343 (wire fraud)] as required by *Morrison*, nor does either statute fall into the narrow class of cases 'enacted because of the right of the government to defend itself against …. Fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents,' identified in *Bowman*, the Court finds that neither statute applies extraterritorially").

[46] "The question is not whether we think 'Congress would have wanted a statute to apply to foreign conduct 'if it had thought of the situation before the court,' but whether Congress has affirmatively and unmistakably instructed that the (continued...)

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.[47] At one time, the cases seemed to imply the existence of another rule, that is, unless Congress declared that it intended a statute to apply overseas to both aliens and American nationals, it would be presumed to apply only to Americans.[48] Yet as discussed below, the challenge seems less compelling in light of the generous reading of the internationally recognized grounds upon which to stake a claim.[49]

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.[50]

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statute do so." RJR Nabisco, Inc. v. European Cmty, 136 S. Ct. 2090, 2100 (2016); *but see*, United States v. Epskamp, 832 F.3d 154, 164 (2d Cir. 2016)(parallel citations omitted)("Even assuming for the sake of argument that the text of §959(b)[that outlaws possession of controlled substances aboard a U.S. registered aircraft] itself is insufficiently plain to overcome the presumption against extraterritoriality, we conclude that the statutory scheme and the context of the statute overcome the presumption against extraterritoriality. *See RJR Nabisco*, 136 S. Ct. at 2102 ('While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential,' and 'context can be consulted as well')").

[47] "It has been a maxim of statutory construction since the decision in *Murray* v. *The Charming Betsy*, 2 Cranch [6 U.S.] 64, 118 (1804), that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," Weinberger v. Rossi, 456 U.S. 25, 32 (1982); The Apollon, 22 U.S. (9 Wheat.) 362, 370-71 (1824)("It cannot be presumed, that Congress would voluntarily justify... a clear violation of the law of nations").

[48] *E.g.*, *Id*. at 370 ("The laws of no nation can justly extend beyond its own territories, *except so far as regards its own citizens*")(emphasis added); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355-6 (1907)("No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive... And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications"); *Bowman*, 260 U.S. at 102 ("Section 41 of the Judicial Code provides that 'the trial of all offenses committed on the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.' 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. The other defendant is a subject of Great Britain. He has never been apprehended, and it will be time enough to consider what, if any, jurisdiction the District Court below has to punish him when he is brought to trial"); United States v. Columba-Colella, 604 F.2d 356, 360 (5th Cir. 1979) ("Congress [is] not competent to attach criminal sanctions to the murder of an American by a foreign national in a foreign country ... ").

[49] *E.g.*, United States v. Vasquez-Velasco, 15 F.3d 833, 839-41 (9th Cir. 1994)(prosecution under 18 U.S.C. §1959 for the murder of two American tourists in Mexico by Mexican nationals acting under the mistaken belief that the Americans were DEA agents came within the principle recognized in international law as permitting the exercise of extraterritorial jurisdiction in the name of a nation's security); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); United States v. Felix-Gutierrez, 940 F.2d 1200, 1205-206 (9th Cir. 1991)(murder of an American agent overseas); United States v. Benitez, 741 F.2d 1312, 1316-317 (11th Cir. 1986); *see also* United States v. Bin Laden, 92 F. Supp. 2d 189, 194-95 (S.D.N.Y.2000) (concluding that *Bowman* applies regardless of the nationality of the offender).

[50] "Yunis seeks to portray international law as a self-executing code that trumps domestic law whenever the two conflict. That effort misconceives the role of judges as appliers of international law and as participants in the federal system. Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law," *Yunis*, 924 F.2d at 1091; United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003)("In determining whether Congress intended a federal statute to apply to overseas conduct, an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. (continued...)

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.

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.[51]

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 reasonableness defines the latitude that international law affords a country to enact, try, and punish violations of its law extraterritorially; its assessment of reasonableness mirrors a balancing of the interests represented in the Harvard study principles.[52]

(...continued)

Nonetheless, in fashioning the reach of our criminal law, Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the United States in excess of the limits posed by international law"); United States v. Felix-Gutierrez, 940 F.2d 1200, 1203 (9th Cir. 1991); United States v. Henriquez, 731 F.2d 131, 134 (2d Cir. 1984). The one exception may apply in those instances where Congress's legislative authority cannot be claimed on the basis its constitutionally enumerated powers and must instead rest upon its authority to carry into effect the powers of sovereignty, *cf.* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

[51] "An analysis... discloses five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five general principles are: first, the *territorial principle*, determining jurisdiction by reference to the place where the offence is committed; second, the *nationality principle*, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the *protective principle*, determining jurisdiction by reference to the national interest injured by the offence; fourth, the *universality principle*, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the *passive personality principle*, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis for an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles." Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. (Supp.)(*Harvard Study*) 439, 445 (1935) (emphasis added).

[52] "The rules in this Restatement governing jurisdiction to prescribe, as well as those governing jurisdiction to adjudicate and to enforce, reflect development in the law as given effect by United States courts. The courts appear to have considered these rules as a blend of international law and domestic law, including international 'comity' as part of that law. Increasingly, however, these rules, notably the principle of reasonableness (§§403, 421, 431), have been followed by other states and their courts and by international tribunals, and have emerged as principles of customary law." American Law Institute, 1 RESTATEMENT OF THE LAW THIRD: THE FOREIGN RELATIONS LAW OF THE UNITED STATES, 231 (1985).

(continued...)

While the Restatement's views carry considerable weight with both Congress and the courts,[53] the courts have traditionally ascertained the extent to which international law would recognize extraterritorial application of a particular law by citing the Harvard study principles, read expansively.[54]

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.[55] Congress often indicates within the text of a statute when it intends a provision to apply within its territorial waters and upon its vessels.[56] Although rarely mentioned in the body of a statute, the courts have long and regularly acknowledged the "impact" basis for a claim of extraterritorial application.[57] This is particularly so, when the facts in a case suggest other principles of international law, in addition to the territorial principle.[58]

(...continued)

Section 403 of the Restatement provides:

"(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) the link of the activity to the territory of the regulated state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

"(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater." *Id.* at 244-45. The remainder of section 403 and other portions of the RESTATEMENT appear as an attachment to this report.

[53] *E.g.*, United States v. MacAllister, 160 F.3d 1304, 1308 (11th Cir. 1998).

[54] *E.g.*, United States v. Lawrence, 727 F.3d 386, 394 (5th Cir. 2013)("The law of nations permits the exercise of criminal jurisdiction by a nation under five general principles. They are the territorial, national, protective, universality, and passive personality principles"); *see generally* Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297 (1996); Abraham Abramovsky, *Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in* United States v. Yunis, 15 YALE J. INT'L L. 121 (1990); D. Brian Bogges, Comment, *Exporting United States Drug Law: An Example of the International Legal Ramifications of the "War on Drugs,"* 1992 BYU L. REV.165.

[55] *Harvard Study* at 480-509.

[56] *E.g.*, 18 U.S.C. §§81 (arson within the maritime and territorial jurisdiction of the United States), 113 (assaults within the maritime and territorial jurisdiction of the United States).

[57] Ford v. United States, 273 U.S. 593, 623 (1927)("[A] man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done"); United States v. Yousef, 327 F.3d 56, 96-7 (2d Cir. 2003)("Moreover, assertion of jurisdiction is appropriate under the 'objective territorial principle' because the purpose of the attack was to influence United States foreign policy and the defendants intended their actions to have an effect—in this case, a devastating effect—on and within the United States"); United States v. Neil, 312 F.3d 419, 422 (9th Cir. 2002); *MacAllister*, 160 F.3d at 1308; United States v. Goldberg, 830 F.2d 459, 463-64 (3d Cir. 1987); United States v. Rojas, 812 F.3d 382, 392 (5th Cir. 2016).

[58] United States v. Felix-Gutierrez, 940 F.2d 1200, 1205 (9th Cir. 1991)("Felix's actions created a significant detrimental effect in the United States and adversely affected the national interest. In helping to prevent the United (continued...)

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."[59] As construed by the courts, however, it is understood to permit the application abroad of statutes which protect the federal government and its functions.[60] And so, it covers the overseas murder or attempted murder of federal officers or those thought to be federal officers;[61] acts of terrorism calculated to influence American foreign policy;[62] conduct that Congress has characterized as a threat to U.S. national security;[63] false statements or forgery designed to frustrate the administration of U.S. immigration law;[64] entering the United States as a stowaway;[65] or overseas bribery in connection with the award of federal government contracts.[66]

The nationality principle rests the exercise of extraterritorial criminal jurisdiction on the citizenship of accused.[67] 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.[68] 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.[69]

(...continued)

States from apprehending Caro-Quintero, Felix directly hindered United States efforts to prosecute an alleged murderer of a government agent. Furthermore that agent was a United States citizen. We need not decide whether any one of these facts or principles, standing alone, would be sufficient. Rather, we hold that cumulatively applied they require the conclusion that giving extraterritorial effect to the accessory after the act statute in Felix's case does not violate international law principles"); United States v. Suerte, 291 F.3d 366, 370 (5th Cir. 2002); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999); United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984).

[59] *Harvard Study* at 543; United States v. Baston, 818 F.3d 651, 670 (11th Cir. 2016)("Under the 'protective principle' of international law, a country can enact extraterritorial criminal law to punish conduct that threatens its security as a state or the operation of its governmental functions and is generally recognized as a crime under the law of states that have reasonably developed legal system"); *Rojas*, 812 F.3d at 392.

[60] United States v. Vilches-Navarrete, 523 F.3d 1, 21-2 (1st Cir. 2008)("Under the protective principle of international law, Congress can punish crimes committed on the high seas regardless of whether a vessel is subject to the jurisdiction of the United States. Under the protective principle, a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems"); *see also* United States v. al Kassar, 660 F.3d 108, 118 (2d Cir. 2011).

[61] United States v. Vasquez-Velasco, 15 F.3d 833, 841 (9th Cir. 1994); United States v. Felix-Gutierrez, 940 F.2d 1200, 1206 (9th Cir. 1991); *Benitez*, 741 F.2d at 1316.

[62] *Yousef*, 327 F.3d at 97 ("Finally, there is no doubt that jurisdiction is proper under the protective principle because the planned attacks were intended to affect the United States and to alter its foreign policy").

[63] United States v. Romero-Galue, 757 F.2d 1147, 1154 (11th Cir. 1985).

[64] United States v. Marino-Garcia, 679 F.2d 1373, 1381 fn. 14 (11th Cir. 1982)(citing cases in accord).

[65] United States v. Banjoko, 590 F.3d 1278, 1281 (11th Cir. 2009).

[66] United States v. Campbell, 798 F.Supp.2d 293, 296 (D.D.C. 2011).

[67] *Harvard Study* at 519; United States v. Bollinger, 798 F.3d 201, 214 (4th Cir. 2015); United States v. Lawrence, 727 F.3d 386, 394-95 (5th Cir. 2013); United States v. Frank, 599 F.3d 1221, 1233 (11th Cir. 2010); United States v. Clark, 435 F.3d 1100, 1106 (9th Cir. 2006); United States v. Martinez, 599 F. Supp. 2d 784, 797 (W.D. Tex. 2009).

[68] Blackmer v. United States, 284 U.S. 421, 437 (1932)("With respect to such exercise of authority, there is no question of international law, but solely of the purport of municipal law which establishes the duties of the citizen in relation to his own government. While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application so far as citizens of the United States in foreign countries are concerned is one of construction, not of legislative power").

[69] United States v. Lawrence, 727 F.3d 386, 394-95 (5th Cir. 2013)(nationality and protective principles); United States (continued...)

The passive personality principle recognizes extraterritorial criminal jurisdiction based on the nationality of the victim of the offense.[70] It, too, has been asserted most often in the presence of facts suggesting other principles.[71]

The universal principle is based on the premise that offenses against all nations may be punished by any nation where the offender is found.[72] At a minimum, it applies to piracy and offenses committed on the high seas on "stateless" vessels.[73]

Current Extent of American Extraterritorial Criminal Jurisdiction

Federal Law

Express

Congress's declaration that a particular statute is to apply outside of the United States is the most obvious evidence of intent to create extraterritorial jurisdiction.[74] 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."[75] The concept of special maritime and territorial jurisdiction, if not the phrase, dates from the First Congress,[76] and encompasses navigable waters and federal enclaves within the United States as well as areas beyond the territorial confines of the United States. Although the concept of the special maritime and territorial jurisdiction of the United States once embraced little more than places over which the United States enjoyed state-like legislative jurisdiction, U.S. navigable territorial waters, and vessels of the United States, its application has been statutorily expanded. It now supplies an explicit basis for the extraterritorial application of various federal criminal laws relating to:

- air travel (special aircraft jurisdiction of the United States);[77]

(...continued)

v. Ayesh, 702 F.3d 162, 166-67 (objective territorial and protective principles); United States v. Plummer, 221 F.3d 1298, 1305-307(11th Cir. 2000)(nationality and territorial principles); Chua Han Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984)(territorial, protective and nationality principles); United States v. Smith, 680 F.2d 255, 257-58 (1st Cir. 1982)(territorial and nationality principles); *Martinez*, 599 F. Supp. 2d at 800 (nationality, passive personality, and territorial principles).

[70] *Harvard Study* at 445.

[71] United States v. Yousef, 327 F.3d 56, 96 (2d Cir. 2003)(passive personality and territorial principles)("consistent with the passive personality principle of customary international jurisdiction because each of these counts involved a plot to bomb United States-flag aircraft that would have been carrying United States citizens and crews and that were destined for cities in the United States"); United States v. Hill, 279 F.3d 731, 739 (9th Cir. 2002)("In the instance case, the territorial, national, and passive personality theories combine to sanction extraterritorial jurisdiction"); United States v. Rezaq, 134 F.3d 1121, 1133 (D.C. Cir. 1998)(protective and passive personality principles).

[72] United States v. Shi, 525 F.3d 709, 722 (9th Cir. 2008); *Harvard Study* at 445.

[73] United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995).

[74] A list of the citations to such federal statutes is attached.

[75] The text of 18 U.S.C. §7 which defines the term "special maritime and territorial jurisdiction of the United States" is attached.

[76] 1 Stat. 113 (1790)(outlawing manslaughter committed in a place "under the sole and exclusive jurisdiction of the United States" and murder committed "upon the high seas").

[77] "In this chapter—

"(1) 'aircraft in flight' means an aircraft from the moment all external doors are closed following boarding—(A) (continued...)

- customs matters (customs waters of the U.S.);[78]
- U.S. spacecraft in flight;[79]
- evasive, stateless submersible vessels on the high seas;[80]
- overseas federal facilities and overseas residences of federal employees;[81]
- members of U.S. Armed Forces overseas and those accompanying them;[82]

(...continued)

through the moment when one external door is opened to allow passengers to leave the aircraft; or (B) until, if a forced landing, competent authorities take over responsibility for the aircraft and individuals and property on the aircraft.

"(2) 'special aircraft jurisdiction of the United States' includes any of the following aircraft in flight: (A) a civil aircraft of the United States. (B) an aircraft of the armed forces of the United States. (C) another aircraft in the United States. (D) another aircraft outside the United States—(i) that has its next scheduled destination or last place of departure in the United States, if the aircraft next lands in the United States; (ii) on which an individual commits an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft) if the aircraft lands in the United States with the individual still on the aircraft; or (iii) against which an individual commits an offense (as defined in subsection (d) or (e) of article I, section I of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) if the aircraft lands in the United States with the individual still on the aircraft. (E) any other aircraft leased without crew to a lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States.

"(3) an individual commits an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft) when the individual, when on an aircraft in flight—(A) by any form of intimidation, unlawfully seizes, exercises control of, or attempts to seize or exercise control of, the aircraft; or (B) is an accomplice of an individual referred to in subclause (A) of this clause," 49 U.S.C. §46501.

[78] "The term 'customs waters' means, [1] in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, [2] in the case of every other vessel, the waters within four leagues of the coast of the United States," 19 U.S.C. §1709(c).

[79] 18 U.S.C. §7(6)("Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard").

[80] "Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years or both." 18 U.S.C. §2285(a).

[81] "With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities," 18 U.S.C. §7(9).

[82] "(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—(1) while employed by or accompanying the Armed Forces outside the United States; or (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

"(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct (continued...)

- human trafficking and sex offenses abroad 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 the theme for a second category of federal criminal statutes with explicit extraterritorial application.[83] The range of these treaty-based federal crimes differs. Some have extraterritorial application only when the offender is an American.[84] Some address misconduct so universally condemned that they fall within federal jurisdiction regardless of any other jurisdictional considerations as long as the offender flees to the United States, is brought here for prosecution, or is otherwise "found in the United States" after the commission of the offense.[85] Some enjoy extraterritorial application under any of a number of these and other explicit jurisdictional circumstances.[86]

Members of another category of explicit extraterritorial federal criminal statutes either cryptically declare that their provisions are to apply overseas[87] 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.[88]

Maritime Drug Law Enforcement Act

The Maritime Drug Law Enforcement Act (MDLEA) is somewhat unusual in that it expressly authorizes extraterritorial coverage of federal criminal law predicated on nothing more than the consent of the nation with primary criminal jurisdiction.[89] MDLEA outlaws the manufacture, distribution, or possession with intent to manufacture or distribute controlled substances aboard vessels within the jurisdiction of the United States.[90] It defines vessels within the jurisdiction of

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(...continued)

constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

"(c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

"(d) No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless—(1) such member ceases to be subject to such chapter; or (2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter," 18 U.S.C. §3261.

[83] *E.g.*, 18 U.S.C. §1203 (hostage taking); 18 U.S.C. §175 (biological weapons); 18 U.S.C. §1091 (genocide); 18 U.S.C. ch.113C (torture).

[84] *E.g.*,18 U.S.C. §1091(d)(2)("the alleged offender is a national of the United States... ").

[85] *E.g.*, 18 U.S.C. §2340A(b)(2)("There is jurisdiction over the activity prohibited in subsection(a) if... (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender").

[86] *E.g.*, 18 U.S.C. §1203 (It is not an offense under this section [relating to hostage taking] if the conduct required for the offense occurred outside the United States unless—(A) the offender or the person seized or detained is a national of the United States; (B) the offender is found in the United States; or (C) the governmental organization sought to be compelled is the Government of the United States").

[87] *E.g.*, 18 U.S.C. §351(i)(relating to crimes of violence committed against Members of Congress, Supreme Court justices, and certain senior executive officials) ("There is extraterritorial jurisdiction over the conduct prohibited by this section").

[88] *E.g.*, 18 U.S.C. §175c (variola virus)(committed by or against a U.S. national; committed in or affecting interstate or foreign commerce; committed against federal property).

[89] 46 U.S.C. §§70501-70507.

