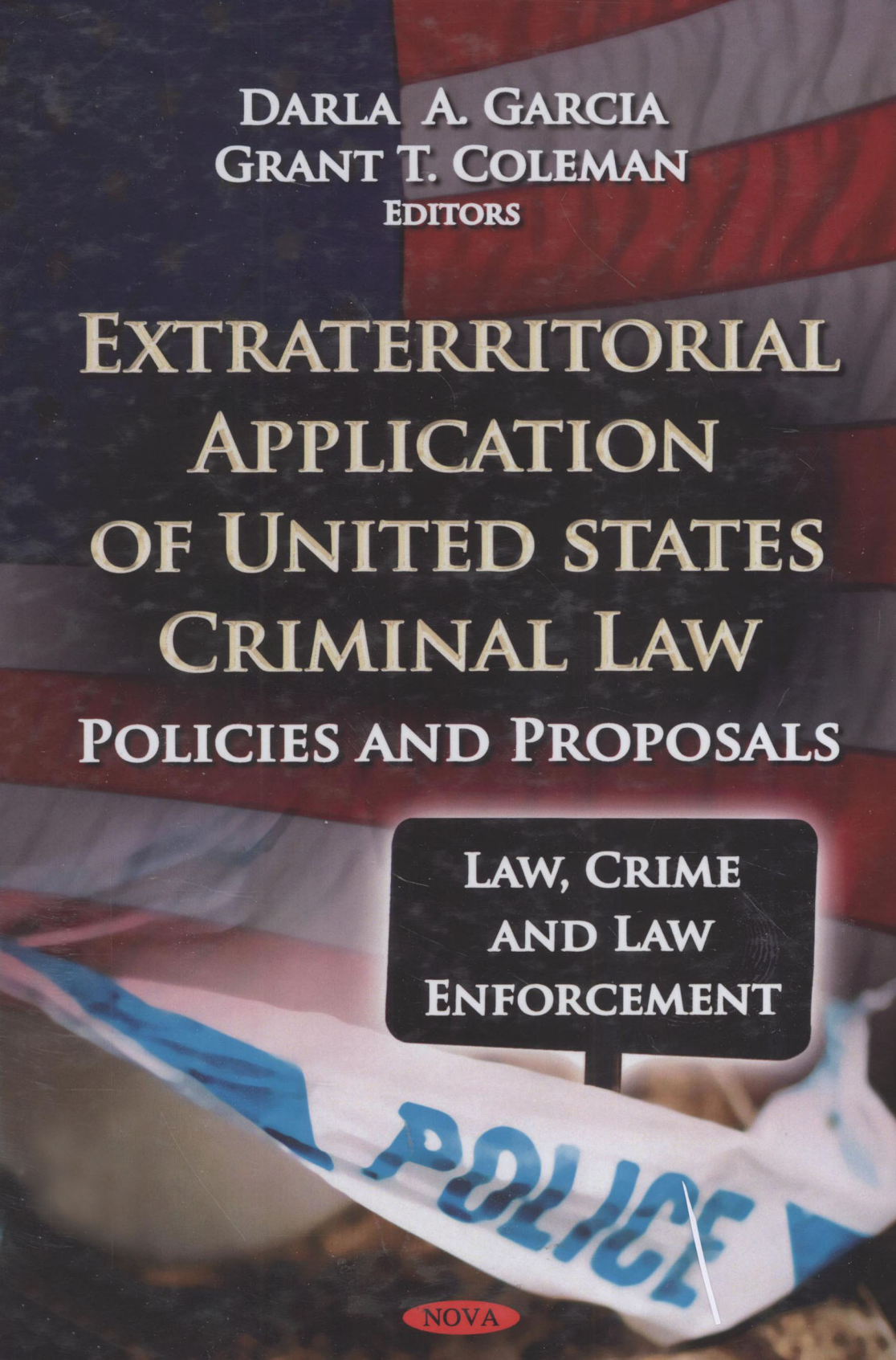
Darla A. Garcia
Grant T. Coleman
Editors

