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Terrorism Abroad: A Quick Look at Applicable Federal and State Laws

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Summary

Terrorists' attacks on the World Trade Center, the Pentagon, the Murrah Federal Building in Oklahoma City and the American Embassies in Kenya and Tanzania have stimulated demands that the terrorists responsible and those like them be brought to justice. American criminal law already proscribes many of these acts of terrorism and there have been proposals to expand that coverage.

Ordinarily, crime is proscribed by the law of the place where it occurs, but more than a few American criminal laws apply to terrorism committed outside the United States. The power to enact such laws flows from the Constitution and is usually limited by little more than due process notice. Practicality and reluctance to offend other nations have traditionally limited American exercise of such authority to instances where there is a discernible nexus to the United States. Yet where there is a clear connection to the United States, American criminal law, primarily federal law generally permits prosecution of terrorism committed overseas.

This report and a companion, CRS Report RS21033, *Terrorism At Home: A Quick Look at Applicable Federal and State Criminal Law*, are abbreviated from portions of CRS Report 95-1050, *Terrorism At Home and Abroad: Applicable Federal and State Criminal Laws*, stripped of its footnotes and appendices.

Constitutional Considerations: The Constitution governs when the Congress may pass laws applicable overseas. It neither explicitly permits nor forbids the passage of terrorism laws with extraterritorial reach. It does give Congress broad general authority over other matters, such as the power to define offenses against the law of nations, to regulate interstate and foreign commerce, and over foreign affairs, under which such laws may be enacted. Nevertheless, these powers are not without limit. The limits most often suggested in cases of extraterritorial jurisdiction flow from due process. At some point, it is contrary to due process to punish a citizen of a foreign country who is reasonably unaware of the extent to which American law regulates his conduct. A citizen 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. Of course, terrorists would presumably be hard pressed to argue that they were unaware that threats or acts of violence might subject them to criminal prosecution. On the other hand, the application of American law to an alien in a foreign country where the conduct is not unlawful – such as monetary support or computer trespassing in some countries for instance – might evidence a lack of notice sufficient to raise due process concerns.

Statutory Construction: Given the broad grant of constitutional authority and limited constitutional restrictions, the question of the extent to which a particular statute applies outside the United States has generally been considered a matter of statutory, rather than constitutional, construction.

General principles of statutory construction have emerged which can explain, if not presage, the result in a given case. The first of these holds that a statute will be construed to have only territorial application unless there is a clear indication of some broader intent. A second states that unless a contrary intent is clear, Congress is assumed to have acted so as not to invite action inconsistent with international law. A third principle of construction, used primarily in the case of criminal statutes, runs contrary to the first two. In simple terms, it states that the nature and purpose of a statute may provide an indication of whether Congress intended a statute to apply beyond the confines of the United States, particularly if extraterritorial application offends no principles of international law. And the first indication of an intended extraterritorial application may be the absence of any geographical tether, such as found in the criminal statutes made applicable within the special maritime and territorial jurisdiction of the United States, *United States* v. *Bowman*, 260 U.S. 94, 97-98, 102 (1922). The final principle encompasses misconduct overseas which has an impact within the United States. The Supreme Court has painted this "external force" principle with a broad brush, "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," *Ford* v. *United States*, 273 U.S. 593, 623 (1927).

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

To what extent does international law permit a nation to exercise extraterritorial jurisdiction? The question is essentially one of national interests. The most common classification of these interests dates to a 1935 Harvard Law School study which divided them into five categories involving: (1) the regulation of activities occurring within the territory of a country; (2) the regulation of the conduct of its nationals; (3) the protection of its nationals; (4) the regulation of activities outside a country which have an impact within it; and (5) the regulation of activities which are universally condemned. Legislation may reflect more than one interest or principle and there is little consensus of the precise boundaries of the principles.

Present Crimes: Congress has enacted laws containing express provisions for extraterritorial jurisdiction in four groups of statutes: (1) those enacted to conform to our obligations under an international agreement to which the United States is a party; (2) those enacted to apply within the special maritime and territorial jurisdiction of the United States or the special airspace jurisdiction of the United States; (3) those passed pursuant to Congress's authority to regulate foreign commerce; (4) those involving offenses which Congress felt merited an unmistakable assertion of extraterritorial jurisdiction. Congress recently added another category when, in the exercise of its powers to regulate the armed forces, it extended – to those accompanying the armed forces of the United States – the felony proscriptions which apply within the special maritime and territorial jurisdiction of the United States, 18 U.S.C. 3261-3267.