[90] 46 U.S.C. §70503.

the United States not only in terms of ordinary U.S. maritime jurisdiction, but also envelops the maritime jurisdiction of other countries as long as they have consented to the application of the U.S. law aboard the vessel.[91] The definition also encompasses "vessels without nationality" sometimes referred to as "stateless" vessels, that is, vessels for which no national registry is effectively claimed.[92]

MDLEA provides the basis for Coast Guard drug interdiction efforts in the Caribbean and in the eastern Pacific off the coast of Central and South America.[93] The courts have concluded that MDLEA constitutes a valid exercise of Congress's constitutional authority to define and punish felonies on the high seas and offenses against the law of nations.[94] They are divided over whether the prosecution must show some nexus between the United States and the offense[95] and over the application of the subsection of the act that assigns jurisdictional determinations to the court rather than to the jury.[96]

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[91] "In this chapter, the term 'vessel subject to the jurisdiction of the United States' includes—(A) a vessel without nationality; (B) a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the 1958 Convention on the High Seas; (C) *a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States*; (D) a vessel located within the customs waters of the United States; (E) *a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States*; and (F) a vessel located in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999, and (i) is entering the United States, (ii) has departed the United States, or (iii) is a hovering vessel as defined in section 491 of the Tariff Act of 1930 (19 U.S.C. 1401)," 46 U.S.C. §70502(c)(1)(emphasis added); *e.g.*, United States v. Cardales-Luna, 632 F.3d 731, 736-37 (1st Cir. 2011).

[92] "In this chapter, the term, "vessel without nationality" includes—(A) a vessel aboard which the master or person in charge makes a claim of registry, which claim is denied by the flag nation whose registry is claimed; (B) any vessel aboard which the master or person in charge fails, upon request of an officer of the United States empowered to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and (C) a vessel aboard which the master or person in charge makes a claim of registry and the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality," 46 U.S.C. §70502(d)(1).

[93] *E.g.*, United States v. Olave-Valencia, 371 F. Supp. 2d 1224, 1226 (S.D. Cal. 2005)(Coast Guard interdiction 250 miles from the Honduras/Costa Rica border); United States v. Valencia-Aguirre, 409 F. Supp. 2d 1358, 1360 (M.D. Fla. 2006)(Coast Guard interdiction from a Navy frigate off the coast of Colombia); United States v. Perlaza, 439 F.3d 1149, 1152 (9th Cir. 2006) (Navy and Coast Guard ships engaged in drug interdiction in Pacific off the coasts of Ecuador, Colombia and Peru).

[94] U.S. CONST. art. I, §8, cl. 10; United States v. Ballestas, 795 F.3d 138, 146-47 (D.C. Cir. 2015); United States v. Ledesma-Cuesta, 347 F.3d 527, 532 (3d Cir. 2003); United States v. Moreno-Morillo, 334 F.3d 819, 824 (9th Cir. 2003); *cf.*, United States v. Matos-Luchi, 627 F.3d 1, 3 (1st Cir. 2010); *contra*, United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1249 (11th Cir. 2012)(concluding that "drug trafficking … falls outside the power of Congress under the Law of Nations Clause)(*Ballestas* concluded that, nevertheless, drug trafficking on the high seas falls within Congress's power under the Felonies Clause); *see also* United States v. Cardales-Luna, 632 F.3d at 738-51(Torruella, J. dissenting).

[95] United States v. Angulo-Hernández, 565 F.3d 2, 10-11(1st Cir. 2009)("Due process does not require the government to prove a nexus between a defendant's criminal conduct and the United States in a prosecution under MDLEA when the flag nation has consented to the application of United State law to the defendants"); United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002); United States v. Perez Oviedo, 281 F.3d 400, 402-3 (3d Cir. 2002); *contra* United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998); *see also* United States v. Ballestas, 795 F.3d 138, 147-48 (D.C. Cir. 2015)(finding it unnecessary to resolve the question since it considered the nexus requirement merely "a proxy for due process," whose arbitrariness or fundamental unfairness concerns were negated by the facts of the case before the court).

[96] 46 U.S.C. §70504(a); United States v. Perlaza, 439 F.3d 1149, 1165-166 (9th Cir. 2006)("After hearing all the evidence as to its status at a pretrial hearing, the district court determined that the Go-Fast was a stateless vessel. We find that by not submitting this issue to the jury, the district court erred. The evidence relating to the Go-Fast's statelessness presents precisely the kind of disputed factual question that *Smith* [United States v. Smith, 282 F.3d 758 (9th Cir. 2002)] requires a jury to resolve"); *contra* United States v. Tinoco, 304 F.3d 1088, 1110-111 and n.22 (11th Cir. (continued...)

Implied

At least until *Morrison* and *RJR Nabisco*, the lower courts understood *Bowman*[97] and *Ford*[98] to mean that a substantial number of other federal crimes operate overseas by virtue of the implicit intent of Congress. In fact, they construed *Bowman* and *Ford* to suggest 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.[99] They held, for instance, that the statute outlawing the assassination of Members of Congress may be applied against an American for a murder committed in a foreign country,[100] and that statutes prohibiting the murder or kidnaping of federal law enforcement officials apply in other countries even if the offenders are not Americans,[101] and even if the offenders simply incorrectly believed the victims were federal law enforcement officers.[102] They have also considered extraterritorial jurisdiction appropriate to (1) cases where aliens have attempted to defraud the United States in order to gain admission into the United States;[103] (2) false statements made by Americans overseas;[104] (3) the theft of federal property abroad;[105] (4) counterfeiting, forging, or otherwise misusing federal documents or checks overseas by either Americans or aliens;[106] and (5) murder of a foreign

(...continued)

2002)("Hence, although fact-bound determinations may be involved, that does not automatically mean that the 46 U.S.C.App. §1903 jurisdictional issue has to be decided by the jury ... Consequently, even if questions under the 46 U.S.C.App. §1903 jurisdictional requirement may have a factual component, that component does not have to be resolved by the jury, given that, as we have explained, the jurisdictional requirement goes only to the court's subject matter jurisdiction and does not have to be treated as an element of a MDLEA substantive offense ... We also note that our rejection of the appellant's argument concerning the fact-bound nature of 46 U.S.C.App. §1903 jurisdictional determinations appears to put us in conflict with one of our sister circuits... In *United States v. Smith*... [t]he Ninth Circuit concluded that the district court erred by taking the issue of whether the §1903 jurisdictional requirement had been met completely away from the jury"); *cf.*, United States v. Matos-Luchi, 627 F.3d at 5.

[97] United States v. Bowman, 260 U.S. 94 (1922)(the nature and purpose of a statute indicate whether Congress intended it to apply outside of the United States).

[98] Ford v. United States, 273 U.S. 593, 623 (1927)("a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done").

[99] United States v. Siddiqui, 699 F.3d 690, 700-701 (2d Cir. 2012)(internal citations omitted) (quoting *United States v. Bowman*)("The ordinary presumption that laws do not apply extraterritorially has no applications to criminal statutes. When the text of a criminal statute is silent, Congressional intent to apply the statute extraterritorially 'must be inferred from the nature of the offense'"); United States v. MacAllister, 160 F.3d 1304, 1308 n.8 (11th Cir. 1998)("On authority of *Bowman*, courts have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm").

[100] United States v. Layton, 855 F.2d 1388, 1395-397 (9th Cir. 1988) (At the time of the murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. §351(i)).

[101] *Siddiqui*, 699 F.3d at 699-701; United States v. Felix-Gutierrez, 940 F.2d 1200, 1204-206 (9th Cir. 1991); United States v. Benitez, 741 F.2d 1312, 1316-317 (11th Cir. 1984).

[102] United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994).

[103] United States v. Pizzarusso, 388 F.2d 8, 9-10 (2d Cir. 1968); Rocha v. United States, 288 F.2d 545, 549 (9th Cir. 1961); United States v. Khale, 658 F.2d 90, 92 (2d Cir. 1981); United States v. Castillo-Felix, 539 F.2d 9, 12-3 (9th Cir. 1976).

[104] United States v. Walczak, 783 F.2d 852, 854-55 (9th Cir. 1986).

[105] United States v. Cotten, 471 F.2d. 744, 749 (9th Cir. 1973)(U.S. citizen); United States v. Ayesh, 762 F. Supp. 2d 832, 838-41 (E.D. Va. 2011)(foreign national).

[106] United States v. Birch, 470 F.2d 808, 810-11 (4th Cir. 1972); United States v. Fernandez, 496 F.2d 1294, 1296 (5th Cir. 1954); United States v. Aguilar, 756 F.2d 1418, 1425 (9th Cir. 1985); *Castillo-Felix*, 539 F.2d at 12-3.

national in another nation designed to facilitate the operation of a criminal enterprise in the United States.[107] *RJR Nabisco* casts serious doubt on the continued validity of these assessments, at least the absence of some textual, structural, or contextual indication that Congress intended the statutes at issue to apply abroad.[108]

This is equally true to the implications of the earlier jurisprudence. A logical extension of earlier law would have been to conclude that statutes enacted to prevent and punish the theft of federal property apply worldwide. And there seemed no obvious reason why statutes protecting the United States from intentional deprivation of its property by destruction should be treated differently from those where the loss is attributable to theft.

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. Earlier cases occasionally expressed the view that an individual might be guilty of conspiracy to violate a federal law within the United States notwithstanding the fact he never entered the United States; it was enough that he was a member of a conspiracy to violate the American law.[109] The cases applied the same rationale to accessories to overseas federal crimes, and to piggyback offenses where criminal liability was predicated upon a crime that applies abroad.[110]

The Court in *RJR Nabisco* seemed to agree: "Congress's incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that [RICO's criminal prohibitions] app[y] to foreign racketeering activity—but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially."[111]

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[107] United States v. Leija-Sanchez, 602 F.3d 797, 801-802 (7th Cir. 2010).

[108] *RJR Nabisco*, 136 S. Ct. at 2100 ("When a statute gives no clear indication of an extraterritorial application, it has none"); *see also* United States v. Epskamp, 832 F.3d 154, 164-65 (2d Cir. 2016)(explaining that the structure and context of a criminal provision within the Controlled Substances Import and Export Act was sufficient to overcome the presumption of purely domestic application) .

[109] United States v. MacAllister, 160 F.3d 1304, 1307-308 (11th Cir. 1998); Ford v. United States, 273 U.S. 593, 620-24 (1927); United States v. Inco Bank & Trust Corp., 845 F.2d 919, 920 (11th Cir. 1988); United States v. Manuel, 371 F. Supp. 2d 404, 409 (S.D.N.Y. 2005).

[110] United States v. Ballestas, 795 F.3d 138, 144 (D.C. Cir. 2015)("[I]n the particular context of an ancillary offense like aiding and abetting or conspiracy, we have held that, generally, the extraterritorial reach of the ancillary offense is coterminous with that of the underlying criminal statute"); United States v. Shibin, 722 F.3d 233, 246-47 (4th Cir. 2013)(citing in accord United States v. Belfast, 611 F.3d 783, 814 (11th Cir. 2010))("Finally, §924(c)… criminalizes the use or possession of a firearm in connection with a crime of violence. It is an ancillary crime that depends on the nature and reach of the underlying crime. Thus, its jurisdictional reach is coextensive with the jurisdiction over the underlying crime… Thus, because Shibin could be prosecuted in the United States for hostage taking and maritime violence, he could also be prosecuted under §924(c) for possessing, using, or carrying a firearm in connection with those crimes"); United States v. Siddiqui, 699 F.3d 699, 701 (2d Cir. 2012)(18 U.S.C. §924(c)); United States v. Felix-Gutierrez, 940 F.2d 1200, 1204-207 (9th Cir. 1991)(accessory after the fact violation committed overseas); *but see* United States v. Ali, 718 F.3d 929, 942 (D.C. Cir. 2013)("Because conspiracy, unlike aiding and abetting, is not part of [the internationally recognized] definition [of piracy], and because §371 [the general conspiracy statute] falls short of expressly rejecting international law, *Charming Betsy*, [which establishes a presumption against any extraterritorial application which is contrary to international law,] precludes Ali's prosecution for conspiracy to commit piracy"). A list of citations to the piggyback offense statutes is attached.

[111] *RJR Nabisco*, 136 S. Ct. at 2102.

State Law

State criminal laws are less likely to apply overseas than federal laws.[112] State law produces fewer instances where a statute was clearly enacted with an eye to its application overseas and fewer examples where frustration of legislative purpose is the logical consequence of purely territorial application. The Constitution seems to have preordained this result when it vested responsibility for protecting American interests and fulfilling American responsibilities overseas in the federal government.[113]

The primacy of the federal government in foreign affairs might suggest that the Constitution precludes the application of state law in other countries, but the courts and commentators have recognized a limited power of the states to enact law governing conduct outside the United States.[114] Obviously, Congress may, by preemptive action, extinguish the legislative authority of a state in any area over which Congress has plenary powers. And the Supremacy Clause also renders treaties to which the United States is a party binding upon the states and therefore beyond their legislative reach.[115] The constitutional limitations aside, and in the absence of federal legislative action, however, "the question ... is one of whether the state actually intended to legislate extraterritorially, not whether it has the power to do so."[116]

The states have chosen to make their laws applicable beyond their boundaries in only a limited set of circumstances and ordinarily only in cases where there is some clear nexus to the state.[117]

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[112] The comparable question under state law is the extent to which a state's criminal law applies to activities occurring in another state.

[113] *See e.g.*, U.S. CONST. art. II, §2, cl.2 ("[t]he President... shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, [and] other public ministers and consuls ... ");

U.S. CONST. art. II, §3, cl.3 (" ... he shall receive Ambassadors and other public ministers ... ");

U.S. CONST. art. II, §2, cl.1 ("[he] shall be commander in chief of the Army and Navy of the United States ... ");

U.S. CONST. art. I, §8, cl.18 ("[t]he Congress shall have power.. to make all laws which shall be necessary and proper for carrying into execution [its] powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof");

U.S. CONST. art. I, §8, cl.10 ("[t]he Congress shall have power... to define and punish piracies and felonies committed on the high seas, and offences against the law of nations");

U.S. CONST. art. I, §8, cl.3 ("[t]he Congress shall have power... to regulate commerce with foreign nations ... ");

U.S. CONST. art. I, §8, cl.1 ("[t]he Congress shall have power to lay and collect... duties, imposts and excises, to pay the debts and provide for the common defence and general welfare ... ");

U.S. CONST. art. I, §8, cls.11, 12, 13, 14 ("[t]he Congress shall have power... to declare war ... ; to raise and support armies ... ; to provide and maintain a navy ... ; [and] to make rules for the government and regulation of the land and naval forces ... ").

[114] Skiriotes v. Florida, 313 U.S. 69, 77 (1941)("If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress"); State v. Flores, 218 Ariz. 407, 413-16, 188 P.3d 706, 712-15 (Ariz. App. 2009); State v. Jack, 125 P.3d 311, 318-19 (Alaska 2005); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L. J. 121, 128 (2007).

[115] "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding," U.S. CONST. art. VI, cl.2.

[116] B.J. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 617 (1966); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §402 comment k, n.5 (1987).

[117] The Model Penal Code section (attached) exemplifies the standards found in most state extraterritorial criminal (continued...)

Perhaps the most common state statutory provision claiming state extraterritorial criminal jurisdiction is one that asserts jurisdiction in cases where some of the elements of the offense are committed within the state's borders or others are committed elsewhere.[118] Another common claim is where an individual outside the state attempts or conspires to commit a crime within the state;[119] or one within the state attempts or conspires to commit a crime beyond its boundaries.[120] Still others define the state's extraterritorial jurisdiction to include instances where the victim of homicide, fatally wounded outside of the state, dies within it;[121] where property stolen elsewhere

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jurisdiction provisions. Several states have no general extraterritorial statute, but instead have statutory venue provisions indicating where criminal offenses with extraterritorial components may be tried, *e.g.*, Ala. Code §15-2-3 ("When the commission of an offense commenced in the State of Alabama is consummated without the boundaries of the state, the offender is liable to punishment therefor in Alabama; and venue in such case is in the county in which the offense was commenced, unless otherwise provided by law").

[118] *ALA. CODE §§15-2-3, 15-2-4; *ALASKA STAT. §12.05.010; ARIZ. REV. STAT. ANN. §13-108(A)(1); ARK. CODE ANN. §5-1-104(a)(1); CAL. PENAL CODE §27(a)(1); COLO. REV. STAT. §18-1-201(1)(a); DEL. CODE tit.11 §204(a)(1); FLA. STAT. ANN. §910.005(1)(a); GA. CODE §17-2-1(b)(1); HAWAII REV. STAT. §701-106(1)(a); IDAHO CODE §18-202(1); 720 ILL. COMP. STAT. ANN. §5/1-5(a)(1); IND. CODE ANN. §35-41-1-1(b)(1); IOWA CODE ANN. §803.1(1)(a); KAN. STAT. ANN. §21-5106(a)(1); KY. REV. STAT. §500.060(1)(a); LA. CODE CRIM. PRO. art. 611; ME. REV. STAT. ANN. tit.17-A §7(1)(A); MICH. COMP. LAWS ANN. §762.2(1)(a); MINN. STAT. ANN. §609.025(1); *MISS. CODE §§99-11-15, 99-11-17; MO. ANN. STAT. §541.191(1)(1); MONT. CODE ANN. §46-2-101; *NEV. REV. STAT. §§170. 015, 170.020; N.H. REV. STAT. ANN. §625:4(I)(A); N.J. STAT. ANN. §2C:1-3(a)(1); N.Y. CRIM. PRO. LAW §20.20(1)(a); *N.C. GEN. STAT. §15A-134; *N.D. CENT. CODE §29-03-01; OHIO REV. CODE §2901.11(A)(1); OKLA. STAT .ANN. tit.21 §151(1); ORE. REV. STAT. §131.215(1); PA. STAT. ANN. tit. 18 §102(a)(1); *S.D. CODIFIED LAWS §23A-16-2; *TENN. CODE ANN. §39-11-103(b); TEX. PENAL CODE §1.04 (a)(1); UTAH CODE ANN. §76-1-201(1)(a); VT. STAT. ANN. tit.13 §2; WASH. REV. CODE ANN. §9A.04.030; WIS. STAT. ANN. §939.03 (1)(a).

*Statutes which phrase the extraterritorial jurisdiction statement in terms of offenses commenced in one state and consummated in another state, rather than in terms of elements.

[119] ARIZ. REV. STAT. ANN. §13-108(A)(2)(attempt and conspiracy); ARK. CODE ANN.§5-1-104(a)(2),(3)(attempt and conspiracy); COLO. REV. STAT. §18-1-201(1)(b),(c)(attempt and conspiracy); DEL. CODE tit.11 §204(a)(2)(conspiracy); FLA. STAT. ANN. §910.005 (1)(b),(c)(attempt and conspiracy); GA. CODE §17-2-1(b)(2)(attempt); HAWAII REV. STAT. §701-106(1)(b),(c)(attempt and conspiracy); 720 ILL. COMP. STAT. ANN. §5/1-5(a)(2),(3)(attempt and conspiracy); IND. CODE ANN. §35-41-1-1(b)(2),(3)(attempt and conspiracy); IOWA CODE ANN. §803.1(1)(b),(c)(attempt and conspiracy); KAN. STAT. ANN. §21-5106(a)(2),(3)(attempt and conspiracy); KY. REV. STAT. §500.060(1)(b),(c)(attempt and conspiracy); ME. REV. STAT. ANN. tit.17-A, §7(1)(B), (C) (attempt and conspiracy); MICH. COMP. LAWS ANN. §762.2(1)(b), (c)(attempt and conspiracy); MO. ANN. STAT. §541.191(1)(2) (attempt and conspiracy); MONT. CODE ANN. §46-2-101(b)(attempt); N.H. REV. STAT. ANN. §625:4(I)(b), (c) (attempt and conspiracy); N.J. STAT. ANN. §2C:1-3(a)(2),(3) (attempt and conspiracy); OHIO REV. CODE §2901.11 (A)(3) (attempt and conspiracy); ORE. REV. STAT. §131.215(2), (3) (attempt and conspiracy); PA. STAT. ANN. tit.18 §102(a)(2), (3) (attempt and conspiracy); TEX. PENAL CODE §1.04(a)(2), (3) (attempt and conspiracy); UTAH CODE ANN. §76-1-201(1)(b), (c) (attempt and conspiracy); WIS. STAT. ANN. §939.03(1)(b)(conspiracy).

