UNIVERS STATES
DEPARTMENT OF JUSTICE

Counterterrorism Section
Criminal Division

Fundamental Principles Governing Extraterritorial
Prosecutions—Jurisdiction, Venue, and
Procedural Rights

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FUNDAMENTAL PRINCIPLES GOVERNING EXTRATERRITORIAL PROSECUTIONS – JURISDICTION, VENUE, AND PROCEDURAL RIGHTS

The purpose of this monograph is to address legal principles governing issues that frequently arise in the prosecution of extraterritorial terrorism cases. These include the ability of the United States to prosecute such acts and assert jurisdiction over them, the determination of the district in which such prosecutions will be vened, and the ability of the United States to project its investigative and law enforcement capabilities overseas. In the context of extraterritorial law enforcement activity, we also consider the extent to which the procedural guarantees of the United States Constitution apply to possible subjects. Although the principles contained in this survey represent the current views of the Counterterrorism Section and comport with what we believe to be the present state of the law, just as in any criminal prosecution, government counsel should always consult the current law of the circuit and its application to the particular case. Should legal issues arise that require further guidance, it may be obtained from either the Criminal Division’s Counterterrorism Section or the Department’s Office of Legal Counsel.

I. JURISDICTION

A. Definitions

“Jurisdiction” in a criminal case addresses power or authority – the question of jurisdiction informs us first of the authority by which Congress enacts legislation; and, second, the authority that the courts have to act in a particular case.

In contrast, the term “venue” simply defines the judicial district in which such authority is to be exercised once an offense is committed.

B. Constraints under international law – limitations on the exercise of jurisdiction when such action infringes upon the rights of other sovereigns.

“Extraterritorial jurisdiction” simply relates to the authority of a government to criminalize activity that occurs outside its territorial borders or to investigate or prosecute such activity. The exercise of extraterritorial jurisdiction by one state with respect to criminal activity necessarily encroaches, in some measure, upon the sovereignty of the nation where the offense occurred. Under customary international law, there are five generally recognized principles upon which a country can permissibly assert extraterritorial jurisdiction. See United States v. Yousef, 327 F.3d 56, 91-92 (2d Cir. 2003). The jurisdictional bases include the following: (1) the objective territorial principle – where the offense occurs in one country but has effects in another, e.g., killing someone by shooting across an international border; (2) the nationality principle – the offender is a citizen of the prosecuting state; (3) the protective principle – the offense offends the vital interests of the prosecuting state e.g., counterfeiting that nation's...
currency; (4) the passive personality principle – the victim is a citizen of the prosecuting state; and (5) the universality principle – the offense, such as piracy, is universally condemned by the international community, sometimes in a multinational convention or treaty to which the United States is a signatory. Furthermore, in Yousef the court held that, where a jurisdictional provision authorizing its extraterritorial assertion has been enacted to implement a treaty obligation, the relevant treaty provision is, itself, a sufficient basis under international law for asserting such jurisdiction.

Despite these limitations upon the exercise of extraterritorial jurisdiction stemming from customary international law, where Congress has clearly articulated its intent to legislate extraterritorially, the legislation trumps any limitation upon the assertion of such jurisdiction that may be implicit from these principles. United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); United States v. Yousef, 327 F.3d 56; 93 (2d Cir. 2003). Moreover, where Congress' intent is silent, the courts ordinarily infer that it intended to legislate in a manner that is in harmony with such principles.

