

CH. 7 FEDERAL LAW & EXTRATERRITORIALITY

What is the international (i.e., cross-border or transnational) scope of:

- (1) the U.S. Constitution, and
- (2) federal (& state) statutes?

Does a “conflict” exist with rules in the destination jurisdiction?

If so, how resolve these conflicts? No full faith & credit.” What is the concept of “comity”?

These issues also relevant in non-foreign country situations: international waters; space.

FEDERAL LAW SUPREMECY

Consider those areas where national law
supersedes local (state) law:

Foreign policy (foreign affairs jurisdiction)

Interstate/international commerce & commerce
clause jurisdiction.

Others

How Far do Federal Statutes Reach?

Limit to the “water’s edge”?

Also, applicable to U.S. citizens/U.S. corporations abroad?

Also, applicable to foreign entities owned by U.S. interests when (1) contacts with U.S. (effects within U.S.), and (2) exclusively foreign contacts?

Use territoriality as a “presumption”? Aramco case as providing a presumption against extraterritoriality?

Restatement of Foreign Relations Law, 3rd

§402 identifies bases for national legislative jurisdiction, including:

- Conduct outside the territory that has or is intended to have substantial effect within its territory.
- Activities, interests, status or relations of its nationals outside (as well as inside) its territory.
- Conduct outside the territory not by nationals directed against security of the state.

Territorialism

p.567

EEOC vs. Aramco

Does Title VII apply extraterritorially to regulate U.S. employers who employ U.S. citizens outside the United States?

Held: No. Aramco Services employee made a charge of discrimination which was dismissed on Motion for Summary Judgment. Based on no extraterritorial application of Title VII – even to U.S. citizens employed by U.S. corporation. EEOC contends intent for extraterritoriality. Rejected – presumption against foreign application.

Cont.

EEOC vs. Aramco

Dissent

p.572

The “resumption against extraterritoriality” is not a “clear statement.”

Was there insufficiently strong intent concerning congressional purpose?

Alien exemption did identify Congressional attention to non-U.S. implications & not limited to purely domestic application.

EEOC vs. Aramco Observations

Was this really a “conflict of laws” situation?

What was the conflict?

Did Saudi Arabia have conflicting rules that would permit discrimination in this situation (U.S. employer, U.S. employee) in that country’s location?

Cf., ADEA (p.572) where recognition of foreign laws arises which might cause violation of laws in the destination country.

Use unilateral or multilateral approach?

Does the ARAMCO approach represent “unilateral disarmament”?

Does a separation of powers limitation apply, i.e., is outside the U.S. within the predominant domain of the U.S. political branches?

P. 574 – see later amendment of Title VII to extend law to foreign based employees. But, subject to a local law violation exception.

See at §(c)(1) (p.575) imputation of this revised jurisdictional rule to employees of foreign subs.

Presumption against extraterritoriality p.575

Morrison v. Natl. Aust. Bank., p.575

SEC Act of 1934, §10(b) - applicable to foreign conduct? No, unless a clear indication of extraterritorial application exists.

This act only applies to securities transactions in the U.S. (even though the deception/fraud may have occurred outside the U.S.).

Lauritzen v. Larsen

p.576

Do U.S. statutes apply to a claim of maritime tort? Danish seaman on Danish vessel injured in employment when in Havana, Cuba harbor.

Employment agreement (in Danish) says rights under agreement are governed by Danish law.

Jones Act suit filed in SDNY.

Is Jones Act applicable to all seamen wherever?

Fundamental principle: One sovereign respects the subjects and rights of other sovereign powers.

Cont.

Lauritzen v. Larsen

p.576 Danish law applies

Seaman's contacts & U.S. ports? Other factors:

- 1) **Place of wrongful act: Cuba**
- 2) **Law of the “flag”, i.e., nationality of the ship.**
- 3) **Domicile of the injured.**
- 4) **Allegiance of the shipowner; cf., flags of “convenience.”**
- 5) **Place of employment contract.**
- 6) **Inaccessibility of a foreign forum**
- 7) **Law of the forum.**

Hartford Fire Insurance

p.582 **Re: Comity**

Sherman Act precludes conspiracies in restraint of trade, including fixing the terms of commercial general liability coverage.

See issues p. 583: (1) “occurrence” basis vs. “claims made” liability trigger; (2) restrict coverage to claims on events occurring after specified date; (3) eliminate “sudden and accidental” pollution coverage; & (4) legal defense cost cap.