[120] ARIZ. REV. STAT. ANN. §13-108(A)(3)(attempt and conspiracy); ARK. CODE ANN.§5-1-104 (a)(4)(attempt and conspiracy); COLO. REV. STAT. §18-1-201(1)(d)(attempt and conspiracy); DEL. CODE tit.11 §204(a)(3)(attempt and conspiracy); FLA. STAT. ANN. §910.005 (1)(d)(attempt and conspiracy); GA. CODE §17-2-1(b)(3)(attempt); HAWAII REV. STAT. §701-106(1)(d) (attempt and conspiracy); IND. CODE ANN. §35-41-1-1(b)(4)(attempt and conspiracy); IOWA CODE ANN. §803.1(1)(e) (attempt and conspiracy); KY. REV. STAT. §500.060(1)(d)(attempt and conspiracy); ME. REV. STAT. ANN. tit.17-A, §7(1)(D) (attempt and conspiracy); MO. ANN. STAT. §541.191(1)(3)(attempt and conspiracy); MONT. CODE ANN. §46-2-101(c)(attempt and conspiracy); N.H. REV. STAT. ANN. §625:4(I) (c); N.J. STAT. ANN. §2C:1-3(a)(4) (attempt and conspiracy); OHIO REV. CODE §2901.11(A)(2) (attempt and conspiracy); ORE. REV. STAT. §131.215(4) (attempt and conspiracy); PA. STAT. ANN. tit.18 §102(a)(4)(attempt and conspiracy); R.I. GEN. LAWS §11-1-7 (conspiracy); TEX. PENAL CODE §1.04(a) (3); UTAH CODE ANN. §76-1-201(1)(d)(attempt and conspiracy).

[121] ARIZ. REV. STAT. ANN. §13-108(B); ARK. CODE ANN. §5-1-104(b); COLO. REV. STAT. §18-1-201(2); DEL. CODE tit.11 §204(c); FLA. STAT. ANN. §910.005(2); GA. CODE §17-2-1(c); HAWAII REV. STAT. §701-106(4); 720 ILL. COMP. STAT. ANN. §5/1-5(b); IND. CODE ANN. §35-41-1-1(c); IOWA CODE ANN. §803.1(2); KAN. STAT. ANN. §21-5106(c); KY. REV. STAT. §500.060(3); LA. CODE CRIM. PRO. art. 611; ME. REV. STAT. ANN. tit.17-A §7(3); MISS. CODE §99-11-21; MO. ANN. STAT. §541.191(2); MONT. CODE ANN. §46-2-101(2); N.H. REV. STAT. ANN. §625:4 (III); N.J. STAT. ANN.§2C:1-
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is brought into the state;[122] or where conduct outside the state constitutes the failure to comply with a legal duty imposed by state law.[123]

Investigation and Prosecution

Although a substantial number of federal criminal statutes have undisputed extraterritorial scope and a great many more until recently thought to have apparent extraterritorial range, 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:

> 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.[124]

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.[125] 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 70 mutual legal assistance treaties in force.[126] Their benefits

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3(d); N.Y. CRIM. PRO. LAW §20.20(2)(a); OHIO REV. CODE §2901.11 (B); ORE. REV. STAT. §131.235; PA. STAT. ANN. tit.18 §102(c); TEX.PENAL CODE §1.04(b); UTAH CODE ANN. §76-1-201(3).

[122] ALA. CODE §15-2-5; CAL. PENAL CODE §27(a)(2); IDAHO CODE §18-202(2); MISS. CODE §99-11-23; N.D. CENT. CODE. §29-03-01.1; OHIO REV. CODE §2901.11(A)(5); OKLA. STAT. ANN. tit.21 §151(2); R.I. GEN. LAWS §12-3-7; WASH. REV. CODE ANN. §9A.04.030(2); WIS. STAT. ANN. §939.03(1)(d).

[123] ARIZ. REV. STAT. ANN. §13-108(A)(4); ARK. CODE ANN. §5-1-104(a)(5); COLO. REV. STAT. §18-1-201(3); DEL. CODE tit.11 §204(a)(4); FLA. STAT. ANN. §910.005(3); GA. CODE §17-2-1(d); HAWAII REV. STAT. §701-106(1)(e); 720 ILL. COMP. STAT. ANN. §5/1-5(c); IND. CODE ANN. §35-41-1-1(b)(5); IOWA CODE ANN. §803.1(3); KAN. STAT. ANN. §21-5106 (d); KY. REV. STAT. §500.060(1)(e); ME. REV. STAT. ANN. tit.17-A §7(1)(E); MO. ANN. STAT. §541.191(1)(4); MONT. CODE ANN. §46-2-101(3); N.H. REV. STAT. ANN. §625:4(I) (e); N.J. STAT. ANN. §2C:1-3(a)(5); OHIO REV. CODE §2901.11(A)(4); ORE. REV. STAT. §131.215(5); PA. STAT. ANN. tit.18 §102(a)(5); TEX. PENAL CODE §1.04(c); UTAH CODE ANN. §76-1-201(4).

[124] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §432 cmt. b (1986). In the parlance of international law, term "state" refers to a nation rather than to one of the several states of the United States.

[125] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §432 cmt. c and rptrs. n.1 (1986) ("In a case that received wide attention, two French customs officials traveled to Switzerland on several occasions in 1980 to interrogate a former official of a Swiss bank, with a view to gaining information about French citizens believed to be hiding funds from the French tax and exchange control authorities. The person interrogated informed the Swiss federal prosecutor's office, which caused the Swiss police to arrest the French officials on their next visit. The officials were convicted of committing prohibited acts in favor of a foreign state, as well as of violations of the Swiss banking and economic intelligence laws. Even though the two French defendants were engaged in official business on behalf of the government of a friendly foreign state, they were given substantial sentences").

[126] *See generally* Michael Abbell, OBTAINING EVIDENCE ABROAD IN CRIMINAL CASES, ch.4 (2010). Jurisdictions with (continued...)

are typically available to state and federal law enforcement investigators though the Department of Justice's Office of International Affairs.[127] Initially negotiated to overcome impediments posed by foreign bank secrecy laws,[128] the treaties generally offer more than the collection and delivery of documents. They ordinarily provide similar clauses, with some variations, for locating and identifying persons and items;[129] service of process;[130] executing search warrants;[131] taking

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whom the United States has a bilateral mutual legal assistance treaty in force include Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belize, Belgium, Brazil, Bulgaria, Canada, China, Cyprus, the Czech Republic, Dominica, Egypt, Estonia, Finland, France, Germany, Greece, Grenada, Hong Kong, Hungary, Ireland, Israel, Italy, India, Jamaica, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, the Netherlands, Nigeria, Panama, the Philippines, Poland, Romania, Russia, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, South Africa, Spain, Switzerland, Thailand, Trinidad and Tobago, Turkey, the United Kingdom, the Cayman Islands, Anguilla, the British Virgin Islands, Montserrat, the Turks and Caicos Islands, Ukraine, Uruguay, and Venezuela, United States Department of State, TREATIES IN FORCE. (Jan. 1, 2013).

[127] 28 C.F.R. §0.64-1; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt*, Arts. 1(3), S. Treaty Doc. 106-19 ("Assistance shall be provided in connection with any conduct that is the subject of the investigation, prosecution, or proceeding under the laws of the Requesting State"); *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece*, art. 1(3), S. Treaty Doc. 106-18; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cyprus*, art. 1(3), S. Treaty Doc. 106-20; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cyprus*, art. 1(3),S. Treaty Doc. 106-35; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr*., art. 1(3), S. Treaty Doc. 106-36. Under a few agreements, treaty benefits may not be available during preliminary investigations or for want of dual criminality, *e.g.*, *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr*., art. 1, S. Treaty Doc. 106-7 (" ... mutual assistance in investigations and proceedings in respect of criminal offenses the punishment of which, at the time of the request for assistance, is a matter for the judicial authorities of the Requesting State"); *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech*., art. 1, S. Treaty Doc. 107-16 ("Assistance shall be provided without regard to whether the conduct that is the subject of the investigation, prosecution, or proceeding in the Requesting State would constitute an offense under the laws of the Requested State, except that the Requested State may refuse to comply in whole or in part with a request for assistance to the extent that the conduct would not constitute an offense under its laws and the execution of the request would require a court order for search and seizure or other coercive measures").

[128] Alan Ellis & Robert L. Pisani, The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis, 19 INT'L LAW. 189, 196-98 (1985); Ethan A. Nadelmann, Negotiations in Criminal Law Assistance Treaties, 33 AM. J. COMP. L. 467, 470-74 (1985); see also T. Markus Fund, Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges, FEDERAL JUDICIAL CENTER, INTERNATIONAL LITIGATION GUIDE, available at http://www.fjc.gov/public/pdf.nsf/lookup/mlat-lr-guide-funk-fjc-2014.pdf/$file/mlat-lr-guide-funk-fjc-2014.pdf.

[129] *E.g*., *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech.*, art. 13, S. Treaty Doc. 106-16 ("If the Requesting State seeks the location or identity of persons or items in the Requested State, the Requested State shall use its best efforts to ascertain the location or identity"); *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece*, art. 13, S. Treaty Doc. 106-18; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt*, art. 12, S. Treaty Doc. 106-19; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Rom*., art. 13, S. Treaty Doc. 106-20; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cyprus*, art. 13, S. Treaty Doc. 106-35; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr*., art. 14, S. Treaty Doc. 106-36.

[130] *E.g*., *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr.*, art. 15, S. Treaty Doc. 106-17 ("The Requested State shall serve procedural documents and judicial decisions sent to it for this purpose by the Requesting State ... "); *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech.*, art. 14, S. Treaty Doc. 106-16; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece*, art. 14, S. Treaty Doc. 106-18; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt*, art. 13, S. Treaty Doc. 106-19; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Rom*., art. 14, S. Treaty Doc. 106-20; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cyprus*, art. 14, S. Treaty Doc. 106-35; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr*., art. 15, S. Treaty Doc. 106-36; *see also* 31 U.S.C. §3158(k)(3)(i)("…the Attorney General may issue a… subpoena to any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank. (ii)… A… subpoena referred to in clause (i) may be served on the foreign bank … in a foreign country pursuant to any mutual legal assistance treaty, multilateral agreement, or other request of international law enforcement assistance"); *see, e.g.*, United States v. Sedaghaty, 728 F.3d 885, 916 (9th Cir. 2013).

[131] *E.g*., *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece*, art. 15, S. Treaty Doc. 106-18 (2000); (continued...)

witness depositions;[132] persuading foreign nationals to come to the United States voluntarily to present evidence here;[133] and forfeiture-related seizures.[134]

Letters Rogatory

Witness depositions may be taken in a foreign country using letters rogatory. Letters rogatory involve the formal request from the courts of one country to those of another asking that a witness's statement be taken. The procedure is governed by statute and rule.[135] It is often a resource of last resort. The process, through diplomatic channels, is time consuming, cumbersome, and lies within the discretion of the foreign court to which it is addressed.[136]

(...continued)

("The Requested State shall execute a request that it search for, seize, and transfer any item to the Requesting State if the request justifies such action under the laws of the Requested State ... "); *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech.*, art. 15, S. Treaty Doc. 106-16; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr.*, art. 10, S. Treaty Doc. 106-17; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt*, art. 14, S. Treaty Doc. 106-19; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Rom.*, art. 15, S. Treaty Doc. 106-20 (2000); *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cypru*s, art. 15, S. Treaty Doc. 106-35; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr*., art. 16, S. Treaty Doc. 106-36.

[132] *E.g*., *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt*, art. 8, S. Treaty Doc. 106-19("A person in the Requested State from whom testimony or evidence is requested pursuant to this Treaty shall be compelled, if necessary, under the laws of the Requested State to appear and testify or produce items, including documents, records, and articles of evidence ... "); *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech.*, art. 8, S. Treaty Doc. 106-16; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr.*, art. 9(2), S. Treaty Doc. 106-17; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece*, art. 8, S. Treaty Doc. 106-18; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Rom*., art. 8, S. Treaty Doc. 106-20; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cypru*s, art. 8, S. Treaty Doc. 106-35; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr*., art. 9, S. Treaty Doc. 106-36.

[133] *E.g*., *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Belize*, art. 10, S. Treaty Doc. 106-19 ("1. When the Requesting State requests the appearance of a person in that State, the Requested State shall invite the person to appear before the appropriate authority in the Requesting State ... "); *see also Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech.*, Art. 10, S.Treaty Doc. 107-16 (person may be served or detained except as stated in the request); *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Venez.*, art. X, S. Treaty Doc. 105-38.

[134] *E.g*., *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cypru*s, art. 17(2), S. Treaty Doc. 106-35 (2000) ("The Parties shall assist each other to the extent permitted by their respective laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offense, restitution to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions. This may include action to temporarily immobilize the proceeds or instrumentalities pending further proceedings"); *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece*, art. 17, S. Treaty Doc. 106-18 ; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech.*, art. 17, S. Treaty Doc. 106-16; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr.*, art. 11, S. Treaty Doc. 106-17; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt*, art. 16, S. Treaty Doc. 106-19; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Rom*., Art. 17, S. Treaty Doc. 106-20; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr*., art. 18, S. Treaty Doc. 106-36.

[135] 28 U.S.C. §1781, 1782; Fed. R. Civ. P. 28(b).

[136] *See generally* Abbell, *supra* note 127, at §3-3; United States Department of State, *Preparation of Letters Rogatory*, at https://travel.state.gov/content/travel/en/legal-considerations/judicial/obtaining-evidence/preparation-letters-rogatory.html. One commentator has observed that, "parties utilizing letters rogatory must simply cross their fingers and hope that the foreign nation will provide the evidence in a timely fashion and in an admissible form. Historically, the absence of a reliable evidence-gathering mechanism often stymied prosecutorial efforts, making it not unusual for the U.S. government to simply forgo transnational prosecutions," L. Song Richardson, *Due Process for the Global Crime Age: A Proposal*, 41 CORNELL INT'L L. J. 347 (2008); *see also* United States v. el-Mezain, 664 F.3d 467, 517 (5th Cir. 2011)(quoting *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 531 (1987))("The letter rogatory process has been described as 'complicated, dilatory, and expensive'").

Cooperative Efforts

American law enforcement officials have historically used other, often less formal, cooperative methods overseas to investigate and prosecute extraterritorial offenses.[137] 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. For example, the Justice Department's Criminal Division has resident legal advisors in 45 countries abroad;[138] and the Federal Bureau of Investigation (FBI) now operates legal attache offices in 78 foreign cities;[139] the Drug Enforcement Administration (DEA) has offices in 92 cities overseas;[140] the U.S. Immigration and Customs Enforcement agency operates out of 75 locations;[141] and the Secret Service has 20 such offices.[142]

A few regulatory agencies with law enforcement responsibilities have working arrangements with their foreign counterparts. The Securities and Exchange Commission, for instance, with 105 similar foreign regulatory entities, is a signatory of the International Organization of Securities Commissions' multilateral memorandum of understanding (IOSCO MMOU) for enforcement cooperation and the exchange of information.[143]

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 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.[144] The authorization extends to the issuance of:

- search warrants;
- court 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.[145]

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[137] *See generally* Abbell, *supra* note 127, at §3-1.

[138] Office of Overseas Prosecutorial Development, Assistance and Training, https://www.justice.gov/criminal-opdat.

[139] Federal Bureau of Investigation, *Legal Attache Offices* at https://www.fbi.gov/contact-us/legal-attache-offices.

[140] Drug Enforcement Administration, *DEA Office Locations* at https://www.dea.gov/about/foreignoffices.shtml.

[141] U.S. Immigration and Customs Enforcement, at http://www.ice.gov/about/offices/homeland-security-investigatons/oia/.

[142] U.S. Secret Service, *Secret Service Presence*, 2015 ANNUAL REPORT, available at http://www.secretservice.gov/data/press/reports/USSS_FY2015AR.pdf.

[143] International Organization of Securities Commissions, https://www.iosco.org/about/?subsection=mmou; *see also* U.S. Securities and Exchange Commission, *International Enforcement Assistance* at http://www.sec.gov/about/offices/oia/oia_crossborder.htm#mechanisms.

[144] P.L. 111-79, 123 Stat. 2086 (2009), 18 U.S.C. §3512.

[145] 18 U.S.C. §3512(a)(2). In the absence of a treaty nexus, the reach of the authority may be subject to constitutional limitations, *e.g.*, U.S. CONST. art. III, §2.

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 "previous significant voluntary connections with the United States."[146]

The Fourth Amendment's application 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[147] nor its exclusionary rule[148] were considered applicable to overseas searches and seizures conducted by foreign law enforcement officials,[149] except under two circumstances. The first covered foreign conduct which "shocked the conscience of the court."[150] 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.[151] The cases seldom explained whether these exceptions operated under all circumstances or only when searches or seizures involved the person or property of U.S. nationals. In the days when MLATs were scarce, however, the courts rarely, if ever, encountered circumstances sufficient to activate either exception.

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.[152]

Prior to *Verdugo-Urquidez,* there seems to have been general agreement among the lower federal appellate courts that the Fourth Amendment governed the foreign search and seizure of the person

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[146] United States v. Verdugo-Urquidez, 494 U.S. 259, 274-75 (1990); *see also* United States v. Rojas, 812 F.3d 382, 397 (5th Cir. 2016)(quoting *Verdugo-Urquidez*)("[T]he Fourth Amendment does not apply to searches and seizures of nonresident aliens who have 'no previous significant voluntary connection with the United States'"); United States v. Stokes, 726 F.3d 880, 892 (7th Cir. 2013); United States v. Valencia-Trujillo, 573 F.3d 1171, 1183 (11th Cir. 2009).

[147] Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965).