C. Constitutional Constraints Upon the Assertion of Extraterritorial Jurisdiction

1. The Due Process Clause

Several circuits have held that, where Congress criminalizes extraterritorial conduct, substantive due process requires some nexus between the United States, or its vital interests, and the proscription. United States v. Yousef, 327 F.3d at 112 (plan to attack Philippine Airlines flight sufficiently related, under Due Process Clause, to U.S. interests where attack was a "test run" for further attacks on U.S. flag carriers); United States v. Davis, 905 F.2d 245 (9th Cir. 1990). The Clause is ordinarily satisfied merely by demonstrating that the offense falls within one of the five internationally recognized bases for asserting extraterritorial jurisdiction set out above. Cf. United States v. Marino-Garcia, 679 F.2d 1373, 1379- 81 (11th Cir. 1982)(imputing to Congress the intent to confine reach of extraterritorial jurisdiction over a stateless vessel on the high seas to that permitted under international law).

2. Congressional Authority to Legislate Extraterritorially

These principles do not, themselves, create extraterritorial jurisdiction. Congress must enact a statute authorizing the assertion of such jurisdiction, and it is clear that it possesses the power under the Constitution to do so. See EEOC v. Arabian Amer. Oil Co., 499 U.S. 244, 248 (1991).

Nonetheless, Congress is not held to the same standard in relation to explicit Constitutional authority when legislating extraterritorially as it is in the enactment of domestic legislation. This is because extraterritorial legislation does not possess the same capacity to encroach upon governmental powers reserved to the states. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936).
In this respect, bases for the enactment of extraterritorial legislation include:

(a) An incident of the Congressional authority to "Define and punish offenses against the law of nations." U.S. Const. Art. 1 § 8, cl. 8.

(b) An incident of Congressional authority to implement treaties under the "necessary and proper clause" of Article I § 8.

D. Determining Whether a Statute Is Intended By Congress To Be Extraterritorial

Although under both international law and the Constitution, Congress possesses the authority to legislate extraterritorially, it is necessary to inquire whether, in the context of a particular statute, it has, in fact, done so. First, consider the language of the statute. Does it expressly address its jurisdictional scope? Statutes that contain formulas specifically defining the scope of jurisdiction include: foreign murder of a U.S. national (18 U.S.C. § 1119); war crimes (18 U.S.C. § 2441); murder of or assault upon a U.S. national abroad for the purpose of coercion, intimidation or retaliation as certified by the Attorney General (18 U.S.C. § 2332); bombing public places or facilities (18 U.S.C. § 2332f(b)); and the commission of certain felony offenses by persons accompanying the armed forces overseas. 18 U.S.C. § 3261.

Some federal statutes are expressly confined in their application to the "special maritime and territorial jurisdiction of the United States," e.g., murder under 18 U.S.C. 1111. The phrase "special maritime and territorial jurisdiction" is defined in 18 U.S.C. § 7. It includes federal enclaves, such as national parks and military installations; territorial waters; U.S. flag vessels; U.S. owned aircraft (while flying in U.S. airspace, or over international waters, etc.). It also includes some territory outside the United States, such as places not subject to the jurisdiction of any nation with respect to crimes by or against U.S. nationals (see 18 U.S.C. § 7(7)), and U.S. diplomatic premises (but only when the victim or the offender is a U.S. national). See 18 U.S.C. § 7(9). Thus, in some instances, an offense committed within the "special territorial jurisdiction of the United States" may actually involve an extraterritorial crime.

"Special aircraft jurisdiction" is another jurisdictional term of art that governs aircraft piracy (49 U.S.C. § 46502) and statute proscribing the destruction of an aircraft (18 U.S.C. § 32). The term is defined in 49 U.S.C. § 46501(2). To be cognizable under the air piracy statute; an offense must be committed while the aircraft is "in flight," a term of art defined in 49 U.S.C. § 46501(1).