Held: Act applies to this foreign conduct. Cont.

Hartford Fire Insurance

p.582, cont. Re: Comity

Held: Foreign conduct was meant to produce a substantial effect in the U.S.; unlawful conspiracy existed of London reinsurers to substantially effect the U.S. insurance market.

Violation of international comity concepts? Outweighed by the conduct of foreign insurers in the U.S. But, does a conflict exist with British law? Holding: no conflict here with British law since UK insurers can comply with U.S. law.

Cont.

Hartford Fire Insurance

p.582, cont. Dissent

Scalia: (1) Dist. Ct. did have subject matter jurisdiction over the Sherman Act claims; and (2) Congress did intend to extend Sherman Act extraterritorial jurisdiction to this conduct (cf., *Aramco* case).

But, regulation would conflict with intl. law principles. U.S. should refrain from exercising jurisdiction here since exercise is unreasonable.

Sherman Act will conflict with interests of other (serious) countries. *Cont.*

Hartford Fire Insurance

p.582, cont. Queries

Does a “true conflict” exist? Court says no.

Should the court have made a “balancing comparison” comparing the interest of the US and the interests of the UK?

Hoffman-LaRoche

p.591

Alleged conspiracy to raise vitamin prices.
“Independently caused foreign injury.”

Are foreign defendants liable under Sherman Act for foreign harm caused by conduct that also caused injury within the United States?

See (p.591) reference (p. 591) to principles of customary international law (i.e., comity),
Restatement Foreign Relations, §403.

Cont.

Hoffman-LaRoche

p.591, cont.

Here conduct is significantly foreign.

Further determination: Sherman Act extension here would not be reasonable. Congress did not intend to bring independently caused foreign injury within Sherman Act.

Note the interpretation of FTAIA (1982)- Sherman Act only applies if direct, substantial economic effect in the U.S.

International Law & Prescriptive Jurisdiction

What is “prescriptive jurisdiction”? P.596/602.

Regulation of a person’s conduct and behavior (often in the criminal context), including beyond national borders (where consistency required with customary international law).

Consider the impact of the possible extraterritoriality of one country’s criminal laws.

U.S. v. Noriega

p.596

International law of prescriptive jurisdiction.

Noriega indicted for international conspiracy to import cocaine into U.S. & for RICO violations.

Can U.S. exercise jurisdiction over Noriega's criminal activities outside U.S. borders?

Is this an (unreasonable) extraterritorial application of U.S. criminal laws? Conduct was by an alien in a foreign country.

Noriega's status as a foreign head of state was not deemed relevant.

Cont.

U.S. v. Noriega

p.596

cont.

Holding: (1) U.S. has power to reach this conduct under international law principles; & (2) Criminal law drug statutes are intended to have extraterritorial effect. Yes, if U.S. impact.

Applicability of these rules even if only a co-conspirator. Also, applicability even if only having an “intent” to produce these effects in the U.S. when importing drugs.

Criminal jurisdiction should be exercised more carefully, but not with narcotics offenses.

U.S. v. Yunis

p.599

Yunis hijacks foreign carrier plane and destroys plane, after hijack victims (including two U.S.) are released. Yunis caught and taken to U.S. & convicted of conspiracy, hostage taking and air piracy.

Motion by Yunis to dismiss for lack of (1) subject matter and (2) personal jurisdiction.

Consider: U.S. Hostage Taking Act (p.600) - includes an offense outside the U.S. if taking a U.S. national.

Cont.

U.S. v. Yunis

p.599, cont.

Hostage Taking Act: Yunis asserts he was not “found” in the U.S., but taken to U.S. by force.

Holding: U.S. jurisdiction exists if a hijacked person includes a U.S. citizen.

Further: U.S. jurisdiction is not precluded under norms of customary international law – under (1) “universal principle” (offenses recognized by “community of nations,” and (2) “passive personal principle” (crimes against nationals outside territory).

Cont.

U.S. v. Yunis

p.599, cont.

Anti-hijacking Act, p. 601: U.S. criminal punishment if foreign hijacker is subsequently “found” in the U.S.

Holding: When brought to the U.S. for hostage taking Yunis was then in U.S. territory and, therefore, could be subjected to the U.S. anti-hijacking legislation (even if no territorial connection and no U.S. citizens involved).