[148] United States v. Janis, 428 U.S. 433, 455-56 n.31 (1976)(" ... It is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or foreign government commits the offending act"); United States v. Callaway, 446 F.2d 753, 755 (3d Cir. 1971); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976); Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978); United States v. Marzano, 537 F.2d 257, 269-71 (7th Cir. 1976); United States v. Rose, 570 F.2d 1358, 1361-62 (9th Cir. 1978); United States v. Hensel, 699 F.2d 18, 25 (1st Cir. 1983); United States v. Mount, 757 F.2d 1315, 1317-18 (D.C. Cir. 1985); United States v. Delaplane, 778 F.2d 570, 573 (10th Cir. 1985); United States v. Rosenthal, 793 F.2d 1214, 1231 (11th Cir. 1986).

[149] Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1969)("Neither the Fourth Amendment to the United States Constitution nor the exclusionary rule of evidence, designed to deter federal officers from violating the Fourth Amendment, is applicable to the acts of foreign officials").

[150] *Callaway*, 446 F.2d at 755; *Morrow*, 537 F.2d at 139; *Stowe*, 588 F.2d at 341; *Rose*, 570 F.2d at1362; *Hensel*, 699 F.2d at 25; *Delaplane*, 778 F.2d at 573-74; *Rosenthal*, 793 F.2d at 1231-32.

[151] *Stonehill*, 405 F.2d at 743; *Callaway*, 446 F.2d at 755; *Morrow*, 537 F.2d at 139; *Rose*, 570 F.2d at 1362; *Hensel*, 699 F.2d at 25; *Mount*, 757 F.2d at 1317-18; *Delaplane*, 778 F.2d at 573-74; *Rosenthal*, 793 F.2d at 1231-32.

[152] United States v. Alexander, 817 F.3d 1178, 1182 (9th Cir. 2016); United States v. Rojas, 812 F.3d 382, 397 (5th Cir. 2016); United States v. Stokes, 726 F.3d 880, 890-91 (7th Cir. 2013); United States v. Valdivia, 680 F.3d 33, 51 (1st Cir. 2012); United States v. Ferguson, 508 F. Supp. 2d 1, 4 (D.D.C. 2007); *but see* United States v. Getto, 729 F.3d 221, 233 (2d Cir. 2013)("We, therefore, decide again not to adopt the joint venture doctrine and, instead, reaffirm the longstanding principles of 'virtual agency' and intentional constitution evasion described in this opinion as the applicable analytic rubric to determine whether 'cooperation with foreign law enforcement officials may implicate constitutional restrictions.'").

or property of U.S. citizens by U.S law enforcement officials.[153] Since then, the question more often has been not whether the Fourth Amendment governs, but what it demands.

With some exceptions, a warrant issued by the neutral magistrate upon a finding of probable cause is the hallmark of a reasonable Fourth Amendment search or seizure in this country.[154] Two concurring opinions in *Verdugo-Urquidez* and subsequent lower court endorsements suggest that the warrant requirement does not apply to searches by U.S. officials in other countries,[155] at least where the Federal Rules of Criminal Procedure or other authority do not authorize the issuance of a warrant.[156]

Nevertheless, "the Fourth Amendment's reasonableness standard applies to United States officials conducting a search affecting a United States citizen in a foreign country."[157] 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."[158]

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 abroad to foreign officials,[159] subject to the same "joint venture"[160] and

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[153] United States v. Conroy, 589 F.2d 1258, 1264 (5th Cir. 1979); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 157 (D.D.C. 1976).

[154] City of Los Angeles v. Patel, 135 S. Ct. 2443, 2451-452 (2015); Riley v. California, 134 S. Ct. 2473, 2482 (2014).

[155] United States v. Verdugo-Urquidez, 494 U.S. 247, 278 (1990) (Kennedy, J., concurring)("The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country"); *id*. at 279 (Stevens, J., concurring in the judgment)("I do agree, however, with the Government's submission that the search conducted by the United States agents with the approval and cooperation of the Mexican authorities was not 'unreasonable' as that term is used in the first Clause of the Amendment. I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches"); *In re* Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157, 167-71 (2d Cir. 2008); United States v. Stokes, 726 F.3d 880, 892-93 (7th Cir. 2013).

[156] Rule 41(b) of the Federal Rules of Criminal Procedure was amended in 2008 with the addition of Rule 41(b)(5) authorizing the issuance of warrants for seizures outside of the United States: "(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government: … (5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following: (A) a United States territory, possession, or commonwealth; (B) the premises-no matter who owns them-of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or (C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state."

[157] *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d at 167-72; *see also Stokes*, 726 F.3d at 893; United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995).

[158] United States v. Juda, 46 F.3d 961, 968 (9th Cir. 1995); United States v. Castro, 175 F. Supp. 2d 129, 133-34 (D.P.R. 2001).

[159] United States v. Straker, 800 F.3d 570, 614 (D.C. Cir. 2015); United States v. Frank, 599 F.3d 1221, 1228 (11th Cir. 2010); United States v. Abu Ali, 528 F.3d 210, 227-28 (4th Cir. 2008); United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003); United States v. Martindale, 790 F.2d 1129, 1131-132 (4th Cir. 1986); United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980); United States v. Mundt, 508 F.2d 904, 906 (10th Cir. 1974); United States v. McVicker, 979 F. Supp. 2d 1154, 1180 (D. Ore. 2013); United States v. Bary, 978 F. Supp. 2d 356, 366 (S.D.N.Y. 2013).

"shocked conscience" exceptions.[161] The Fifth Amendment and *Miranda* requirements do apply to custodial interrogations conducted abroad by American officials regardless of the nationality of the defendant.[162] Finally, as a general rule, to be admissible at trial in this country, any confession or other incriminating statements must have been freely made.[163]

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

As a general rule, prosecution of federal crimes must begin within five years.[164] Federal capital offenses, certain federal sex offenses, and various violent federal terrorist offenses, however, may be prosecuted at any time.[165] Prosecution of nonviolent federal terrorism offenses must begin within eight years.[166] Moreover, the statute of limitations is suspended or tolled during any period in which the accused is a fugitive.[167]

(...continued)

[160] *Straker*, 800 F.3d at 615; *Frank*, 599 F.3d at 1228-229; *Abu Ali*, 528 F.3d at 227-28; *Yousef*, 327 F.3d at 145-46; *Heller*, 625 F.2d at 599; United States v. Covington, 783 F.2d 1052, 1056 (9th Cir. 1986); *Mundt*, 508 F.2d at 906-907; *McVicker*, 979 F. Supp. 2d at 1180; *Bary*, 978 F. Supp. 2d at 366.

[161] *Frank*, 599 F.3d at 1228; *Abu Ali*, 528 F.3d at 227-28; *Yousef*, 327 F.3d at 145-46 (citing, United States v. Cotroni, 527 F.2d 708, 712 n.10 (2d Cir. 1975)); *Heller*, 625 F.2d at 599; *McVicker*, 979 F. Supp. 2d at 1180; *Bary*, 978 F. Supp. 2d at 366.

[162] *In re* Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157, 201-2 (2d Cir. 2008); *Yousef*, 327 F.3d at 145-46; United States v. Clarke, 611 F. Supp. 2d 12, 28-9 (D.D.C. 2009); *cf.*, United States v. Dire, 680 F.3d 446, 473-75 (4th Cir. 2012); *but see* United States v. Mosquera-Murillo, 153 F. Supp. 3d 130, 192-93 (D.D.C. 2015)("The D.C. Circuit has not definitively decided whether 'the Fifth Amendment privilege against self-incrimination protects nonresident aliens facing criminal trial in the United States, when, as here, the question by federal authorities took place abroad,' nor '[r]elatedly,' whether '*Miranda* applies to statements obtained by U.S. authorities from suspects held in foreign custody abroad.' *Straker*, 800 F.3d at 613 (assuming without deciding that *Miranda* applies in such situations). Here, however, the government concedes 'the Fifth Amendment's protections against self-incrimination extend to non-U.S. citizens, such as Chang-Rendon, facing criminal prosecution in the United States when the questioning by U.S. authorities occurs outside the United States'").

[163] Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973)("the ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has will to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of confession offends due process"); United States v. Siddiqui, 699 F.3d 690, 706-707 (2d Cir. 2012); *Abu Ali*, 528 F.3d at 232; United States v. Lopez, 437 F.3d 1059, 1063-64 (10th Cir. 2006); United States v. Jacobs, 431 F.3d 99, 108 (3d Cir. 2005); United States v. Thompson, 422 F.3d 1285, 1295-296 (11th Cir. 2005); United States v. Garcia Abrego, 141 F.3d 142, 170-71 (5th Cir. 1998); United States v. Karake, 443 F. Supp. 2d 8, 85-6 (D.D.C. 2006); United States v. Marzook, 435 F. Supp. 2d 708, 741 (N.D. Ill. 2006)("interrogation accompanied by physical violence is presumptively involuntary").

[164] 18 U.S.C. 3282.

[165] 18 U.S.C. §3281 (capital offenses); 18 U.S.C. §3299 (felony violations of 18 U.S.C. chs. 109A, 110, 117 and §§1201 (if the victim is a child) and 1591); 18 U.S.C. §3286(b)(prosecution of any of the offenses listed in 18 U.S.C. §2332b(g)(5)(B) whose commission created a foreseeable risk of serious injury or resulted in such injury). Section §2332b(g)(5)(B) lists more than 40 federal criminal offenses including crimes such as violence in international airports (18 U.S.C. §37), assassination of the President (18 U.S.C. §1751), providing material support to terrorist organizations (18 U.S.C. §2339B).

[166] 18 U.S.C. §3286(a)(violation of an offense listed in 18 U.S.C. §2332b(g)(5)(B) whose commission does not create a foreseeable risk of serious injury or result in such injury).

[167] 18 U.S.C. §3290. Most courts construe section 3290 to require flight with an intent to avoid prosecution or a departure from the place where the offense occurred with the knowledge that an investigation is pending or being conducted, United States v. Florez, 447 F.3d 145, 150-52 (2d Cir. 2006)(citing authority in accord). Thus, a suspect in the case of an federal extraterritorial offense is not likely to be considered a fugitive, if he simply remains in the country were of the offense was committed.

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:

> Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.[168]

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.[169] 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.[170] The government must show by a preponderance of the evidence that the purpose of the request is to obtain evidence located overseas.[171] Because of the built-in time limits, however, the government need not show that it acted diligently in its attempts to gather overseas evidence.[172] The circuits are divided over whether the section may be used to revive a statute of limitations by filing a request after the statute has run,[173] and over whether the section can be used to extend the statute of limitations with respect to evidence that the government has already received at the time it filed the request.[174] At least one circuit has held that the statutory reference to "the district court before which a grand jury is impaneled to investigate the offense" is intended to identify the court that may issue the suspension order and does not limit the statute to requests filed in aid of a pending grand jury investigation.[175]

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[168] 18 U.S.C. §3292(a)(1).

[169] 18 U.S.C. §3292(c)("The total of all periods of suspension under this section with respect to an offense—(1) shall not exceed three years; and (2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section"); United States v. Jenkins, 633 F.3d 788, 797 (9th Cir. 2011); United States v. Baldwin, 414 F.3d 791, 795 (7th Cir. 2005); United States v. Grenoble, 413 F.3d 569, 574-75 (6th Cir. 2005).

[170] 18 U.S.C. §3292(b).

[171] United States v. Broughton, 689 F.3d 1260, 1273 (11th Cir. 2012)("A plain reading of §3292 demonstrates that a district court's decision to suspend the running of a statute of limitations is limited to two considerations: 1) whether an official request was made; and 2) whether that official request was made for evidence that reasonably appears to be in the country to which the request was made"); United States v. Lyttle, 667 F.3d 220, 224 (2d Cir. 2012); United States v. Jenkins, 633 F.3d 788, 797-98 (9th Cir. 2011); United States v. Trainor, 376 F.3d 1325, 1332-334 (11th Cir. 2004).

[172] United States v. Hagege, 437 F.3d 943, 955 (9th Cir. 2006).

[173] United States v. Jenkins, 633 F.3d 788, 799 (9th Cir. 2011)(emphasis added)("[T]he only temporal requirements of a §3292 application are (1) that the *official request* for evidence in a foreign country be made before the statute of limitations expires and (2) that the application for suspension be submitted to the district court before the indictment is filed"); United States v. Kozeny, 541 F.3d 166, 174 (2d Cir. 2008)(emphasis added)("We therefore conclude that the plain language of 18 U.S.C. §3292 requires that an application to suspend the running of the statute of limitations be filed before the limitations period has expired"); United States v. Hoffecker, 530 F.3d 137, 163 n.4 (3d Cir. 2008)("[T]here is no reason why a case seemingly barred by the statute of limitations cannot be revived by a §3292 application made before the Government has received all of the requested foreign evidence").

[174] United States v. Atiyeh, 402 F.3d 354, 362-66 (3d Cir. 2005)(holding that the statute of limitations may not be suspended under section 3292 when the request for foreign assistance is submitted after the evidence has in fact been received); *contra*, United States v. Miller, 830 F.2d 1073, 1076 (9th Cir. 1987); United States v. DeGeorge, 380 F.3d 1203, 1213 (9th Cir. 2004).

[175] United States v. DeGeorge, 380 F.3d 1203, 1214 (9th Cir. 2004).

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.[176] The United States has bilateral extradition treaties with roughly two-thirds of the nations of the world.[177] 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.[178] Subsequently negotiated agreements either require extradition regardless of where the offense occurs,[179] permit extradition regardless of where the offense occurs,[180] or require extradition where the extraterritorial laws of the two nations are compatible.[181]

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.

Federal crimes committed within other countries are more likely than not to be the work of those who live there. Yet, the "most common type of treaty provision provides that neither of the contracting parties shall be bound to deliver up its own citizens or subjects."[182] Most treaties negotiated of late, however, contain either an article declaring that extradition may not be denied on the basis of nationality[183] or one declaring that if extradition is denied on the basis of nationality, the case must be referred to local authorities for prosecution.[184]

"The political offense exception is now a standard clause in almost all extradition treaties of the world."[185] Originally designed to protect unsuccessful insurgents in flight,[186] it is often construed

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[176] See generally CRS Report 98-958, *Extradition To and From the United States: Overview of the Law and Contemporary Treaties*, by Michael John Garcia and Charles Doyle.

[177] 18 U.S.C. §3181 note (listing the countries with which the United States has an extradition treaty).

[178] Michael Abbell, EXTRADITION TO AND FROM THE UNITED STATES, §§3-2(5), 6-2(5) (2010).

[179] *E.g.*, *Extradition Treaty, U.S.-Jordan*, art.2(4), S. Treaty Doc. 104-3 ("An offense described in this Article shall be an extraditable offense regardless of where the act or acts constituting the offense were committed"); *Extradition Treaty, U.S.-Austria*, art.2(6), S. Treaty Doc. 105-50; *Extradition Treaty, U.S.-Lux.*, art.2(1), S. Treaty Doc. 105-10.

[180] *Extradition Treaty, U.S.-Hung.*, art.2(4), S. Treaty Doc. 104-5 ("If the offense has been committed outside the territory of the Requesting State, extradition shall be granted if the laws of the Requested State provide for the punishment of an offense committed outside of its territory in similar circumstances. If the laws of the Requested State do not so provide, the executive authority of the Requested State may, in its discretion grant extradition"); *Extradition Treaty, U.S.-Bah.*, art.2(4), S. Treaty Doc. 102-17.

[181] *Extradition Treaty, U.S.-Fr.*, art.2(4), S. Treaty Doc. 105-13 ("Extradition shall be granted for an extraditable offense committed outside the territory of the Requesting State, when the laws of the Requested State authorize the prosecution or provide the punishment for that offense in similar circumstances").

[182] M. Cherif Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 746 (6th ed. 2014).

[183] *E.g.*, *Extradition Treaty, U.S.-Peru*, art. III, S. Treaty Doc. 107-6 ("Extradition shall not be refused on the ground that the person sought is a national of the Requested State"); *Extradition Treaty, U.S.-Belize*, art. 3, S. Treaty Doc. 106-38; *Extradition Treaty, U.S.-Para.*, art. III, S. Treaty Doc. 106-4.

[184] *Extradition Treaty, U.S.-Kor.*, art. 3, S. Treaty Doc. 106-2 ("1. Neither Contracting State shall be bound to extradite its own nationals, but the Requested State shall have the power to extradite such person if, in its discretion, it be deemed proper to do so. 2. If extradition is refused solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its authorities for prosecution. 3. Nationality shall be determined at the time of the commission of the offense for which extradition is requested"); *Extradition Treaty, U.S.-Pol.*, art. 4, S. Treaty Doc. 105-14; *Extradition Treaty, U.S.-Fr.*, art. 3, S. Treaty Doc. 105-13.

[185] BASSIOUNI, *supra* note 183, at 670.

to include both the purely political offense such as treason and sedition and related political offenses such as an act of violence committed during the course of, and in furtherance of, a political upheaval.[187] The exception is somewhat at odds with contemporary desires to prevent, prosecute, and punish acts of terrorism. Consequently, treaties forged over the last several years frequently include some form of limitation on the exception, often accompanied by a discretionary right to refuse politically or otherwise discriminatorily motivated extradition requests.[188]

Current U.S. extradition treaties signed prior to the 1980s list specific crimes to which the treaty is limited.[189] In the nation's first extradition treaty the list was limited to murder and forgery;[190] toward the end of the 20th century the standard lists had grown close to more than 30 crimes.[191] Treaties agreed to more recently opt for a generic description.[192]

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.[193] In the absence of a specific treaty provision, the fact

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[186] Quinn v. Robinson, 783 F.2d 776, 792-93 (9th Cir. 1986)("The political offense exception is premised on a number of justifications. First, its historical development suggests that it is grounded on the belief that individuals have a right to resort to political activism to foster political change. This justification is consistent with the modern consensus that political crimes have greater legitimacy than common crimes. Second, the exception reflects a concern that individuals—particularly unsuccessful rebels—should not be returned to countries where they may be subjected to unfair trials and punishments because of their political opinions. Third, the exception comports with the notion that governments—and certainly their non-political branches—should not intervene in the internal political struggles of other nations").

[187] BASSIOUNI, *supra* note 183, at 669-738.

[188] *E.g.*, *Extradition Treaty, U.S.-S.Afr.*, art. 4, S. Treaty Doc. 106-24 ("1. Extradition shall not be granted if the offense for which extradition is requested is a political offence. 2. For the purpose of this Treaty, the following offenses shall not be considered political offenses: (a) a murder or other violent crime against a Head of State or Deputy Head of State of the Requesting or Requested State, or against a member of such person's family; (b) an offence for which both the Requesting and Requested States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their respective competent authorities for decision as to prosecution; (c) murder; (d) an offense involving kidnaping, abduction, or any form of unlawful detention, including the taking of a hostage; and (e) attempting or conspiring to commit, aiding, abetting, inducing, counseling or procuring the commission of, or being an accessory before or after the fact of such offences. 3. Notwithstanding the terms of sub-article 2, extradition shall not be granted if the executive authority of the Requested State determines that there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, or political opinion"); *Extradition Treaty, U.S.-Pol.*, art. 5, S. Treaty Doc. 105-14 (motivation clause is limited to politically motivated); *Extradition Treaty, U.S.-Sri Lanka*, art. 4, S. Treaty Doc. 106-34 (only Heads of State clause, clauses identifying particular international obligations, and a conspiracy-attempt-accessory clause)(motivation clause is limited to politically motivated requests).