E. Jurisdictional Provisions Common to Statutes Implementing Treaties

The United States is party to a number of multilateral agreements designed to combat terrorism which contain provisions requiring signatories: (1) to criminalize the prescribed conduct; and (2) to either extradite or prosecute persons present within their territory who are
believed to have committed prohibited acts. Statutes implementing such treaties therefore authorize prosecution of any offender by virtue of his mere presence in the United States. Hostage taking (18 U.S.C. § 1203) is an example of an offense upon which extraterritorial jurisdiction can be predicated solely upon the defendant's being "thereafter found" in the United States. The phrase "thereafter found" has been held to include the defendant's forcible rendition for the purpose of standing trial for another offense (see Yunis, 924 F. 2d at 1090) or for the very crime to which the "thereafter found" provision applies. See United States v. Rezaq, 134 F.3d 1121 (D.C. Cir. 1998) ("thereafter found" requirement permits prosecution for aircraft piracy even in cases where defendant is forcibly returned to the United States to stand trial for only that offense). We have enumerated a number of multilateral agreements designed to combat terrorism, the implementing federal legislation, and jurisdictional provisions of such legislation as an addendum to this monograph.

F. What If the Statute Is Silent With Respect to Its Extraterritorial Application?

1. The presumption of territoriality

Crimes against individuals or their property, like assaults, murder, burglary, larceny, robbery and other offenses which affect the peace and good order of the community are presumptively territorial unless Congress says differently. United States v. Bowman, 260 U.S. 94, 98 (1921).

2. The exception that all but swallows the rule

"[T]he same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent upon 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. [T]o limit their locus to the strictly territorial jurisdiction would be to greatly 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 to include the high seas and foreign countries, but it may be inferred from the nature of the offense." Bowman, 260 U.S. at 98-99.

3. Finally, in determining whether Congress intended that a statute apply outside the borders of the United States, it is appropriate to take into account the structure of the statute, its legislative history and, in some instances, the text and negotiating history of the treaty which the legislation implements. See Sale v. Haitian Ctrs. Council, 509 U.S. 155, 174-177 (1993) (examining legislative history of statute, as well as text and history of the convention it implemented, to determine whether "forced repatriation" provisions of the Immigration and Nationality Act were intended to apply extraterritorially).

4. Examples of offenses with respect to which extraterritoriality may be inferred
United States v. Benitz, 741 F.2d 1312 (11th Cir. 1984) (assault by a foreign national on a U.S. government official); fraud against the government.

5. Offenses that are ancillary to extraterritorial crime

Attempts, accessory after the fact, conspiracy; use of a firearm during and in relation to a crime of violence (18 U.S.C. § 924(c), have been held to assume the territorial character of the base offense. See Yousef, 327 F.3d at 87-88 (collecting cases); United States v. Lindh, 212 F. Supp. 2d 541, 580 (E.D.Va. 2002) (an extraterritorial violation of 18 U.S.C. § 2339B is a crime of violence to which a Section 924(c) use of a firearms count can attach); see also, United States v. Khan, 2004 WL 406338 (E.D.V.A., March 4, 2004) at *28; United States v. Goba, 240 F. Supp. 2d 242, 249 (W.D. N.Y. 2003).

G. Prohibitions Against “Providing Material Support”

18 U.S.C. §§ 2339A and 2339B respectively prohibit providing “material support or resources” knowing or intending that they are to be used in preparation for or carrying out one of a number of enumerated terrorist crimes (§ 2339A) or providing “material support or resources” to a “Foreign Terrorist Organization” (“FTO”) (§ 2339B). Both statutes embrace attempts and conspiracies as well. Since the events of September 11, 2001, these two statutes have become mainstays in the Department’s war on terrorism. As of March 15, 2004, over 50 persons have been charged with violations in 19 different districts. The two statutes contain somewhat different jurisdictional provisions that illustrate the principles in the preceding subsection addressing ancillary jurisdiction. In addition, Section 2339C, which we discuss in connection with the Terrorist Financing Convention, infra, prohibits providing or collecting funds to foster acts of terrorism.