Proper indictment occurred after arrival in U.S.

Universal jurisdiction for hijacking? P. 602.

Scope of Prescriptive Jurisdiction p.602

- 1) Territoriality – conduct (or impact) within its territory.**
- 2) Nationality – regulation of citizens within and without the national territory.**
- 3) Protective – regulate non-U.S. conduct when affecting US national security or government.**
- 4) Passive personality – regulation of conduct of others that harms U.S. citizens abroad.**
- 5) Universality – regulating egregious conduct wherever occurring in the world.**

Universal Jurisdiction

p.604

Piratical acts

- 1) Piracy
- 2) War crimes
- 3) Crimes against humanity
- 4) What about “terrorism,” including state sponsored terrorism? What is terrorism?
- 5) Torture & genocide acts are committed outside the U.S. by a non-U.S. person, but the person is brought into the U.S.?

Extraterritoriality & U.S. Constitution p.606

Reid v. Covert – can U.S. persons abroad invoke U.S. constitutional rights?

Here wives on U.S. military bases in foreign countries kill spouses and (claiming insanity) are tried under the Uniform Code of Military Justice. Wives claim no jurisdiction by military authorities exists to try their cases.

Holding: wives are entitled to constitutional protections in their trials; fundamental constitutional rights apply; is this a form of “global due process”?

Reid v. Covert concurrency

p.608

Harlan: U.S. Constitution does not apply to all situations outside the U.S.

Including, no full Article III trial is required for civilian dependent of U.S. military person located abroad.

Except for capital cases.

U.S. v. Verdugo-Urquidez

p.610

Does 4th Amendment “search and seizure” limit apply to U.S. agents seizing property of nonresident alien located in foreign country? No.

Mexican citizen-resident drug dealer into U.S.

USG arrest warrant; U.S. agents raided suspect’s residence in Mexico for evidence.

US Dist. Ct. granted motion to suppress evidence obtained without 4th Amend. warrant. Ct. of Appeals affirmed 4th Amend. applicability.

Cont.

U.S. v. Verdugo-Urquidez p.610, cont.

U.S. Sup. Ct.: No 4th Amend. restrictions on U.S. agents against foreigners in foreign countries.

Different U.S. constitutional treatment applies for foreign individual with no substantial connections with the U.S. The search here did occur (in Mexico) when Defendant was in U.S. (involuntarily) for a few days.

Ultimately this is a political issue, not a 4th Amend. issue.

U.S. v. Verdugo-Urquidez p.610, cont.

Brennan dissent, p.617: U.S. criminal laws are enforced outside the U.S., but no U.S. 4th Amend. rights are exercisable in the proceeding. Def. is part of U.S. community for purposes of his U.S. criminal trial.

Also, no geographical limit on the 4th Amend.

Majority disregards notions of mutuality. P.619.

Further, Def. is one of the “governed.”

Also, Executive Dept. prerogative remains
(except in criminal matters).

Boumediene v. Bush

p.623

Re: Habeas corpus challenges by Guantanamo detainees. U.S. Const., Art. 1, §9, provide for writ of habeas corpus except suspended in cases of rebellion/invasion if public safety requires.

Military Commissions Act of 2006 eliminated habeas corpus jurisdiction over “enemy combatants”- non-citizens at GITMO.

Is GITMO not within U.S. sovereign control (with Cuba maintaining sovereignty)? Cont.

Boumediene v. Bush

p.623 cont.

Is U.S. Const. not applicable at GITMO because U.S. disclaims sovereignty there?

Majority: U.S. Const. can not be contracted away in this manner.

Congress has not provided an adequate substitute for habeas corpus review.

The denial of habeas corpus jurisdiction is unconstitutional.

Cont.

Boumediene v. Bush **p.623, cont. Dissent**

Scalia: No relevance of the writ of habeas corpus outside the United States.

This is a military matter and court should not be involved.

U.S. Constitutional rights do not extend to aliens held outside U.S. sovereign territory.

Preserve the supremacy of the Court!

Alternative Approaches to Const. Rights p.629

- 1) Universalist approach- rights have no limits.**
- 2) Membership approach – rights are based in Contract, i.e., consent of the governed who have established a state.**
- 3) Territorial model – limited by the borders of the United States.**
- 4) Balancing approach – government’s reduced rights outside the U.S. and, also, reduced individual rights outside the U.S.**