An inventory of the federal criminal laws covering acts of terrorism abroad, either explicitly or by operation of the law announced in *Bowman, Ford* and their progeny, might be roughly summarized as follows:

It is a federal crime to kill or physically assault an American for a terroristic purpose anywhere in the world regardless of the nationality of the terrorist or the means used, 18 U.S.C. 2331, 2332. No matter what the purpose, or where in the world the crime occurs, or the nationality of the offender or the means used, it is a federal crime to kill, beat, or kidnap the President, Members of Congress, members of the U.S. diplomatic corps, any other federal officer or employee including members of the armed forces (or anyone assisting them) because of or during the performance of their duties, 18 U.S.C. 1751, 351, 1114, 111, 1201.

A terrorist or anyone else who takes hostages, or commits an act of violence at an international airport, 18 U.S.C. 37, sabotages, 18 U.S.C. 32 or hijacks an airplane, 49 U.S.C. 46502, anywhere in the world is subject to federal prosecution and to capital punishment if anyone is killed during the course of the crime, as long as either the offender or one of the victims is an American or the offender is later "found" in the United States.

By the same token, overseas crimes involving the weapons of mass destruction, 18 U.S.C. 2332a, biological weapons, 18 U.S.C. 175, chemical weapons, 18 U.S.C. 229, or nuclear materials, 18 U.S.C. 831, may be prosecuted in the United States when either the victim or the offender is an American. And regardless of the nationality of the victim or offender, the overseas use of explosives to damage or destroy federal property may be prosecuted in this country and carries the death penalty if anyone is killed.

Foreign terrorists who flee to the United States are subject to the federal laws which outlaw the use of perjury, false statements, or other schemes to gain unlawful entry into the United States even when committed within another country. Circumstances which permit federal prosecution of an act of terrorism committed abroad will also support prosecution of various auxiliary or "piggyback" offenses, like conspiracy, aiding and abetting an act of terrorism, harboring or otherwise assisting another after the commission of such an offense, or possession of a firearm or explosive during the commission of the offense, *inter alia*.

Federal criminal law features a special category of piggyback offenses for overseas terrorism – conduct in the United States made criminal because of its relationship to terrorism abroad. The earliest example may be the Walker Act, 18 U.S.C. 960, which

prohibits launching a military or naval expedition against a friendly nation from the United States. More contemporary prohibitions ban conspiracies in this country to commit murder, kidnapping or mayhem abroad, 18 U.S.C. 956; providing material assistance to terrorists, 18 U.S.C. 2339A, or terrorist organizations, 18 U.S.C. 2339B, engaging in financial transactions with countries that support international terrorism, 18 U.S.C. 2332d.

Past federal prosecution of acts of terrorism committed abroad have rested on a combination of jurisdictional foundations, some explicit and others implied. For instance, the terrorists who bombed the American Embassies in Kenya and Tanzania were charged with violations of 18 U.S.C. 930 (murder while unlawfully in possession of a bomb within a federal facility), 844(f)(murder resulting from the bombing of a federal building), 844(h)(possession of a bomb during the commission of a federal felony), 844(n)(conspiracy to violate section 844), 1114 (murder of federal officers and employees), and 2155 (destruction of national defense materials), *United States v. Bin Laden*, 92 F.Supp.2d 189, 192 (S.D.N.Y. 2000). Extraterritorial application of all of these depends on *Bowman*. Prosecution of terrorists for air piracy and related offenses, on the other hand, have not tended to rely exclusively on an implied jurisdictional base.

State criminal laws are less likely to apply overseas. 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.

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, some of which may be relevant in a terrorism context. Perhaps the most common state statutory provision claiming state extraterritorial criminal jurisdiction is one which asserts jurisdiction in cases where some of the elements of the offense are committed within the state or others are committed outside it. Another common claim is where an individual outside the state attempts or conspires to commit a crime within the state. 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 (or vice versa).

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