1. Section 2339A

As originally enacted, 18 U.S.C. 2339A prohibited a person “within the United States” from providing material support or resources knowing that it would be used for the commission of a terrorist crime. See Pub. L. 103-322 § 120005, 108 Stat. 2022 (1994). As part of the USA PATRIOT Act, however, the jurisdictional limitation, “within the United States,” was deleted. Pub. L. 107-56, § 805, 115 Stat. 377 (2001). The plain implication of this amendment is to expand the jurisdictional scope of the statute to extraterritorial acts of providing material support. Thus, it would appear that such offenses are now akin to “ancillary offenses,” i.e., that their jurisdictional scope corresponds to that of the crime that the “material support or resources” is intended to facilitate. Consequently, after October 26, 2001, where the contemplated terrorism offense permits the exercise of extraterritorial jurisdiction, so also would a § 2339A violation designed or intended to facilitate it. Prior to that date, the prohibited conduct must have occurred “within the United States” to constitute a violation of § 2339A.
2. Section 2339B

In contrast to § 2339A, persons embraced by the prohibition against providing material support or resources to FTOs are limited to those "within the United States or subject to the jurisdiction of the United States." Subsection (d) further states that "there is extraterritorial Federal jurisdiction over an offense under this section - a provision that we believe explicates the phrase "or subject to the jurisdiction of the United States" to make clear that it is meant to convey an extraterritorial application. Thus, anyone who within the U.S. provides material support or resources to an FTO is subject to prosecution. Likewise, persons outside the U.S. who provide such material support to an FTO are subject to prosecution as long as they are U.S. nationals.

Some have suggested that the "protective principle" would enable the United States to assert extraterritorial jurisdiction under § 2339B if the subject's conduct threatened United States interests abroad. Such reasoning, if adopted, would transform Section 2339B into a "universal jurisdiction" statute because the target's providing material support to an FTO (which by definition involves a threat to United States national security) could always be said to threaten the United States. This would appear to be contrary to the intent of Congress - as reflected by its jurisdictional language. Accordingly, our best guidance at this time is that purely foreign conduct by foreign people would not be covered under Section 2339B.

Nonetheless, we believe that when any person is properly charged with providing material support to an FTO, under the theory of ancillary jurisdiction, any person who conspires in the commission of that offense is also subject to prosecution without regard to the place of his activity or his nationality.

3. Section 2339C

As noted earlier, § 2399C, which became effective on June 25, 2002, in the wake of the United States' accession to the Terrorist Financing Convention, prohibits fund-raising or monetary contributions to those bent upon undertaking activities that violate one of a number of international terrorism conventions. It also reaches contributions with knowledge that the funds are to be used to carry out acts intended to cause death or bodily harm for the purpose of intimidating a population or compelling a government. The role of § 2339C will likely be

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1 We note that, in contrast to Section 2339A, the USA PATRIOT Act did not affect the jurisdictional predicates for violations of Section 2339B. Thus, for jurisdictional purposes, it is of no consequence whether the alleged misconduct predated or followed the October 26, 2001 enactment of that statute.

2 The scope of the jurisdictional predicate - subject to the jurisdiction of the United States - is not settled. At the least, the term embraces U.S. nationals and corporations. It is not certain whether it includes resident aliens as well.
confined to those rare instances where the jurisdictional provisions of §§ 2339A and 2339B do not reach a person located abroad but against whom a U.S. prosecution is appropriate. Note the multiple jurisdictional predicates enumerated in § 2339C(b) and summarized in our compilation of treaty-implementing jurisdictional provisions. One of them permits the assertion of extraterritorial jurisdiction over an offense on the basis of the defendant's presence in the United States, alone. As a matter of due process, however, the application of this Section should be confined to instances where the United States has some interest in prosecuting the defendant recognized by international law. To date, no one has been charged with a violation of this Section.

II. VENUE

A. Constitutional Constraints

U.S. Const. Art. III, § 2, cl. 3 provides:

All criminal trials, except in cases of impeachment] shall be held in the State where such crime shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as Congress may by law have directed.