Extraterritorial Application of United States Criminal Law

Policies and Proposals

Law, Crime and Law Enforcement



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LAW, CRIME AND LAW ENFORCEMENT

EXTRATERRITORIAL APPLICATION OF U. S. CRIMINAL LAW

POLICIES AND PROPOSALS

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PREFACE

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 outside of the United States. Application is generally a question of legislative intent, expressed or implied. In either case, it most often involves crimes committed aboard a ship or airplane, crimes condemned by international treaty, crimes relating to government employees or property overseas, or crimes that have an impact in this country even if planned or committed in part elsewhere. This book discusses the laws and policy surrounding extraterritorial jurisdiction and proposals for furthering accountability.

Chapter 1 - 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 outside of the United States. Application is generally a question of legislative intent, expressed or implied. In either case, it most often involves crimes committed aboard a ship or airplane, crimes condemned by international treaty, crimes relating to government employees or property overseas, or crimes that have an impact in this country even if planned or committed in part elsewhere.

Although the crimes over which the United States has extraterritorial jurisdiction may be many, so are the obstacles to their enforcement. For both practical and diplomatic reasons, criminal investigations within another country require the acquiescence, consent, or preferably the assistance, of the authorities of the host country. The United States has mutual legal assistance treaties with several countries designed to formalize such cooperative law enforcement assistance. Searches and interrogations carried out 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 the nation's earlier agreements which complicate extradition for extraterritorial offenses, that is, dual criminality requirements, reluctance to recognize extraterritorial jurisdiction, and exemptions on the basis of nationality or political offenses. To further facilitate the prosecution of federal crimes with extraterritorial application Congress has enacted special venue, statute of limitations, and evidentiary statutes. To further cooperative efforts, it enacted the Foreign Evidence Request Efficiency Act, P.L. 111-79, which authorizes federal courts to issue search warrants, subpoenas and other orders to facilitate criminal investigations in this country on behalf of foreign law enforcement officials.

Chapter 2 - The United States government uses hundreds of thousands of civilian contractors and employees overseas. They and their dependants are often subject to local prosecution for the crimes they commit abroad. Whether by agreement, practice, or circumstance—sometimes they are not. The Military Extraterritorial Jurisdiction Act (MEJA) permits federal prosecution of certain crimes committed abroad by Defense Department civilian employees, contractors, or their dependants. The Civilian Extraterritorial Jurisdiction Act (CEJA; H.R. 2136) (Representative Price of North Carolina) and S. 1145 (Senator Leahy) would permit federal prosecution for certain crimes committed abroad by the civilian employees, dependants, or contractors of other federal agencies.

The bills would supplement rather than replace MEJA or other provisions of federal extraterritorial jurisdiction. The crimes covered would include various federal violent, corruption, and trafficking offenses. The Attorney General would be responsible to ensure the availability of personnel and other resources necessary for investigation and prosecution of such offenses.

Otherwise applicable statutes of limitation would be suspended during the absence of a suspect from the United States. Prosecutors would be afforded the additional option of trying cases under CEJA in the district in which the employing or contracting agency maintained its headquarters.

Chapter 3 - Statement of Senator Patrick Leahy (D-Vt.), Chairman, Senate Judiciary Committee.

Chapter 4 - Statement of Tara Lee Global Co-Chair, Transnational Litigation DLA Piper LLP (US).

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Chapter 1

EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW*

Charles Doyle

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 outside of the United States. Application is generally a question of legislative intent, expressed or implied. In either case, it most often involves crimes committed aboard a ship or airplane, crimes condemned by international treaty, crimes relating to government employees or property overseas, or crimes that have an impact in this country even if planned or committed in part elsewhere.

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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.