[189] Abbell, *supra* note 187, at §3-2(2).

[190] 8 Stat. 116, 129 (1794).

[191] *Extradition Treaty, U.S.-U.K.*, 28 U.S.T. 227, 235(1977)(29 crimes); *Extradition Treaty, U.S.-Nor.*, 31 U.S.T. 5619, 5634 (1980)(33 crimes); *Extradition Treaty, U.S.-F.R.G.*, 32 U.S.T. 1485, 1515 (1980)(33 crimes).

[192] *E.g.*, *Extradition Treaty, U.S.-Austria*, art. 2(1), S. Treaty Doc. 105-50 ("Extradition shall be granted for offenses which are subject under the laws in both Contracting Parties by deprivation of liberty for a period of more than one year or by a more severe penalty"); *Extradition Treaty, U.S.-Malay.*, art. 2(1), S. Treaty Doc. 104-26; *Extradition Treaty, U.S.-Zimb.*, art. 2(1), S. Treaty Doc. 105-33.

[193] United States v. Shibin, 722 F.3d 233, 243 (4th Cir. 2013)(Somali police turned the defendant to the FBI); United States v. Struckman, 611 F.3d 560, 565-67 (9th Cir. 2010); United States v. Mejia, 448 F.3d 436, 439 (D.C. Cir. 2006)(Panamanian authorities arrested the defendants and turned them over to DEA officers in Panama who flew them to the U.S.); United States v. Arbane, 446 F.3d 1223, 1225 (11th Cir. 2006)(Ecuadorian officials deported the defendant to Iran on a plane scheduled to stop in the U.S. where the defendant was arrested); United States v. Matta-Ballesteros, (continued...)

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.[194]

Venue

Federal crimes committed within the United States must be tried where they occur.[195] Crimes committed outside the United States are tried where Congress has provided.[196] 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.[197] The phrase "first brought" as used in section 3238 means "first brought while in custody."[198] The phrase "is arrested" applies when the accused is initially

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71 F.3d 754, 761 (9th Cir. 1995)(Honduran military and U.S. Marshals seized the defendant in Honduras and the Marshals flew him to the U.S. by way of the Dominican Republic); United States v. Chapa-Garza, 62 F.3d 118, 120 (5th Cir. 1995)(Mexican authorities deported the defendant to the United States); United States v. Pomeroy, 822 F.2d 718, 720 (8th Cir. 1987)(Canadian authorities deported the defendant to the United States); United States v. Valot, 625 F.2d 308, 309 (9th Cir. 1980)(Thai immigration authorities handed the defendant over to DEA agents in the Bangkok airport who flew him to the United States "over his protest").

[194] United States v. Alvarez-Machain, 504 U.S. 655, 669-70 (1992)(portions of the footnote 25 of the Court's opinion in brackets)("Mexico has protested the abduction of respondent through diplomatic notes, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch. [The Mexican Government has also requested from the United States the extradition of two individuals it suspects of having abducted respondent in Mexico on charges of kidnaping...]... The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States"); *see also* United States v. Odoin, 782 F.3d 1226, 1231-32 (11th Cir. 2015); United States v. Bout, 731 F.3d 233, 240 (2d Cir. 2013); *Shibin*, 722 F.3d at 243-44; *Struckman*, 611 F.3d at 571 (internal citations omitted)("[T]he manner by which a defendant is brought to trial does not affect the government's ability to try him. We have, however, recognized exceptions to the *Ker/Frisbie* doctrine if either: (1) the transfer of the defendant violated the applicable extradition treaty, or (2) the United States government engaged in misconduct of the most shocking and outrageous kind to obtain his presence"); *Mejia*, 448 F.3d at 442-43; United States v. Best, 304 F.3d 308, 311-16 (3d Cir. 2002); United States v. Torres Gonzalez, 240 F.3d 14, 16 (1st Cir. 2001).

[195] U.S. CONST. art. III, §2, cl.3; amend.VI.

[196] "The Trial of all 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*." U.S. CONST. art. III, §2, cl.3 (emphasis added); "In all criminal prosecutions, the accused shall enjoy the right to… 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…" *Id*. at amend.VI.

[197] "The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia," 18 U.S.C. §3238. United States v. Hisin-Yung, 97 F. Supp. 2d 24, 28 (D.C. Cir. 2000)("The two clauses [in the statute] provide alternative proper venues. Therefore, if the latter provision is relied on, and defendant is indicted before he is brought into the United States, he may be tried in the district in which he was indicted regardless of whether it is the district in which he is first brought into the United States"); *see also* United States v. Gurr, 471 F.3d 144, 155 (D.C. Cir. 2007); United States v. Hilger, 867 F.2d 566, 568 (9th Cir. 1989); United States v. Fraser, 709 F.2d 1556, 1558 (6th Cir. 1983); United States v. McRary, 616 F.2d 181, 185 (5th Cir. 1980).

[198] United States v. Feng, 277 F.3d 1151, 1155 (9th Cir. 2002)("The word 'brought' under the statute means first brought into a jurisdiction from outside the United States jurisdiction while in custody"); United States v. Catino, 735 F.2d 718, 724 (2d Cir. 1984).

taken into custody under an indictment that is subsequently dismissed.[199] As the language of the section suggests, venue for all joint offenders is proper wherever venue for one of their number is proper.[200] Courts are divided over whether section 3238 may be applied even though venue may have been proper without recourse to its provisions.[201]

On occasion, Congress will enact individual provisions covering venue for offenses committed abroad. The Controlled Substances Import and Export Act and the Maritime Drug Law Enforcement Act (MDLEA) are two such examples. The Controlled Substance section outlaws overseas possession with intent to import into the United States.[202] MDLEA outlaws possession of controlled substances on vessels subject to the jurisdiction of the United States.[203] They contain parallel venue provisions, which permit trial in the judicial district where the accused enters the United States or in the District of Columbia.[204]

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[199] United States v. Holmes, 670 F.3d 586, 593-96 (4th Cir. 2012).

[200] 18 U.S.C. §3238 ("... or any one of two or more joint offenders... "). United States v. Stickle, 454 F.3d 1265, 1272-273 (11th Cir. 2006); United States v. Yousef, 327 F.3d. 56, 115 (2d Cir. 2003); United States v. Slatten, 50 F. Supp. 3d 29, 32 (D.D.C. 2014).

[201] United States v. Pendleton, 658 F.3d 299, 304-305 (3d Cir. 2011)("[T]wo of our sister courts of appeals have held that '[s]ection 3238 does not apply unless the offense was committed entirely on the high seas or outside the United States.' United States v. Pace, 314 F.3d 344, 351 (9th Cir. 2002); United States v. Gilboe, 684 F.2d 235 (2d Cir. 1982)... On the other hand, the Courts of Appeals for the Fourth and Fifth Circuits have held that §3238 applies even when some of a defendant's offense conduct takes place in the United States. See e.g. United States v. Levy Auto Parts, 787 F.2d 946, 950-52 (4th Cir. 1986)(finding venue proper under §3238 when conspiracy was 'essentially foreign,' even when some overt acts occurred inside the United States); United States v. Erwin, 602 F.2d 1183, 1185 (5th Cir. 1979)('That venue may also be appropriate in another district will not divest venue properly established under §3238.')... Although the title of §3238 includes only 'offenses not committed in any district,' it is a 'well-settled rule of statutory interpretation that titles and section headings cannot limit the plain meaning of statutory text where that text is clear.'... Here, the plain language of §3238 supports the Fourth and Fifth Circuits' interpretation of the statute... Here, although Pendleton's offense began when he initiated foreign travel by boarding a plane bound for Germany in the Eastern District of New York, he 'committed' the offense when he engaged in an illicit sex act in Germany. Because Pendleton's criminal conduct was 'essentially foreign,' *Levy Auto Parts*, 787 at 950, the District Court did not err in applying §3238 to hold that venue was proper in the district of arrest"); United States v. Miller, 808 F.3d 607, 620, 621 (2d Cir. 2015)("Further, we do not think that venue becomes improper under §3238 simply because it might also have been properly laid elsewhere pursuant to §3237(a)[relating to continuing offense begun in one district and completed elsewhere] ... [O]ur dicta in *Giboe* do not control our decision here"); United States v. Hassanshahi, ___ F. Supp. 3d ___, ___ *4 (D.D.C. May 13, 2016); United States v. Rivera-Niebla, 37 F. Supp. 3d 374, 380 (D.C. Cir. 2014)("Several circuits have addressed whether, for section 3238 to apply, the entire offense must be committed extraterritorially, but the D.C. Circuit is not one of them").

[202] 21 U.S.C. §959 (captions omitted)("(a) It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II or flunitrazepam or a listed chemical intending, knowing, or having reasonable cause to believe that such substance or chemical will be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States. (b) It shall be unlawful for any person to manufacture or distribute a listed chemical-(1) intending or knowing that the listed chemical will be used to manufacture a controlled substance; and (2) intending, knowing, or having reasonable cause to believe that the controlled substance will be unlawfully imported into the United States. (c) It shall be unlawful for any United States citizen on board any aircraft, or any person on board an aircraft owned by a United States citizen or registered in the United States, to - (1) manufacture or distribute a controlled substance or listed chemical; or (2) possess a controlled substance or listed chemical with intent to distribute. (d) This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States …").

[203] 46 U.S.C. §70503.

[204] 21 U.S.C. §859(c)("… Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia") and 46 U.S.C. §70504(b)("A person violating section 70503 or 70508 of this title shall be tried in the district court of the United States for- (1) the district at which the person enters the United States; or (2) the District of Columbia"); United States v. Rojas, 812 F.3d. 381, 3949-95 (5th Cir. 2016)(citing in accord United States v. Ahumedo-Avendano, 872 F.2d 367, 17-72 (11th Cir. 1989)).

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.[205] Federal courts ordinarily have no authority to subpoena foreign nationals located in a foreign country.[206] 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[207] and in other instances to elicit assistance to encourage foreign nationals to come to this country and testify voluntarily.[208]

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[205] 28 U.S.C. §1783 ("A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner"); Blackmer v. United States, 284 U.S. 421, 436-38 (1932).

[206] United States v. Abu Ali, 528 F.3d 210, 239 (4th Cir. 2008); United States v. Yates, 345 F.3d 1280, 1283 (11th Cir. 2003); United States v. Olafson, 213 F.3d 435, 441 (9th Cir. 2000); United States v. Groos, 616 F. Supp. 2d 777, 791 (N.D. Ill. 2008); United States v. Ozsusamlar, 428 F. Supp. 2d 161, 177 (S.D.N.Y. 2006); *cf.*, United States v. Liner, 435 F.3d 920, 924 (8th Cir. 2006). Cases where the witness is in federal custody overseas may prove an exception to the rule, but they may also come with their own special complications, *see e.g.*, United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004)(foreign nationals held in military custody overseas whom the government, in the interest of national security, declined to make available for depositions or to appear as witnesses in a criminal trial).

From a defendant's perspective, the inability of federal courts to compel the appearance in this country of foreign nationals located overseas, limits the scope of his Sixth Amendment right to "compulsory process for obtaining witnesses in his favor." United States v. Beyle, 782 F.3d 159, 170 (4th Cir. 2015)(citing in accord United States v. Theresius Filippi, 918 F.2d 244, 246 n.2 (1st Cir. 1988); United States v. Zabaneh, 837 F.2d 1249, 1259-60 (5th Cir. 1988); and United States v. Greco, 298 F.2d 247, 251 (2d Cir. 1962)); United States v. Tuma, 738 F.3d 681, 688-89 (5th Cir. 2013)("It is well-established that a conviction is constitutional and does not violate a defendant's right to compulsory process even when the court lacks the power to subpoena potential defense witnesses from foreign countries").

[207] *E.g.*, *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Leich.*, art. 11, S. Treaty Doc. 107-16 ("1. A person in the custody of the Requested State whose presence outside of the Requested State is sought for purposes of assistance under this Treaty shall be transferred form the Requested State for that purpose if the person consents and if the Central Authorities of both States agree ... 3. For purposes of this Article: a) the receiving State shall have the authority and the obligation to keep the person transferred in custody unless otherwise authorized by the sending State; b) the receiving State shall return the person transferred to the custody of the sending State as soon as circumstances permit or as otherwise agreed by both Central Authorities; c) the receiving state shall not require the sending State to initiate extradition proceedings for the return of the person transferred; d) the person transferred shall receive credit for service of the sentence imposed in the sending State for time served in the custody of the receiving State; and e) where the receiving State is a third State the Requesting State shall be responsible for all arrangements necessary to meet the requirements of this paragraph"); *see also Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Ukr.*, art. 11, S. Treaty Doc. 106-16; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr.*, art. 18, S. Treaty Doc. 106-17; *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece*, art. 11, S. Treaty Doc. 106-18.

[208] *E.g.*, *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Belize*, art. 10, S. Treaty Doc. 106-19 ("1. When the Requesting State requests the appearance of a person in that State, the Requested State shall invite the person to appear before the appropriate authority in the Requesting State. The Requesting State shall indicate the extent to which the expenses will be paid. The Central Authority of the Requested State shall promptly inform the Central Authority of the Requesting State of the response of the person. 2. The Central Authority of the Requesting state shall inform the Central Authority of the requested State whether a decision has been made by the competent authorities of the Requesting State that a person appearing in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subject to any restriction of personal liberty, by reason of any acts or convictions which preceded his departure from the Requested State"); see also, *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech.*, Art. 10, S. Treaty Doc. 107-16 (person may not be served or detained except as stated in the request); *Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Venez.*, arts. X, S. Treaty Doc. 105-38. When a witness is found in a country with whom the United States has no such treaty, officials have used U.S. immigration parole (continued...)

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."[209] 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.[210]

Originally, only a defendant might request that depositions be taken under Rule 15 of the Federal Rules of Criminal Procedure,[211] but they have been available to prosecutors since the 1970s.[212] The Rule offers depositions as an alternative to long-term incarceration of material witnesses.[213] Otherwise, depositions may be ordered only under exceptional circumstances. Some courts have said that to "establish exceptional circumstances the moving party must show the witness's unavailability and the materiality of the witness's testimony."[214] Others would add to these that "the testimony is necessary to prevent a failure of justice" or additional considerations.[215]

As general matter, depositions are to be taken in the same manner as depositions in civil cases.[216] Moreover, the Rule requires that the defendant be afforded an opportunity to attend depositions

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authority in an effort to accomplish the same results, *see, e.g.*, Wang v. Reno, 81 F.3d 808, 811-12 (9th Cir. 1996).

[209] FED. R. CRIM. P. 15(a)(1)("A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data").

[210] U.S. CONST. amend. VI; FED. R. CRIM. P. 15; *e.g.*, FED. R. EVID. 802; discussed below.

[211] FED. R. CRIM. P. 15(a), 18 U.S.C. App. (1964 ed.). For a history of the evolution of Rule 15(2), *see* WRIGHT, FEDERAL PRACTICE AND PROCEDURE §251 (Crim. 3d 2000).

[212] FED. R. CRIM. P. 15(a), 18 U.S.C. App. (1976 ed.); *see also* 18 U.S.C. §3503 (1970 ed.).

[213] FED. R. CRIM. P. 15(a)(2)("A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript").

[214] United States v. Liner, 435 F.3d 920, 924 (8th Cir. 2006); *see also* United States v. Kelley, 36 F.3d 1118, 1125 (D.C. Cir. 1994)(identifying the two as "critical factors"); United States v. Jefferson, 594 F. Supp. 2d 655, 664 (E.D. Va. 2009).

[215] United States v. Cohen, 260 F.3d 68, 78 (2d Cir. 2001); *see also* United States v. Khan, 794 F.3d 1288, 1306 (11th Cir. 2015)(internal citations omitted)(Rule 15 "permits depositions in criminal cases 'in order to preserve testimony for trial' because of 'exceptional circumstances and in the interest of justice.' Such circumstances exist when (1) the witnesses are unavailable to testify at trial, (2) their testimony is material, and (3) countervailing factors do not 'render taking the depositions unjust to the nonmoving party"); United States v. Ruiz-Castro, 92 F.3d 1519, 1533 (10th Cir. 1996)(identifying the three factors as among those a court should consider before authorizing depositions); United States v. Thomas, 62 F.3d 1332, 1341 (11th Cir. 1995)(listing consideration of unavailability, materiality, and "countervailing factors [that] would make the deposition unjust to the nonmoving party"); United States v. Aggarwal, 17 F.3d 737, 742 (5th Cir. 1994)(denial of the motion may be based entirely upon the fact it is untimely); *Jefferson*, 594 F. Supp. 2d at 664-65 (failure of justice and all the circumstances); United States v. Warren, 713 F. Supp. 2d 1, 3-4 (D.D.C. 2010)("The defendant must also make some showing beyond unsubstantiated speculation, that the evidence exculpates him").

[216] FED. R. CRIM. P. 15(e),(f),(g)(captions omitted)("(e) Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that (1) A defendant may not be deposed without that defendant's consent. (2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial. (3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial. (f) A party may use all or part of a deposition as provided by the Federal Rules of Evidence. (g) A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition"); *see also Khan*, 794 F.3d at 1307 n. 18 ("The Federal Rules of Criminal Procedure require Rule 15 depositions to 'be taken and filed in the same manner as a deposition in a civil action.' Fed. R. Crim. P. 15(e). The Federal Rules of Civil Procedure, in turn, permit depositions to be taken in a foreign country 'under a letter of request,' (continued...)

taken at the government's request.[217] When a deposition is taken abroad, the courts prefer that the defendant be present,[218] that his counsel be allowed to cross-examine the witness,[219] that the deposition be taken under oath,[220] that a verbatim transcript be taken, and that the deposition be captured on videotape;[221] 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.[222] In nations whose laws might not otherwise require, or even

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whether or not captioned a 'letter rogatory.' Fed. R. Civ. P. 28(b)(1)(B)").

[217] FED. R. CRIM. P. 15(c)(captions omitted)("(1) The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion. (2) A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant—absent good cause—waives both the right to appear and any objection to the taking and use of the deposition based on that right").

FED. R. CRIM. P. 15(d)(captions omitted)("If the deposition was requested by the government, the court may—or if the defendant is unable to bear the deposition expenses, the court must—order the government to pay: (1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and (2) the costs of the deposition transcript").

[218] United States v. McKeeve, 131 F.3d 1, 8 (1st Cir. 1997)("the confrontation clause requires, at a minimum, that the government undertake diligent efforts to facilitate the defendant's presence. We caution, however, that although such efforts must be undertaken in good faith, they need not be heroic"); United States v. Kelly, 892 F.2d 255, 262 (3d Cir. 1989); United States v. Salim, 855 F.2d 944, 950 (2d Cir. 1988).

[219] United States v. Johnpoll, 739 F.2d 702, 710 (2d Cir. 1984)("The confrontation clause does not preclude admission of prior testimony of an unavailable witness, provided his unavailability is shown and the defendant had an opportunity to cross-examine. In the present case, Johnpoll had the full opportunity, at government expense, with his attorney to confront and cross-examine the Swiss witness, which he waived when he and his attorney decided not to attend the taking of the depositions").