The final phrase ("but when not committed ") has been held to "impose no restriction as to the place of trial, except that the trial cannot occur until Congress designates the place, and may occur at any place which shall have been designated." Cook v. United States, 138 U.S. 157, 182 (1891).

B. Proof Requirements

Venue must be established by a preponderance of the evidence. See United States v. Naranjo, 14 F.3d 145, 146 (2d Cir. 1994). Unlike claims based upon a lack of jurisdiction, however, claims of improper venue are waived if not raised prior to trial. See Singer v. United States, 380 U.S. 24 (1965). Your charging papers should allege the basis for venue in the particular district.

C. Venue Statutes for Territorial Offenses

1. In some limited circumstances, Congress has specifically designated the district (within the constitutional limitation) in which venue exists. Some examples of such offenses include –

   flight to avoid prosecution (18 U.S.C. § 1073)(district in which original crime committed or where defendant was detained)
capital cases (18 U.S.C. § 3235)(county where the offense was committed when without “great inconvenience”)

murder or manslaughter (18 U.S.C. § 3236)(place where injury inflicted)

2. Venue for territorial offenses where no district is specified by statute - Fed. R. Crim. P. 18 supplies the general rule: “Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.” 18 U.S.C. § 3237 is a refinement to the general rule where the offense occurs in more than one district:

(a) Except as otherwise provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of a person or an object into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

See United States v. Rodriguez-Moreno, 526 U.S. 275 (1999), where the Supreme Court held that the offense of using or carrying a firearm during a predicate crime of violence or a drug trafficking crime can properly be prosecuted in the district where the predicate offense occurred even though the using or carrying did not occur in that district. This is because the underlying crime of violence is an element of the Section 924(c) offense.

With respect to a conspiracy to commit a territorially-based offense, “venue is proper in any district in which an overt act in furtherance of the conspiracy was committed by any of the co-conspirators... The defendant need not have been present in the district, so long as an overt act in furtherance of the conspiracy occurred there.” United States v. Naranjo, 14 F.3d at 147. See United States v. Bin Laden, 91 F. Supp. 2d 600 (S.D.N.Y., 2000)(venue in Southern District of New York for conspiracy to bomb U.S. Embassies in Africa proper where overt acts in furtherance of the conspiracy occurred there).

The “continuing offense” principal can include the receipt of phone calls and e-mail messages in the district where the sender or recipient is located. See, e.g., United States v. Kim, 246 F.3d 186, 191-193 (2d Cir. 2001) (offense of wire fraud is committed in any district in which transmission is sent or received, even if defendant making the transmissions never enters the country).

Venue determinations are offense specific. Where more than one count is charged in an indictment, venue must be established with respect to each count. See United States v. Beech.
Nut Nutrition Corp., 871 F.2d. 1181, 1188 (2d Cir. 1989). This principle also governs substantive crimes and conspiracy, even if the substantive offense is in furtherance of the conspiracy. Thus, where no element of that offense is committed in the district where the underlying conspiracy occurred, it cannot be joined with the conspiracy for trial. See United States v. Corona, 34 F.3d 876, 879-880 (9th Cir. 1994).

D. Venue for Extraterritorial Offenses

18 U.S.C. § 3238 provides:

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 first brought; but if such offender or offenders are not so arrested or brought in any district, an indictment or information may be filed in the district of the last known residence of the offender or any one of two or more joint offenders, if no such residence is known, the indictment or information may be filed in the District of Columbia.

Several courts have held or suggested that an offense may be extraterritorial under Section 3238 when "begun" on the high seas or in a foreign country even though subsequent overt acts or elements of the offense occur within the United States. See 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"); United States v. Bin Ladin, 91 F. Supp. 2d at 613 n.23 (collecting cases). But see United States v. Gilboe, 684 F.2d 235, 239 (2d Cir., 1982) (dicta). Thus, in circuits that follow this rule, prosecutors may have a measure of latitude in determining whether to allege venue with respect to an offense begun overseas but involving the commission of subsequent elements in U.S. territory on the basis of Section 3237 (pertaining to territorial crimes), or, alternatively, under Section 3238 (pertaining to extraterritorial offenses).