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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 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 which 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 properly 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 enacted extraterritorial criminal legislation primarily in a maritime context.[7] The powers have been read broadly 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 power "[t]o regulate Commerce with foreign Nations,"[9] affords it additional authority in the area. The commerce power, that is, the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," is a power of exceptional breadth domestically.[10] Its reach may be even more extraordinary in an international context,[11] although there is certainly support for a contrary view.[12] In recent cases, the courts have opted for a middle ground. In one, it 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.[14] In another, it elected to construe the legislation narrowly and thereby avoided the necessity of ruling on the scope of Congress's power under the clause.[15] In a third, the court held that Congress's authority to regulate foreign commerce extended to the regulation of the channels of U.S. foreign commerce; it left for another day the questions of whether the domestic "affect on commerce" prerogative has a foreign commerce counterpart or whether foreign commerce issues should be judged by standards of their own.[16]

Congress has resorted on countless occasions to its authority to enact extraterritorial legislation not only in reliance on its own enumerated powers but also, reliance on the powers vested in one of the other branches or on powers it shares with one of the other branches – through the necessary and proper clause.[17] It has, for instance, regularly called upon the authority deposited with the President and the Congress in the fields of foreign affairs and military activities,[18] powers which the courts have described in particularly sweeping terms.[19]

Constitutional Limitations

Nevertheless, the powers granted by the Constitution are not without limit.[20] The clauses enumerating Congress's powers carry specific and implicit limits which govern the extent to which the power may be exercised overseas.[21] Other limitations appear elsewhere in the Constitution, most notably in the due process clauses of the Fifth Amendment.[22] 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.[23]

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.[24]

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.[25] Even the value of this scant illumination is dimmed by the realization that the circumstances most likely to warrant such due process analysis are the very ones for 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,[26] 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."[27] Moreover,

the Court's more recent decisions often begin with the assumption that the issues of extraterritorial jurisdiction come without constitutional implications.[28]

A handful, but growing number, of lower courts have considered due process issues. Some describe a due process requirement that demands some nexus between the United States and the circumstances of the offense.[29] In some instances, they look to international law principles to provide a useful measure to determine whether the nexus requirement has been met;[30] in others they consider the principles at work in the minimum contacts test for personal jurisdiction.[31] 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 criminal liable for it in an American court. The commentators have greeted this analysis with some hesitancy,[32] and some courts have simply rejected it.[33]

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.[34] Here, indicia 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.[35] 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.[36]

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

Statutory Construction

For this reason, the question of the extent to which a particular statute applies outside the United States has generally been considered a matter of statutory, rather than constitutional, construction.[37] 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.[38]

A second rule of construction states that the nature and purpose of a statute may provide an indication of whether Congress intended a statute to apply beyond the confines of the United States. Although hints of it can be found earlier,[39] the rule was first clearly announced in *United States v. Bowman*.[40]

Does the Supreme Court's emphatic endorsement of the domestic presumption in a civil context in *Morrison v. National Australia Bank Ltd.*[41] cast doubt on Bowman's continued vitality? Early indications are that the courts and commentators are unwilling to go that far.[42]

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.[43] 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.[44] In the eyes of the community of nations, a jurisdictional claim over misconduct based solely on the nationality of the victim continues to be among the more tenuous. 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.[45]

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.[46]

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 which involves crimes occurring or having an impact within the territory of a country; (2) the nationality principle which involves crimes committed by its nationals; (3) the passive personality principle which involves crimes committed against its nationals; (4) the protection principle which involves the crimes which have an impact on its interests as a nation; and (5) the universal principle which involves crimes which are universally condemned.[47]

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.[48]

While the Restatement's views carry considerable weight with both Congress and the courts,[49] 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.[50]

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.[51] Congress often indicates within the text of a statute when it intends a provision to apply within its territorial waters and upon its vessels.[52] 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.[53] This is particularly so, when the facts in a case suggest other principles of international law in addition to the territorial principle.[54]

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."[55] As construed by the courts, however, it is understood to permit the application abroad of statutes which protect the federal government and its functions.[56] And so, it covers the overseas murder or attempted murder