[220] United States v. Sines, 761 F.2d 1434, 1441 (9th Cir. 1985)("The Supreme Court has identified the major purposes of the confrontation clause as: (1) ensuring that witnesses will testify under oath; (2) forcing witnesses to undergo cross-examination; and (3) permitting the jury to observe the demeanor of witnesses. All three of these purposes were fulfilled when Steneman's videotaped deposition was taken [in Thailand] with Sine's attorney present").

[221] *Medjuck*, 156 F.3d at 920 ("When the government is unable to secure a witness's presence at trial, Rule 15 is not violated by admission of videotaped testimony so long as the government makes diligent efforts to secure the defendant's physical presence at the deposition, and failing this, employs procedures that are adequate to allow the defendant to take an active role in the deposition proceedings... The government was unable to secure Medjuck's presence at the Canadian depositions because there was no mechanism in place to allow United States officials to transfer Medjuck to Canadian authorities... and secure his return to the United States in a timely fashion after the depositions. Finally, the government set up an elaborate system to allow Medjuck to witness the depositions live by video feed and to participate with his attorneys by private telephone connection during the depositions taken in Canada... [A]n exception to the confrontation requirements] has been recognized for admission of deposition testimony where a witness is unavailable to testify at trial... First, the deposition testimony must fall within an established exception to the hearsay rule. Second the deposition must be taken in compliance with law. Finally, the defendant must have had an opportunity to cross-examine the deposed witness "); *Kelly*, 892 F.2d at 260-62; United States v. Walker, 1 F.3d 423, 429 (6th Cir. 1993); United States v. Mueller, 74 F.3d 1152, 1156-157 (11th Cir. 1996); *see also Salim*, 855 F.2d at 950 ("In the context of the taking of a foreign deposition, we believe that so long as the prosecution makes diligent efforts... to attempt to secure the defendant's presence, preferably in person, but if necessary via some form of live broadcast, the refusal of the host government to permit the defendant to be present should not preclude the district court from ordering that the witness' testimony be preserved anyway. However, the district court should satisfy itself that defense counsel will be given an opportunity to cross-examine the witness in order to fulfill the mandate of Rule 15(b) to ensure a likelihood that the deposition will not violate the confrontation clause") .

[222] United States v. Sturman, 951 F.2d 1466, 1480-481(6th Cir. 1992)("Swiss law forbids verbatim transcription so the summary method of establishing the record was the most effective legal method. All defense questions, with just one exception, were submitted to the witnesses so that objections and determinations on admissibility could be litigated (continued...)

permit, depositions under conditions considered preferable under U.S. law, a treaty provision sometimes addresses the issue.[223]

Although the government will ordinarily take depositions under the conditions that would permit them to be used as evidence at trial, "[c]ompliance with Rule 15 is a necessary but not sufficient condition for use of a deposition at trial."[224] The question of admissibility of overseas depositions rests ultimately upon whether the Confrontation Clause requirements have been met.[225] The right of an accused under the Confrontation Clause embodies not only the prerogative of a literal face-to-face confrontation, but also the right to cross examine and to have the witness's testimonial demeanor exposed to the jury.[226] The early cases relied on the Supreme Court's decisions either in *Ohio v. Roberts*[227] or in *Maryland v. Craig*.[228] 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."[229] *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.[230]

After *Roberts* and *Craig*, however, the Supreme Court held in *Crawford v. Washington* that "testimonial" hearsay could not be considered reliable and admitted into evidence without the

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later. Although the witnesses were not given an oath, defense conceded that each witness was told the penalties for giving false testimony... Depositions taken in foreign countries cannot at all times completely emulate the United States methods of obtaining testimony. Here all steps were taken to ensure the defendants' rights while respecting the legal rules established in a different country"); United States v. Cooper, 947 F. Supp. 2d 108, 110-16 (D.D.C. 2013)(the court ordered depositions taken in Indonesia even though the government could not guarantee that the written record would be created, but where: an oath or affirmation would be administered; both sides would be allowed to examine and cross examine the witnesses; an official translator would be used and the defendant would be allowed to have his own translator; the depositions would be videotaped; the parties would be allowed to make objections on the record; the defendant, although not present, would be allowed to view the proceedings by video and audio link and to consult with his attorney by telephone during the proceedings; the court would entertain challenges to use the depositions at trial "[i]f the actual procedures vary from the procedures outlined").

[223] *E.g.*, *Treaty on Mutual Legal Assistance on Criminal Matters, U.S.-Fr.*, art. 9(2), S. Treaty Doc. 106-17 ("The procedures specified in this paragraph and outlined in the request shall be carried out insofar as they are not contrary to the fundamental principles of a judicial proceeding in the Requested State. The Requested State, if the Requesting State requests, shall: (a) take the testimony of witnesses or experts under oath... ; (b) allow a confrontation between a defendant, together with counsel, and a witness or expert whose testimony or evidence is taken for use against the defendant in a criminal prosecution in the Requesting State; (c) ask questions submitted by the Requesting State, including questions proposed by authorities of the Requesting State present at the execution of the request; (d) record or allow to be recorded the testimony, questioning, or confrontation; and (e) produce or allow to be produced a verbatim transcript of the proceeding in which the testimony, questioning, or confrontation occurs").

[224] United States v. McKeeve, 131 F.3d 1, 8 (1st Cir. 1997).

[225] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him…").

[226] Barber v. Page, 390 U.S. 719, 725 (1968)("The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness").

[227] *McKeeve*, 131 F.3d at 9; United States v. Drogoul, 1 F.3d 1546, 1552 (11th Cir. 1993); United States v. Kelly, 892 F.2d 255, 261 (3d Cir. 1989); United States v. Salim, 855 F.2d 944, 954-55 (2d Cir. 1988).

[228] *Medjuck*, 156 F.3d at 920-21.

[229] 497 U.S. 836, 848 (1990).

[230] 448 U.S. 56, 66 (1980).

safeguard of cross examination.[231] *Crawford* forecloses subsequent reliance on *Roberts*' across-the-board hearsay rule exception when faced with the question of whether a "testimonial" deposition may be admitted into evidence at trial. *Crawford* repudiates the suggestion that *Roberts* permits anything less than actual confrontation in the case of "testimonial" hearsay in the form of a deposition or any other form.[232] The status of *Craig*'s video and public interest exception is less clear. 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;[233] but another has held that national security interests may suffice.[234]

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 Eleventh Circuit's en banc *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.[235] Yet in a later video case, the Fourth Circuit rejected a Confrontation Clause challenge when the circumstances satisfied the dual demands for a *Craig* exception: (1) denial of a face-to-face confrontation made necessary by important policy considerations, and (2) assurance of reliability in the form of an "oath, cross-examination, and observation of the witness' demeanor."[236]

The Federal Rules of Evidence govern the admissibility of evidence in federal criminal trials. A deposition taken overseas that has survived scrutiny under Rule 15 of the Federal Rules of Criminal Procedure and the Confrontation Clause is likely to be found admissible. The hearsay rule, Rule 802, which reflects the law's preference for evidence that is exposed to the adversarial process, poses the most obvious obstacle.[237] The Rule, however, provides an explicit exception

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[231] Crawford v. Washington, 541 U.S. 36, 61-2 (2004).

[232] *Id*. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from confrontation clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination").

[233] United States v. Yates, 438 F.3d 1307, 1316 (11th Cir. 2006).

[234] United States v. Abu Ali, 528 F.3d 210, 240-42 (4th Cir. 2008).

[235] *Yates*, 438 F.3d at 1316 (emphasis added)("The government's interest in presenting the fact-finding with crucial evidence is, of course, an important public policy. We hold , however, that, under the circumstances of this case (*which include the availability of a Rule 15 deposition*), the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the defendants' rights to confront their accusers face-to-face").

[236] *Abu Ali*, 528 F.3d at 240-42. The Fourth Circuit distinguished *Yates* on the grounds that there the lower court had not considered alternative procedures under which face to face confrontation might have been possible and that there the crimes of conviction were different in kind and degree ("Whatever the merits in *Yates*, the defendants there were charged with mail fraud, conspiracy to commit money laundering, and drug-related offenses, crimes different in both kind and degree from those implicating the national security interests here [(conspiracy commit terrorist attacks on the United States)]"); *see also* United States v. Mostafa, 14 F. Supp. 3d 515, 518-19 (S.D.N.Y. 2014) rejected the court weighed Confrontation Clause considerations before permitting a witness located in United Kingdom to testified at the defendant's trial by way of live closed-circuit television with opportunity for defense counsel to cross examine.

[237] "Hearsay is not admissible except as provided by these rules and by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress," FED. R. EVID. 802. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," FED. R. EVID. 801(c).

for depositions,[238] one that has been applied to depositions taken abroad under the authority of Rule 15.[239]

National Security Concerns

When witnesses and other 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.[240] 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.[241] 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.[242]

Congress has provided the Classified Information Procedures Act (CIPA)[243] as a means of accommodating the conflict of interests.[244] 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.[245] 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."[246]

Admissibility of Foreign Documents

There is a statutory procedure designed to ease the evidentiary admission of foreign business records in federal courts.[247] 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."[248] It exempts

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[238] "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) Testimony given as a witness... in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination," FED. R. EVID. 804(b)(2).

[239] *Medjuck*, 156 F.3d at 921; *McKeeve*, 131 F.3d at 10; *Kelly*, 892 F.2d 255, 261-62 (3d Cir. 1990).

[240] *E.g.*, In re Terrorist Bombings of U.S. Embassies, 552 F.3d 93, 118 n.24 (2d Cir. 2008); *Abu Ali*, 528 F.3d at 257-58; *see also* United States v. el-Mezain, 664 F.3d 467, 518-19 (5th Cir. 2011)(involving interception of communication in this country under the Foreign Intelligence Surveillance Act).

[241] United States v. Moussaoui, 382 F.3d 453, 470 (4th Cir. 2004).

[242] *Abu Ali*, 528 F.3d at 254.

[243] 18 U.S.C. App. III, §§1-16.

[244] United States v. Sedaghaty, 728 F.3d 885, 903 (9th Cir. 2013)("CIPA procedures … endeavor to harmonize a defendant's right to a fair trial with the government's right to protect classified information").

[245] See generally CRS Report R41742, *Protecting Classified Information and the Rights of Criminal Defendants: The Classified Information Procedures Act*, by Edward C. Liu.

[246] *Abu Ali*, 528 F.3d at 254; *cf.*, *Sedaghaty*, 728 F.3d at 907 ("In the end, the inadequate substitution interfered with Seda's ability to present a complete defense").

[247] 18 U.S.C. §3505. "Under §3505, a foreign certification serves to authenticate the foreign records, and thus dispenses with the necessity of calling a live witness to establish authentication," United States v. Hagege, 437 F.3d 943, 957 (9th Cir. 2006).

[248] 18 U.S.C. §3505(c)(1).

qualified business records from the operation of the hearsay rule in federal criminal proceedings[249] and permits their authentication upon foreign certification.[250] Finally, it establishes a procedure under which the reliability of the documents can be challenged in conjunction with other pre-trial motions.[251] While the prosecution's failure to provide timely notice of its intent to rely upon the section does not necessarily bar admission,[252] its failure to supply a foreign certification of authenticity precludes admission under the section.[253]

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*.[254] As noted above, *Crawford* cast doubt upon the continued vitality of the all-encompassing *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.[255] 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."[256] More than one later court panel has rejected a confrontation clause challenge to Section 3505 on the basis of this distinction.[257]

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[249] "In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that—(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters; (B) such record was kept in the course of a regularly conducted business activity; (C) the business activity made such a record as a regular practice; and (D) if such record is not the original, such record is a duplicate of the original [—] unless the source of information or the method or circumstances of preparation indicate [a] lack of trustworthiness," 18 U.S.C. §3505(a)(1).

[250] "A foreign certification under this section shall authenticate such record or duplicate," 18 U.S.C. §3505(a)(2). "Foreign certification" is "a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country," 18 U.S.C. §3505(c)(2).

[251] "At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver," 18 U.S.C. §3505(b).

[252] United States v. Newell, 239 F.3d 917, 921 (5th Cir. 2001); United States v. Garcia Abrego, 141 F.3d 142, 176-78 (5th Cir. 1998). The court expressed "no opinion as to whether a showing of prejudice resulting from untimely notice of an intent to offer foreign records could eliminate §3505 as a potential pathway for admissibility of foreign business records," 141 F.3d at 178 n. 26.

[253] United States v. Doyle, 130 F.3d 523, 546 (2d Cir. 1997).

[254] *Garcia Abrego*, 141 F.3d at 178-79; United States v. Ross, 33 F.3d 1507, 1517 (11th Cir. 1994); United States v. Sturman, 951 F.2d 1466, 1490 (6th Cir. 1991); United States v. Miller, 830 F.2d 1073, 1078 (9th Cir. 1987).

[255] 541 U.S. 36, 68 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from confrontation clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination").

[256] 541 U.S. at 56.

[257] United States v. Bansal, 663 F.3d 634, (3d Cir. 2011)("[T]he Supreme Court has indicated that business records are almost never 'testimonial' for Confrontation Clauses purposes, *see Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539-2540... [and] the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury"); *see also* United States v. Anekwu, 695 F.3d 967, 973-77 (9th Cir. 2012); United States v. Hagege, 437 F.3d 943, 957-58 (9th Cir. 2006); *accord* United States v. Qualls, 553 F. Supp. 2d 241, 244-45 (E.D.N.Y. 2008); *but see* United States v. Ekiyor, 90 F. Supp. 3d 735 (E.D. Mich. 2015) (citing and quoting *Melendez-Diaz*, 557 U.S. at 323-40) ("As noted earlier, the Supreme Court explained... that business records ordinarily are 'not testimonial' because they are 'created for the administration of an (continued...)

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.

Attachments

Federal Criminal Laws Which Enjoy Express Extraterritorial Application

Special Maritime & Territorial Jurisdiction

8 U.S.C. §1375a(d)(3) (informed consent violations by international marriage brokers)
15 U.S.C. §1175 (manufacture or possession of gambling devices)
15 U.S.C. §1243 (manufacture or possession of switchblade knives)
15 U.S.C. §1245 (manufacture or possession of ballistic knives)
16 U.S.C. §3372(a)(3) (possession of illegally taken fish or wildlife)

18 U.S.C. §81 (arson)
18 U.S.C. §113 (assault)
18 U.S.C. §114 (maiming)
18 U.S.C. §115 (violence against federal officials, former officials and members of their families)
18 U.S.C. §117 (domestic assault by an habitual offender)
18 U.S.C. §118 (interference with certain protective functions [State Department & diplomatic security])
18 U.S.C. §249 (hate crimes)
18 U.S.C. §546 (smuggling goods into a foreign country from an American vessel)

18 U.S.C. §661 (theft)
18 U.S.C. §662 (receipt of stolen property)
18 U.S.C. §831 (threats, theft, or unlawful possession of nuclear material or attempting or conspiring to do so)
18 U.S.C. §931 (purchase, ownership, or possession of body armor by violent felons)
18 U.S.C. §1025 (false pretenses)
18 U.S.C. §§§1081 - 1083 (gambling ships)

18 U.S.C. §1111 (murder)
18 U.S.C. §1112 (manslaughter)
18 U.S.C. §1113 (attempted murder or manslaughter)
18 U.S.C. §1115 (misconduct or neglect by ship officers)
18 U.S.C. §1201 (kidnaping)

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entity's affairs and not the for the purpose of establishing or proving some fact at trial.' On the other hand, the Supreme Court has emphasized that evidence 'prepared specifically for use at… trial' generally is deemed testimonial under the Confrontation Clause").

18 U.S.C. §1363 (malicious mischief)
18 U.S.C. §1460 (sale or possession with intent to sell obscene material)
18 U.S.C. §1466A (obscene visual representation of sexual abuse of children)
18 U.S.C. §1587 (captain of a slave vessel with slaves aboard)
18 U.S.C. §1591(sex trafficking of children)

18 U.S.C. §1656 (piratical conversion of vessel by captain, officer or crew member)
18 U.S.C. §1658 (plundering a ship in distress)
18 U.S.C. §1659 (attack upon a vessel with intent to plunder)
18 U.S.C. §1654 (Americans arming or serving on privateers outside the United States to be used against the United States or Americans)
18 U.S.C. §1801 (video voyeurism)

18 U.S.C. §1957 (prohibited monetary transactions)
18 U.S.C. §2111 (robbery)
18 U.S.C. §2191 (cruelty to seamen)
18 U.S.C. §2192 (incite to revolt or mutiny)
18 U.S.C. §2193 (revolt or mutiny by seamen)

18 U.S.C. §2194 (shanghaiing sailors)
18 U.S.C. §2195 (abandonment of sailors overseas)
18 U.S.C. §2196 (drunkenness of seamen)
18 U.S.C. §2197 (misuse of documents associated vessels)
18 U.S.C. §2198 (seduction of a female passenger)

18 U.S.C. §2199 (stowaways)
18 U.S.C. §2241 (aggravated sexual abuse)
18 U.S.C. §2242 (sexual abuse)
18 U.S.C. §2243 (sexual abuse of a minor or ward)
18 U.S.C. §2244 (abusive sexual contact)

18 U.S.C. §2252(a) (sale or possession of material involving sexual exploitation of children)
18 U.S.C. §2252A(a) (sale or possession of child pornography)
18 U.S.C. §2261 (interstate domestic violence)
18 U.S.C. §2261A (stalking)
18 U.S.C. §2262 (interstate violation of a protective order)
18 U.S.C. §§2271-2279 (destruction of ships)
18 U.S.C. §2283 (transportation of explosives, biological, chemical, radioactive or nuclear materials for terrorist purposes on the high seas or aboard a U.S. vessel or in U.S. waters)

18 U.S.C. §2284 (transportation of a terrorist on the high seas or aboard a U.S. vessel or in U.S. waters)
18 U.S.C. §2318 (transporting counterfeit phonorecord labels, copies of computer programs or documentation, or copies of motion pictures or other audio visual works)
18 U.S.C. §2332b (acts of terrorism transcending national boundaries)
18 U.S.C. §2388 (war-time activities affecting armed forces)
18 U.S.C. §2422(b) (causing a minor to engage in prostitution or other sexual acts)

18 U.S.C. §2425 (transmission of information about a minor)
18 U.S.C. §3261(offenses committed by members of the United States armed forces or individuals accompanying or employed by the United States armed forces overseas)

46 U.S.C. §70503 (maritime drug law enforcement)
46 U.S.C. §70508 (operation of stateless submersible vessels)
48 U.S.C. §1912 (offenses committed on United States defense sites in the Marshall Islands or Federated States of Micronesia)
48 U.S.C. §1934 (offenses committed on United States defense sites in Palau)