E. Options for Determining Venue For An Extraterritorial Offense Under § 3238

1. Indict while defendant is still overseas – you may wish to do so to lock in venue with respect to a particular offense, to stop the running of the statute of limitations, or as a prerequisite to extradition. If you choose to indict while the defendant is still abroad, the indictment must be in the district of the defendant’s last known residence (or the last known residence of any indicted co-defendant). Where there is no such district (or former residence cannot be ascertained), venue lies in the District of Columbia.

2. Alternatively, the government can apprehend the defendant and return him to the United States without first indicting him. In such cases, venue lies where the defendant first enters the United States. Where this option is to be employed, the phrase “first brought”
means that the defendant must be returned in a custodial status. See United States v. Liang, 224 F.3d 1057, 1060 (9th Cir. 2000).

3. In addition, under the “thereafter found” option, venue is triggered by any incidental stop in the U.S. regardless of whether it is the intended destination of the flight returning the defendant from overseas. See Chandler v. United States, 171 F.2d 921, 933 (1st Cir. 1948)(brief layover triggers “first brought” venue). Thus, an en-route refueling stop can effectively thwart a plan to return the defendant to a particular district for indictment and trial.

4. The venue by “arrest” option under Section 3238 is offense specific. The term “arrested” applies to the district in which the defendant is first restrained in connection with the particular offense charged. Thus, if a defendant’s case has been venued in a particular district, and the defendant is present in that district awaiting trial, he may be “arrested” there for an extraterritorial offense, with the result that venue for that offense will be in the same district as that for the previously charged crime. See United States v. Wharton, 320 F.3d 526, 536-37 (5th Cir. 2003); United States v. Catino, 735 F.2d 718, 724 (2d Cir. 1984).

F. Venue Analysis

- Is the offense territorial or extraterritorial? If the former, in what district did the offense occur or did it occur in several districts?
  
  - If territorial, have we an option as to which of several districts to bring the charges? If so, is one preferable to others?
  
  - If extraterritorial, do we want or need, for some reason, to indict prior to defendant’s return?
  
  - If we wish to file a pre-return indictment, what is the appropriate district?
  
  - Do we have reasons for declining to seek a pre-return indictment? If so, do we want to effect the defendant’s return to a particular district? 1

G. Venue For Criminal Complaints

You may need a criminal complaint to obtain the extradition of a defendant. Fed. R. Crim. P. 3 & 4 do not particularize the district in which a complaint can be sought and an arrest warrant obtained for an extraterritorial offenses when an indictment is not first returned. You should ordinarily seek process in the district where an indictment is likely to be brought, but we

1 We have attached to this outline a “flow chart” which should assist in the analysis of determining the most appropriate venue for prosecution.
believe that any U.S. magistrate judge can issue a warrant for an extraterritorial offense without regard to the location where the indictment is likely to be returned.

III. AUTHORITY TO INVESTIGATE, DETAIN, AND REMOVE

A. Investigative Jurisdiction of the FBI

— is worldwide with respect to any federal offense. However, when exercised on the territory of another sovereign, such authority is subject to international law, statutory (e.g., 22 U.S.C. § 3927(b)) and regulatory constraints. See Attorney General Guidelines on the Development and Operation of FBI Criminal Informants in Extraterritorial Jurisdictions, (Jan. 15, 1993)(Secret).

B. Authority to Arrest

— is also worldwide. However, any such exercise of United States law enforcement authority must ordinarily be reconciled with the sovereignty of the host or asylum nation. Consequently, such initiatives must be closely coordinated with the State Department.

1. Fed. R. Crim. P: 4(c)(2)

The execution of an arrest warrant overseas must be pursuant to a federal statute authorizing such an arrest. Investigators can, however, rely upon probable cause where no warrant can issue.