Special Aircraft Jurisdiction

18 U.S.C. §32 (destruction of aircraft)
18 U.S.C. §831 (threats, theft, or unlawful possession of nuclear material or attempting or conspiring to do so)
18 U.S.C. §1201 (kidnaping)
18 U.S.C. §2318 (transporting counterfeit phonorecord labels, copies of computer programs or documentation, or copies of motion pictures or other audio visual works)
49 U.S.C. §46502(a) (air piracy or attempted air piracy)
49 U.S.C. §46504 (interference with flight crew or attendants within the special aircraft jurisdiction of the United States)
49 U.S.C. §46506 (assaults, maiming, theft, receipt of stolen property, murder, manslaughter, attempted murder or manslaughter, robbery, or sexual abuse)

Treaty-Related

18 U.S.C. §32(b)
Offenses:
- violence aboard a foreign civil aircraft (likely to endanger the safety of the aircraft) while in flight;
- destruction of or incapacitating or endangering damage to foreign civil aircraft;
- placing a bomb aboard a foreign civil aircraft; or
- attempting or conspiring to do so

Jurisdictional factors:
- a United States national was on board;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §37
Offenses:
- violence causing or likely to cause serious bodily injury or death at an international airport;
- destruction of or serious damage to aircraft or facilities at an international airport; or
- attempting or conspiring to do so

Jurisdictional factors:
- a victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §112
Offenses:
- assaulting an internationally protected person;
- threatening an internationally protected person; or
- attempting to threaten an internationally protected person

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §175
Offenses:
- develop, produce, stockpile, transfer, acquire, retain, or possess biological weapons or delivery systems, misuse of biological weapons;

- assisting a foreign power to do so; or
- attempting, threatening or conspiring to do so

Jurisdictional factor:

- "there is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States," 18 U.S.C. §175(a)

18 U.S.C. §229

Offenses:

- using chemical weapons outside the United States; or
- attempting, or conspiring to do so

Jurisdictional factors:

- the victim or offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. §831

Offenses:

- threats, theft, or unlawful possession of nuclear material; or
- attempting or conspiring to do so

Jurisdictional factors:

- a United States national or an American legal entity was the victim of the offense;
- the offender was a United States national or an American legal entity; or
- the offender is afterwards found in the United States;
- the offense involved a transfer to or from the United States; or
- the offense was a threat directed against the United States

18 U.S.C. §832

Offenses:

-participating in nuclear and weapons of mass destruction threats to the United States

Jurisdiction;

"There is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C. §732(b)

18 U.S.C. §878

Offenses:

- threatening to assault, kill or kidnap an internationally protected person

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §1091

Offense: genocide

- killing members of a national, ethnic, racial or religious group
- assaulting members of a national, ethnic, racial or religious group
- imposing reproductive and other group destructive measures on a national, ethnic, racial or religious group
- forcibly transferring children of a national, ethnic, racial or religious group

Jurisdictional factors:

- the offender was a United States national
- the offender is a stateless person habitually residing in the United States
- the offender is present in the United States
- the offense occurred in part in the United States

18 U.S.C. §1116

Offense: killing an internationally protected person

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §1117

Offense: conspiracy to kill an internationally protected person

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §1201
Offense:
- kidnaping an internationally protected person; or
- attempting or conspiring to do so

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §1203
Offense:
- hostage taking; or
- attempting or conspiring to do so

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §2280
Offenses:
- violence committed against maritime navigation; or
- attempting or conspiracy to commit violence against maritime navigation

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §2280a
Offenses:
- violence committed against maritime navigation involving weapons of mass destruction; or
- attempting or conspiracy to commit violence against maritime navigation involving weapons of mass destruction

Jurisdictional factors:
- committed aboard or against United States vessel or vessel subject to United States jurisdiction;
- the offender was a United States national;
- a United States national was seized, threatened, injured, or killed;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §2281
Offenses:
- violence committed against a maritime platform; or
- attempting or conspiracy to commit violence against a maritime platform

Jurisdictional factors:
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §2281a
Offenses:
- additional offenses committed against a maritime platform; or
- attempting or conspiracy to commit additional offenses against a maritime platform

Jurisdictional factors:
- the offender was a United States national;

- a United States national was seized, threatened, injured, or killed;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §2332a
Offenses:
- using a weapon of mass destruction outside the United States; or
- threatening, attempting, or conspiring to do so

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. §2332f (effective upon the terrorist bombing convention entering into force for the U.S.)
Offenses:
- bombing public places, government facilities, or public utilities outside the United States; or
- threatening, attempting, or conspiring to do so

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offense was committed against federal property;
- the offender is present in the United States;
- the offense was committed on United States registered vessel or aircraft; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §2332g
Offenses:
- producing, acquiring, or possessing anti-aircraft missiles; or
- threatening, attempting, or conspiring to do so

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offense was committed against federal property;
- the offender aids or abets the commission of the offense

18 U.S.C. §2332h
Offenses:
- producing, acquiring, or possessing radiological dispersal devices; or
- threatening, attempting, or conspiring to do so

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offense was committed against federal property;
- the offender aids or abets the commission of the offense

18 U.S.C. §2332i)
Offenses:
- acts of nuclear terrorism; or
- threatening, attempting, or conspiring to commit such acts

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offense was committed against federal property;
- the offender is found in the United States
- the offense was committed on United

18 U.S.C. §2339C
Offenses:
- financing terrorism outside the U.S.; or

- attempting or conspiring to do so

Jurisdictional factors:

- predicate act of terrorism was directed against
  + United States property,
  + United States nationals or their property, or
  + property of entities organized under United States law;
- offense was committed on United States registered vessel or aircraft operated by the United States.;
- the offense was intended to compel action or abstention by the United States;
- the offender was a United States national; or
- (effective upon the terrorism financing convention entering into force for the U.S.) the offender is present in the United States

18 U.S.C. §2340A

Offenses:

- torture under color of law outside the United States; or
- attempted torture

Jurisdictional factors:

- the offender was a United States national; or
- the offender is present in the United States

18 U.S.C. §2441

Offense:

- war crimes

Jurisdictional factors:

- an American or member of the American armed forces was the victim of the offense; or
- the offender was an American or member of the American armed forces

49 U.S.C. §46502(b)

Offenses:

- air piracy outside the special aircraft jurisdiction of the United States; or
- attempted air piracy outside the special aircraft jurisdiction of the United States
  Jurisdictional factors:
  - a United States national was aboard;
  - the offender was a United States national; or
  - the offender is afterwards found in the United States

Others

18 U.S.C. §38 (fraud involving aircraft or space vehicle parts)

Jurisdictional factors:

- the offender was a United States national;
- the offender was an entity organized under the laws of the United States;
- United States national or entity owned aircraft or vehicle to which the part related; or
- an act in furtherance of the offense was committed in the United States

18 U.S.C. §175c (variola virus (small pox))

Jurisdictional factors:

- the offender or victim was a United States national;
- the offense occurred in or affected interstate or foreign commerce
- the offense was committed against U.S. property; or
- the offender aided or abetted the commission of an offense under the section for which there was extraterritorial jurisdiction

Attempt/conspiracy

- includes attempts and conspiracies

18 U.S.C. §351

Offenses:

- killing, kidnaping, attempting or conspiring to kill or kidnap, or assaulting a Member of Congress, a Supreme Court Justice, or senior executive branch official

Jurisdictional factors:

- "[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C. 351(i)

18 U.S.C. §877 (mailing threatening communications to the United States from foreign countries)

18 U.S.C. §956 (conspiracy and overt act within the United States to commit murder, kidnaping, maiming or the destruction of certain property overseas)

18 U.S.C. §1029

Offenses:

- fraud related to access devices; or
- attempting or conspiring to commit the offense

Jurisdictional factors:

- involves a device issued, managed or controlled by an entity within the jurisdiction of the United States and
- item used in the offense or proceeds are transported or transmitted to or through the United States or deposited here, 18 U.S.C. 1029(h)

18 U.S.C. §1119 (killing of American by an American in a foreign country)

18 U.S.C. §1204 (parental kidnaping by retaining a child outside the United States)

18 U.S.C. §1512

Offenses:

- tampering with a federal witness or informant; or
- attempting to tamper with a federal witness or informant

Jurisdictional factors:

- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C. 1512(g)

18 U.S.C. §1513

Offenses:

- retaliating against a federal witness or informant; or
- attempting to retaliate against a federal witness or informant

Jurisdictional factors:

- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C. 1513(d)

18 U.S.C. §1585 (service aboard a slave vessel by an American or American resident)

18 U.S.C. §1586 (service aboard a vessel transporting slaves from one foreign country to another by an American or American resident)

18 U.S.C. §1587 (captain of a slave vessel hovering off the coast of the United States)

18 U.S.C. §1596

Offenses:

- peonage (18 U.S.C. 1581)
- enticement into slavery (18 U.S.C. 1583)
- sale into involuntary servitude (18 U.S.C. 1584)
- forced labor (18 U.S.C. 1589)
- trafficking in re peonage, slavery, involuntary servitude, or forced labor (18 U.S.C. 1590)
- sex trafficking (18 U.S.C. 1591)

Jurisdictional factors:

- the offender is a United States national
- the offender is found in the United States

18 U.S.C. §1651 (piracy upon the high seas where the offender is afterwards brought into or found in the United States)

18 U.S.C. §1652 (Americans acting as privateers against the United States or Americans on the high seas)

18 U.S.C. §1653 (acts of piracy upon the high seas committed against the United States or Americans by aliens)

18 U.S.C. §1654 (Americans arming or serving on privateers outside the United States to be used against the United States or Americans)

18 U.S.C. §1751

Offenses:

- killing, kidnaping, attempting or conspiring to kill or kidnap, or assaulting the President, Vice President, or a senior White House official

Jurisdictional factors:
- "[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C. 1751(k)

18 U.S.C. §§1831-1839
Offenses:
- economic espionage;
- theft of trade secrets

Jurisdictional factors:
- "[t]his chapter also applies to conduct occurring outside the United States if"
  (1) the offender was a United States national or entity organized under United States law; or
  (2) an act in furtherance was committed here, 18 U.S.C. 1837

18 U.S.C. §1956
Offense:
- money laundering

Jurisdictional factors: "[t]here is extraterritorial jurisdiction over the conduct prohibited by this section if
- the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and
- the transaction or series of related transactions involves funds... of a value exceeding $10,000," 18 U.S.C. §1956(f)

18 U.S.C. §1957
Offense:
- prohibited monetary transactions

Jurisdictional factors:
- the offense under this section takes place outside the United States, but the defendant is a United States person [other than a federal employee or contractor who is the victim of terrorism]," 18 U.S.C. 1957(d)

18 U.S.C. §1992 (attacks on railroad and mass transit systems engaged in interstate or foreign commerce)

18 U.S.C. §§2151 - 2157 (sabotage)(definitions afford protection for armed forces of the United States and "any associate nation" and for things transported "either within the limits of the United States or upon the high seas or elsewhere," 18 U.S.C. §2151)

18 U.S.C. §2260 (production of sexually explicit depictions of children outside the United States with the intent to import into the United States)

18 U.S.C. §2285 (operation of submersible vessel or semi-submersible vessel without nationality)

Jurisdictional factors: "[t]here is extraterritorial Federal jurisdiction over an offense under this section, including attempt or conspiracy to commit such an offense"

18 U.S.C. §2290
Offenses:
- destruction of vessels or maritime facilities (18 U.S.C. §2291);
- attempting or conspiring to do so (18 U.S.C. §2291); or
- imparting or conveying false information (18 U.S.C. §2292)

Jurisdictional factors:
- victim or offender was a U.S. national;
- U.S. national was aboard victim vessel;
- victim vessel was a U.S. vessel

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. §2332 (killing, attempting or conspiring to kill, or assaulting Americans overseas) (prosecution upon Department of Justice certification of terrorist intent)

18 U.S.C. §2332b
Offenses:
- terrorist acts transcending national boundaries; or
- attempting or conspiring to do so

Jurisdictional factors:
- use of U.S. mail or other facility of United States foreign commerce;

- affects foreign commerce of the United States;
- victim was federal officer or employee or United States government; or
- the offense was committed within the special maritime or territorial jurisdiction of the United States

18 U.S.C. §2339B
Offenses:
- providing material support or resources to designated terrorist organizations by one "subject to the jurisdiction of the United States;" or
- attempting or conspiring to do so

Jurisdictional factors:
- "[t]here is extraterritorial jurisdiction over an offense under this section," 18 U.S.C. §2339B(d)

18 U.S.C. §2339D (receipt of military training from a foreign terrorist organization)
Jurisdictional factors:
- the offender was a United States national;
- the offender was habitual resident of the United States;
- the offender is present in the United States;
- the offense was committed in part in the United States;
- the offense occurred in or affected interstate or foreign commerce; or
- the offender aided or abetted a violation of the section over which extraterritorial jurisdiction exists

18 U.S.C. §2381 (treason) ("within the United States or elsewhere")
18 U.S.C. §2423 (U.S. citizen or resident alien traveling overseas with the intent to commit illicit sexual activity or traveling overseas and thereafter engaging in illicit sexual activity)
18 U.S.C. §2442 (recruitment or use of child soldiers)
Jurisdictional factors:
- the offender was a United States national
- the offender was a stateless person habitually residing in the United States
- the offender is present in the United States
- the offense occurred in part in the United States

18 U.S.C. §3271(overseas transportation of illicit sexual purposes or overseas trafficking in persons—by those employed by or accompanying the United States)
21 U.S.C. §337a
Offenses:
-violations of the Federal Food, Drug, and Cosmetic Act
Jurisdictional factors:
- the offense involved an article intended for import into the United States
- an act in furtherance of the offense was committed in the United States

21 U.S.C. §959
Offenses:
- manufacture, distribution or possession of illicit drugs for importation into the United States

Jurisdictional factors:
- "this section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States ..." 21 U.S.C. §959(c)

21 U.S.C. §960A (narco-terrorism)
Jurisdictional factors:
- the offense was a U.S. drug or terrorism offense;
- the offender provided pecuniary value for terrorist offense to injure a U.S. national or damage U.S. property outside the United States;
- the offense was committed in part in the United States and the offender is a U.S. national; or
- the offense occurred in or affected interstate or foreign commerce

46 U.S.C. §§70503
Offenses:
- manufacture, distribution or possession of controlled substances on various vessels outside United States maritime jurisdiction

Jurisdictional factors:
- the vessel is a "vessel without nationality"; or

- the vessel is of foreign registry or located within foreign territorial waters and the foreign nation has consented to application of the United States law

50 U.S.C. §§3121, 3124
Offense:
- Unlawful disclosure of classified information

Jurisdictional factor:
- the offender is a U.S. citizen or permanent resident alien

Federal Crimes Subject to Federal Prosecution When Committed Overseas

Homicide

18 U.S.C. §32 (death resulting from destruction of aircraft or their facilities)
Jurisdictional factors:
- aircraft was in the special aircraft jurisdiction of the United States;
- the victim or offender was a United States national; or
- the offender is found in the United States

Attempt/Conspiracy
attempt and conspiracy are included

18 U.S.C. §37 (death resulting from violence at international airports)
Jurisdictional factors:
- a victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §38 (death resulting from fraud involving aircraft or space vehicle parts)
Jurisdictional factors:
- the victim or offender was an entity organized under United States law;
- the victim or offender was a United States national; or
- an act in furtherance of the offense was committed in the United States)

18 U.S.C. §43
Offense (where death results):
- travel to disrupt an animal enterprise;
- causing damages of over $10,000 to an animal enterprise; or
- conspiring to cause damages of over $10,000 to an animal enterprise

Jurisdictional factors:
- the offense involved travel in the foreign commerce of the United States; or
- the offense involved use of the mails or other facility in the foreign commerce of the United States

18 U.S.C. §175 (death resulting from biological weapons offenses)
Jurisdictional factors:
- a victim was a United States national; or
- the offender was a United States national

18 U.S.C. §175c (variola virus (small pox))
Jurisdictional factors:
- the offender or victim was a United States national;
- the offense occurred in or affected interstate or foreign commerce;
- the offense was committed against U.S. property; or
- the offender aided or abetted the commission of an offense under the section for which there was extraterritorial jurisdiction

18 U.S.C. §229 (death resulting from chemical weapons offenses)
Jurisdictional factors:
- a victim was a United States national;
- the offender was a United States national; or
- committed against United States property

18 U.S.C. §351 (killing a Member of Congress, cabinet officer, or Supreme Court justice)
Attempt/conspiracy
attempt and conspiracy are included

18 U.S.C. §831
Offenses:
- unlawful possession of nuclear material where the offender causes the death of another; or
- attempting or conspiring to do so

Jurisdictional factors:
- the offense is committed within the special aircraft or special maritime and territorial jurisdiction of the United States;
- a United States national or an American legal entity was the victim of the offense;
- the offender was a United States national or an American legal entity;
- the offender is afterwards found in the United States;
- the offense involved a transfer to or from the United States; or
- the offense was a threat directed against the United States

18 U.S.C. §956 (conspiracy and overt act within the United States to commit murder, kidnaping, maiming or the destruction of certain property overseas)
18 U.S.C. §1091 (genocide)
Jurisdictional factors:
- the offender was a United States national
- the offender is a stateless person habitually residing in the United States
- the offender is present in the United States
- the offense occurred in part in the United States

18 U.S.C. §1111 (murder within the special maritime jurisdiction of the United States)
18 U.S.C. §1112 (manslaughter within the special maritime jurisdiction of the United States)
18 U.S.C. §1113 (attempted murder or manslaughter within the special maritime jurisdiction of the United States)
18 U.S.C. §1116 (killing an internationally protected person)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §1117 (conspiracy to kill an internationally protected person)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §1119 (a United States national killing or attempting to kill a United States national outside the United States)
18 U.S.C. §1201 (kidnaping where death results)
Jurisdictional factors:
- the victim is removed from the United States;
- the offense occurs within the special aircraft or special maritime and territorial jurisdiction of the United States;
- the victim is a federal officer or employee; or
- the victim is an internationally protected person and
    + the victim was a United States national;
    + the offender was a United States national; or
    + the offender is afterwards found in the United States

Attempt/conspiracy
attempt and conspiracy are included

18 U.S.C. §1203 (hostage taking where death results)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

Attempt/conspiracy
attempt and conspiracy are included

18 U.S.C. §1512 (tampering with a federal witness or informant where death results)
Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C.1512(g)

Attempt/conspiracy
attempt is included

18 U.S.C. §1513 (retaliating against a federal witness or informant)
Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C.1513(d))

Attempt/conspiracy
attempt is included

18 U.S.C. §1652 (murder of an American by an American on the high seas in the name of a foreign state or person)
18 U.S.C. §1751 (killing the President, Vice President, or a senior White House official)
Jurisdictional factors:
- "[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C.1751(k)

Attempt/conspiracy
attempt and conspiracy are included

18 U.S.C. §§2241, 2245 (aggravated sexual abuse within the special maritime and territorial jurisdiction of the United States where death results)
18 U.S.C. §§2242, 2245 (sexual abuse within the special maritime and territorial jurisdiction of the United States where death results)
18 U.S.C. §§2243, 2245 (sexual abuse of a minor or ward within the special maritime and territorial jurisdiction of the United States where death results)
18 U.S.C. §§2244,2245 (abusive sexual contact within the special maritime and territorial jurisdiction of the United States where death results)
18 U.S.C. §2280 (a killing resulting from violence against maritime navigation)
Jurisdictional factors
- aboard a ship of American registry;
- committed by an American national aboard a ship of foreign registry or outside the U.S.;
- victim was an American;
- committed in the territorial waters of another country and the offender is subsequently found in the United States; or
- committed in an effort to compel federal action or abstention