Rule 14(b)(3) authorizes a magistrate to issue an arrest warrant with effect outside his district in international or domestic terrorism cases. The language of the rule is not confined to the issuance of process within the territory of the United States.

C. Return of An Offender From Overseas For the Purpose of Prosecution

1. Extradition involves the return of an offender from an "asylum state" to the United States pursuant to and in accordance with an international agreement with the asylum state.

2. Rendition involves the taking of a defendant into custody overseas and his return to the United States for trial in a manner outside the framework of an extradition treaty. The defendant’s rendition can be with or without the cooperation or acquiescence of the asylum state. The former, commonly termed "ordinary rendition," the latter is referred to as "extraordinary rendition."

3. Expulsion involves the asylum state simply removing the defendant from its territory, often by placing him on a flight or escorting him to its territorial border. U.S. officials
may arrange with the asylum state to assume custody over the defendant upon his removal. See United States v. Lovato, 520 F.2d 1270, 1271 (9th Cir. 1975).

D. Principles Governing Custody of an Extraterritorial Offender.

1. The holdings in Ker v. Illinois, 119 U.S. 436 (1886) and Frisbie v. Collins, 342 U.S. 519 (1952) form the foundation of analysis. Under those decisions, courts will not ordinarily inquire as to the manner in which an individual was brought before it for trial. The power of a court to try an individual for a crime is not impaired by the fact that he/she was brought before the court by forcible abduction.

2. In United States v. Alvarez-Machain, 504 U.S. 655 (1992), the Supreme Court held that, even where an extradition treaty is in effect and would otherwise apply, a defendant's rendition to the United States for trial without compliance with the terms of an extradition treaty does not preclude his subsequent prosecution, unless it violates a provision of the extradition treaty that expressly prohibits the taking of a defendant into custody by means outside its terms.

3. Exceptions to the Ker/Frisbie doctrine

(i) United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) — the mode of rendition cannot be affected by means that shocks the conscience such as torture or brutality. No court, however, has ever actually dismissed an indictment on such grounds. See, e.g., Yunis, 924 F.2d at 1092-93 (rejecting claim based upon Toscanino).

(ii) under Alvarez-Machain, the rendition cannot violate an express limitation contained in an extradition treaty between the U.S. and the asylum nation. If it does, the subject can likely assert the bar as the basis for dismissal of the pending charge.

(iii) NSDD 77 (Jan. 19, 1993) — contains Presidential public policy guidelines governing forcible renditions. The NSDD is classified at the SECRET level.

E. Extradition and its Limitations

1. The applicable extradition treaty may preclude extradition because the offense is not extraditable, or the treaty does not permit extradition of the asylum state's own national.

2. The "rule of speciality" precludes the defendant's trial for offenses other than those specified in the extradition request and with respect to which the asylum state authorizes extradition. Although individual defendants can assert the rule of speciality as a bar to prosecution, the limitation can be waived by the asylum state. In the event that it grants such a waiver, the trial on the additional offence can proceed over the defendant's objection. See, e.g., United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986)(the protection afforded by the rule...
of specialty "exists only to the extent that the surrendering country wishes . . . However, the person extradited may raise whatever objections the rendering country may have. ").

3. The extradition treaty may contain a "non bis in idem" provision precluding a prosecution by the requesting state that replicates a preceding prosecution by the asylum state. If, however, the defendant's custody is not acquired pursuant to such a treaty, a non bis in idem limitation in an extradition treaty between the asylum state and the United States is inapplicable and cannot be asserted by the defendant as a bar to prosecution. See, e.g., United States v. Duarte-Acero, 208 F.3d 1282, 1283 n. 2 (11th Cir. 2000)(rejecting motion based upon non bis in idem clause in extradition treaty).