18 U.S.C. §2281 (resulting from violence against fixed maritime platforms)
Jurisdictional factors
- aboard a platform on the United States continental shelf;
- committed by an American national aboard a platform on the continental shelf of another nation
- victim was an American;
- committed aboard a platform on the continental shelf of another nation and the offender is subsequently found in the United States; or
- committed in an effort to compel federal action or abstention

18 U.S.C. §2283 (transportation of explosives, biological, chemical, radioactive or nuclear materials for terrorist purposes on the high seas or aboard a United States vessel or in United States waters)

18 U.S.C. §2290
Offenses:
- destruction of vessels or maritime facilities (18 U.S.C. §2291); or
- attempting or conspiring to do so (18 U.S.C. §2291)

Jurisdictional factors:
- victim or offender was a United States national;
- U.S. national was aboard victim vessel; or
- victim vessel was a United States vessel

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. §2332 (killing an American overseas)
Jurisdictional factors
- prosecution only on DoJ certification "to coerce, intimidate, or retaliate against a government or civilian population"

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. §2332a (resulting from use of weapons of mass destruction)
Jurisdictional factors
- victim or offender is American; or
- against federal property

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. §2332f (resulting from bombing of public places, government facilities, public transportation systems or infrastructure facilities)(effective when the terrorist bombing treaty enters into force for the U.S.)
Jurisdictional factors
- victim or offender is American;
- aboard aircraft operated by the United States;
- aboard vessel of aircraft of United States registry;
- offender is found in the United States;
- committed to coerce United States action; or
- against federal property

Attempt/conspiracy
includes attempts and conspiracies

18 U.S.C. §2340A (resulting from torture committed outside the United States (physical or mental pain inflicted under color of law upon a prisoner))
Jurisdictional factors
- American offender; or
- offender subsequently found within the United States

Attempt/conspiracy
includes attempts

18 U.S.C. §2441 (war crimes)
Jurisdictional factors
- victim or offender is an American; or
- victim or offender is a member of United States armed forces

18 U.S.C. §3261(offenses committed by members of the United States armed forces or individuals accompanying or employed by the United States armed forces overseas)
49 U.S.C. §46502 (air piracy where death results)
49 U.S.C. §46506 (murder, manslaughter, or attempted murder or manslaughter within the special aircraft jurisdiction of the United States)

Kidnaping

18 U.S.C. §351 (kidnaping a Member of Congress, a Supreme Court Justice, or senior executive branch official)
Jurisdictional factors:
- "[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C.351(i)

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. §956 (conspiracy and overt act within the United States to commit murder, kidnaping, maiming or the destruction of certain property overseas)
*18 U.S.C. §1091(*genocide)
- forcibly transferring children of a national, ethnic, racial or religious group

Jurisdictional factors:
- the offender was a United States national
- the offender is a stateless person habitually residing in the United States
- the offender is present in the United States
- the offense occurred in part in the United States

18 U.S.C. §1201 (kidnaping)
Jurisdictional factors:
- the victim is removed from the United States;
- the offense occurs within the special aircraft or special maritime and territorial jurisdiction of the United States;
- the victim is a federal officer or employee; or
- the victim is an internationally protected person and
  + the victim was a United States national;
  + the offender was a United States national; or
  + the offender is afterwards found in the United States

18 U.S.C. §1203 (hostage taking)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. §1204 (international parental kidnaping detaining a child outside of the United States in violation of parental custody rights)
18 U.S.C. §3261(offenses committed by members of the United States armed forces or individuals accompanying or employed by the United States armed forces overseas)

Assault

18 U.S.C. §37 (violence at international airports)
Jurisdictional factors:
- a victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. §112 (assaulting an internationally protected person)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §113 (assault within the special maritime and territorial jurisdiction of the United States)
18 U.S.C. §114 (maiming within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. §351 (assaulting a Member of Congress, a Supreme Court Justice, or senior executive branch official;
Jurisdictional factor:
"[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C.351(i)

18 U.S.C. §831
Offenses:
- unlawful use of nuclear material where the offender causes the serious injury to another; or
- attempting or conspiring to do so

Jurisdictional factors:
- the offense is committed within the special aircraft or special maritime and territorial jurisdiction of the United States;
- a United States national or an American legal entity was the victim of the offense;
- the offender was a United States national or an American legal entity;
- the offender is afterwards found in the United States;
- the offense involved a transfer to or from the United States; or
- the offense was a threat directed against the United States

18 U.S.C. §956 (conspiracy and overt act within the United States to commit murder, kidnaping, maiming or the destruction of certain property overseas)
*18 U.S.C. §1091(*genocide)
- assaulting members of a national, ethnic, racial or religious group
- forcibly transferring children of a national, ethnic, racial or religious group

Jurisdictional factors:
- the offender was a United States national
- the offender is a stateless person habitually residing in the United States
- the offender is present in the United States
- the offense occurred in part in the United States

18 U.S.C. §1512 (tampering with a federal witness or informant through the use of physical force)
Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C.1512(g)

Attempt/conspiracy
attempt is included

18 U.S.C. §1513
Offenses (causing physical injury):
- retaliating against a federal witness or informant; or
- attempting to retaliate against a federal witness or informant

Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C.1513(d))

18 U.S.C. §1655 (assaulting the commander of a vessel is piracy)
18 U.S.C. §1751 (assaulting the President, Vice President, or a senior White House official; "[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C.1751(k))

18 U.S.C. §2191 (cruelty to seamen within the special maritime jurisdiction of the United States)
18 U.S.C. §2194 (shanghaiing sailors for employment within the foreign commerce of the United States)
18 U.S.C. §2241 (aggravated sexual abuse within the special maritime and territorial jurisdiction of the United States)
18 U.S.C. §2242 (sexual abuse within the special maritime and territorial jurisdiction of the United States)
18 U.S.C. §2243 (sexual abuse of a minor or ward within the special maritime and territorial jurisdiction of the United States)
18 U.S.C. §2244 (abusive sexual contact within the special maritime and territorial jurisdiction of the United States)
18 U.S.C. §2261A (stalking within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. §2280
Offenses:
- violence committed against maritime navigation; or
- attempting or conspiracy to commit violence against maritime navigation

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §2281
Offenses:
- violence committed against a maritime platform; or
- attempting or conspiracy to commit violence against a maritime platform

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §2332 (assaulting a United States national outside the United States) (prosecution upon Department of Justice certification of terrorist intent)

18 U.S.C. §2332a
Offenses:
- using a weapon of mass destruction outside the United States resulting physical injury; or
- attempting or conspiring to do so

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. §2332b
Offenses:
- terrorist assaults transcending national boundaries; or
- attempt or conspiracy

Jurisdictional factors:
- use of United States mail or other facility of United States foreign commerce;
- affects foreign commerce of the United States;
- victim was federal officer or employee or United States government; or
- the offense was committed within the special maritime or territorial jurisdiction of the United States

18 U.S.C. §2340A
Offenses:
- torture under color of law outside the United States; or
- attempted torture

Jurisdictional factors:
- the offender was a United States national; or
- the offender is present in the United States

18 U.S.C. §3261(offenses committed by members of the United States armed forces or individuals accompanying or employed by the United States armed forces overseas)
46 U.S.C. §11501 (seaman's assault upon officers within the special maritime jurisdiction of the United States)
49 U.S.C. §46504 (assaulting a flight crew member within the special aircraft jurisdiction of the United States)
49 U.S.C. §46506 (assaults within the special aircraft jurisdiction of the United States)

Property Destruction

18 U.S.C. §32 (destruction of aircraft or their facilities)
Jurisdictional factors:
- aircraft was in the special aircraft jurisdiction of the United States;
- the victim or offender was a United States national; or
- the offender is found in the United States

Attempt/Conspiracy
attempt and conspiracy are included

18 U.S.C. §33 (destruction of motor vehicles or their facilities used in United States foreign commerce)
18 U.S.C. §37 (violence at international airports)
Jurisdictional factors:
- a victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §81 (arson within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. §229 (chemical weapons damage)
Jurisdictional factors:
- a victim was a United States national;
- the offender was a United States national; or
- committed against United States property

18 U.S.C. §831 (use nuclear material of damage or destroy)
Jurisdictional factors:
- committed within the special aircraft or special maritime and territorial jurisdiction of the United States
- a United States national or an American legal entity was the victim of the offense;
- the offender was a United States national or an American legal entity;
- the offender is afterwards found in the United States; or
- the offense involved a transfer to or from the United States

18 U.S.C. §956 (conspiracy and overt act within the United States to commit murder, kidnaping, maiming or the destruction of certain property overseas)
18 U.S.C. §1030 (computer abuse involving damage to federal or United States financial systems or systems used in the foreign commerce or communications of the United States)
18 U.S.C. §1363 (destruction of property within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. §2272 (destruction of a vessel within the maritime jurisdiction of the United States by its owner)
18 U.S.C. §2273 (destruction of a vessel within the maritime jurisdiction of the United States by others)
18 U.S.C. §2275 (burning or tampering with a vessel within the maritime jurisdiction of the United States)
18 U.S.C. §2280 (destruction of maritime navigational facilities)
Jurisdictional factors:
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §2281 (damage to a maritime platform)
Jurisdictional factors:
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §2290
Offenses:
- destruction of vessels or maritime facilities (18 U.S.C. 2291); or

- attempting or conspiring to do so (18 U.S.C. 2291)

Jurisdictional factors:
- victim or offender was a United States national;
- United States national was aboard victim vessel;
- victim vessel was a United States vessel

18 U.S.C. §2332a (using a weapon of mass destruction)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. §2332f (effective upon the terrorist bombing convention entering into force for the U.S.) (bombing public places, government facilities, or public utilities outside the United States)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offense was committed against federal property;
- the offender is present in the United States;
- the offense was committed on United States registered vessel or aircraft; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §3261(offenses committed by members of the United States armed forces or individuals accompanying or employed by the United States armed forces overseas)

Threats

18 U.S.C. §32 (threats to destroy foreign civil aircraft, or aircraft in the special aircraft jurisdiction of the United States, or aircraft or aircraft facilities in the special maritime and territorial jurisdiction of the United States)
18 U.S.C. §112 (threatening internationally protected person)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §175 (threatening to develop, produce, stockpile, transfer, acquire, retain, or possess biological weapons or delivery systems, misuse of biological weapons; or threatening to assisting a foreign power to do so; "there is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States," 18 U.S.C.175(a)
18 U.S.C. §229 (threatening to use chemical weapons)
Jurisdictional factors:
- the victim or offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. §831 (threaten to use nuclear material of injury or destroy)
Jurisdictional factors:
- committed within the special aircraft or special maritime and territorial jurisdiction of the United States;
- a United States national or an American legal entity was the victim of the offense;
- the offender was a United States national or an American legal entity; or
- the offender is afterwards found in the United States;
- the offense involved a transfer to or from the United States; or
- the offense was a threat directed against the United States

18 U.S.C. §875 (transmission of a threat in the foreign commerce of the United States)
18 U.S.C. §877 (mailing a threat to kidnap or injure from a foreign country to the United States)
18 U.S.C. §878 (threatening to kill, kidnap or assault an internationally protected person)
Jurisdictional factors:

- a victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. §1203 (threaten to kill or injure a hostage outside the United States)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §1512 (threatening a federal witness or informant)
Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C.1512(g)

18 U.S.C. §1513 (threatening to retaliate against a federal witness or informant)
Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C. §1513(d))

18 U.S.C. §2280 (threats of violence against maritime navigation)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §2281 (threatens injury or destruction aboard a fixed maritime platform)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. §2290
Offenses:
- destruction of vessels or maritime facilities (18 U.S.C. §2291); or
- attempting or conspiring to do so (18 U.S.C. §2291)

Jurisdictional factors:
- victim or offender was a United States national;
- United States national was aboard victim vessel;
- victim vessel was a United States vessel

18 U.S.C. §2332a (threatening to use a weapon of mass destruction)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. §2332f (effective upon the terrorist bombing convention entering into force for the U.S.) (threatening to bomb public places, government facilities, or public utilities outside the United States)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offense was committed against federal property;
- the offender is present in the United States;
- the offense was committed on United States registered vessel or aircraft; or
- the offense was intended to compel action or abstention by the United States

49 U.S.C. §46507 (threats or scares concerning air piracy or bombing aircraft in the special aircraft jurisdiction of the United States)

Theft

18 U.S.C. §38 (fraud involving aircraft or space vehicle parts)
Jurisdictional factors:
- the victim or offender was an entity organized under United States law;
- the victim or offender was a United States national; or
- an act in furtherance of the offense was committed in the United States)

18 U.S.C. §831 (theft of nuclear materials)
Jurisdictional factors:
- within the special aircraft or special maritime and territorial jurisdiction of the United States;
- the victim was a United States national or an American legal entity;
- the offender was a United States national or an American legal entity;
- the offender is afterwards found in the United States; or
- the offense involved a transfer to or from the United States

18 U.S.C. §1025 (theft by false pretenses or fraud within the special maritime and territorial jurisdiction of the United States)

Counterfeiting

18 U.S.C. §§470-474 (counterfeiting United States obligations outside the United States)

Piggyback Statutes

18 U.S.C. §2 (principals)
18 U.S.C. §3 (accessories after the fact)
18 U.S.C. §4 (misprision)
18 U.S.C. §371 (conspiracy)
18 U.S.C. §924(c), (j) (using or carrying a firearm during the course of a federal crime of violence or drug trafficking crime)

18 U.S.C. §1952 (Travel Act)
18 U.S.C. §§1956-1957 (money laundering)
18 U.S.C. §1959 (violence in aid of racketeering)
18 U.S.C. §§1961-1965 (RICO)
21 U.S.C. §846 (conspiracy or attempt to violate the Controlled Substances Act)
21 U.S.C. §963 (conspiracy or attempt to violate the Controlled Substances Import and Export Act)

Model Penal Code

§1.03 Territorial Applicability
(1) Except as otherwise provided in this Section, a person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if:

(a) either the conduct that is an element of the offense or the result that is such an element occurs within this State; or

(b) conduct occurring outside the State is sufficient under the law of this State to constitute an attempt to commit an offense within the State; or

(c) conduct occurring outside the State is sufficient under the law of this State to constitute a conspiracy to commit an offense within the state and an overt act in furtherance of such conspiracy occurs within the state; or
(d) conduct occurring within the State establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit , an offense in another jurisdiction that also is an offense under the law of this State; or
(e) the offense consists of the omission to perform a legal duty imposed by the law of this State with respect to domicile, residence or a relationship to a person, thing or transaction in the State; or
(f) the offense is based on a statute of this State that expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.

(2) Subsection (1)(a) does not apply when either causing a specified result or a purpose to cause or danger of causing such a result is an element of an offense and the result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense, unless a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result.
(3) Subsection (1)(a) does not apply when causing a particular result is an element of an offense and the result is caused by conduct occurring outside the State that would not constitute an offense if the result had occurred there, unless the actor purposely or knowingly caused the result within the State.
(4) When the offense is homicide, either the death of the victim or the bodily impact causing death constitutes a result within the meaning of Subsection (a)(1), and if the body of a homicide victim is found within the State, it is presumed that such result occurred within the State.
(5) This State includes the land and water and the air space above such land and water with respect to which the State has legislative jurisdiction.

Restatement of the Law Third: Foreign Relations Law of the United States

§401. Categories of Jurisdiction
Under international law, a state is subject to limitations on
(a) jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;
(b) jurisdiction to adjudicate, i.e., to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;
(c) jurisdiction to enforce, i.e., to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.

§402. Bases of Jurisdiction to Prescribe
Subject to §403, a state has jurisdiction to prescribe law with respect to
(1)(a) conduct that, wholly or in substantial part, takes place within its territory;
(b) the status of persons, or interests in things, present within its territory;
(c) conduct outside its territory that has or is intended to have substantial effect within its territory;
(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

§403. Limitations on Jurisdiction to Prescribe

(1) Even when one of the bases for jurisdiction under §402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

§404. Universal Jurisdiction to Define and Punish Certain Offenses

A state has jurisdiction to define and prescribe punishment for certain Offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the jurisdiction indicated in §402 is present.

§421. Jurisdiction to Adjudicate

(1) A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.

(2) In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted:

(a) the person or thing is present in the territory of the state, other than transitorily;

(b) the person, if a natural person, is domiciled in the state;

(c) the person, if a natural person, is resident in the state;

(d) the person, if a natural person, is a national of the state;

(e) the person, if a corporation or comparable juridical person, is organized pursuant to the law of the state;

(f) a ship, aircraft, or other vehicle to which the adjudication relates is registered under the laws of the state;

(g) the person, whether natural or juridical, has consented to the exercise of jurisdiction;
(h) the person, whether natural or juridical, regularly carries on business in the state;
(i) the person, whether natural or juridical, had carried on activity in the state, but only in respect to such activity;
(j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect to such activity; or
(k) the thing that is the subject of adjudication is owned, possessed, or used in the state, but only in respect to a claim reasonably connected with that thing.

(3) A defense of lack of jurisdiction is generally waived by any appearance by or on behalf of a person or thing (whether as plaintiff, defendant, or third party), if the appearance is for a purpose that does not include a challenge to the exercise of jurisdiction.

§431. Jurisdiction to Enforce

(1) A state may employ judicial or nonjudicial measures to induce or compel compliance or punish noncompliance with its laws or regulations, provided it has jurisdiction to prescribe in accordance with §§402 and 403.

(2) Enforcement measures must be reasonably related to the laws or regulations to which they are directed; punishment for noncompliance must be preceded by an appropriate determination of violation and must be proportional to the gravity of the violation.

(3) A state may employ enforcement measures against a person located outside the territory
(a) if the person is given notice of the claims or charges against him that is reasonable in the circumstances;
(b) if the person is given an opportunity to be heard, ordinarily in advance of enforcement, whether in person or by counsel or other representative; and
(c) when enforcement is through the courts, if the state has jurisdiction to adjudicate.

18 U.S.C. §7. Special Maritime and Territorial Jurisdiction of the United States (text)

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

(9) With respect to Offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—

> (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and
>
> (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.

18 U.S.C. §3261. Military Extraterritorial Jurisdiction (text)

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—
(1) while employed by or accompanying the Armed Forces outside the United States; or
(2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

(c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

(d) No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless –
(1) such member ceases to be subject to such chapter; or
(2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter.

18 U.S.C. §3271. Trafficking in Persons (Text)

(a) Whoever, while employed by or accompanying the Federal Government outside the United States, engages in conduct outside the United States that would constitute an offense under chapter 77 or 117 of this title if the conduct had been engaged in within the United States or within the special maritime and territorial jurisdiction of the United States shall be punished as provided for that offense.

(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

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Author Information

Charles Doyle
Senior Specialist in American Public Law

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