4. Extradition treaties ordinarily require an indictment in the requesting state as a predicate to an extradition request. This exemplifies one of the reasons why you may need to obtain an indictment against the defendant before his return to the United States.

5. You must coordinate any request for extradition with the Criminal Division's Office of International Affairs (202) 514-0000.
THE EXTRATERRITORIAL APPLICATION OF PROCEDURAL RIGHTS

I. THE FOURTH AMENDMENT

A. Extraterritoriality As To U.S. Nationals and Non-nationals

In United States v. Verdugo, 494 U.S. 259 (1990), the Supreme Court held that, as the protections provided by the Fourth Amendment belong to "the people," they do not extend to non-U.S. nationals who are the subjects of searches and seizures outside the territory of the United States. It is not clear from this decision whether the Amendment protects resident aliens when outside of the United States. See United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995) (noting that the issue had not been resolved).

B. Extraterritorial Searches and Seizures of U.S. Persons

1. To what intrusions do the requirements of the Amendment apply?

   (i) The Fourth Amendment does not apply to intrusions conducted exclusively by foreign law enforcement authorities. Evidence resulting from such intrusions is admissible even when the intrusion is triggered by information supplied by U.S. law enforcement authorities. See United States v. Barona, 56 F.3d 1087, 1097 (9th Cir. 1995).

   (ii) Where the intrusion is made jointly by U.S. and foreign law enforcement authorities, or made at the behest of or with the involvement of U.S. authorities, what is known as the "joint venture" rule applies. In such cases, the reasonableness requirement of the Fourth Amendment governs the intrusion. See United States v. Barona, 56 F.3d at 1094-96; United States v. Rosenthal, 793 F.2d 1214, 1231 (11th Cir. 1986).

2. Options for satisfying the reasonableness requirement where the intrusion is made by U.S. law enforcement authorities or the "joint venture" rule applies:

   (i) Fed. R. Crim. P. 41(b)(3) A magistrate judge – in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331) – having authority in any district in which activities relating to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

   (ii) Comply with the applicable foreign law. Where the law of the foreign nation is followed, the reasonableness requirement is ordinarily satisfied. See Barona, 56 F.3d at 1093-96.

   (iii) Manual for Courts-Martial, (1995, ed.) & Military Rule of Evidence 315. With respect to persons or property within U.S. military control, or persons subject to military law or the law of war, the commander with authority over the place or person to be searched, or a
military judge or magistrate has authority to authorize probable cause searches. This provision may prove useful in instances where the local courts are not operating, and the place to be searched is within a U.S. military enclave or otherwise under U.S. military control.

(iv) Obtain subject’s consent to a search.

(v) Conduct a probable cause search without judicial process — use as a last ditch expedient.

(vi) Seek from the Attorney General an order pursuant to his foreign intelligence-gathering authority to conduct a foreign search, after consultation with appropriate authorities, including the Office of Intelligence-Policy and Review.

II. THE FIFTH AMENDMENT AND THE REQUIREMENTS OF MIRANDA V. ARIZONA

A. Applicability Overseas

The Verdugo decision distinguished the Fourth Amendment right against unreasonable searches and seizures from the Fifth Amendment right against self-incrimination on the ground that the latter is a trial right. Thus, if you anticipate any likelihood that you will eventually want to introduce into evidence a statement obtained outside the United States, you should adhere to the Fifth Amendment’s requirements, including those articulated in Miranda v. Arizona.

B. Voluntariness

1. The test governing voluntariness is whether “under the totality of the circumstances” the defendant’s will was overborne. To vitiate a confession as involuntary, the coercion must be by a “state actor.” See Colorado v. Connelly, 479 U.S. 157 (1986). Thus, a defendant’s psychological vulnerability or lack of familiarity with U.S. judicial procedures is insufficient, of itself, to vitiate a confession on voluntariness grounds.

2. Admissibility of confessions coerced by foreign authorities. See United States v. Wolf, 813 F.2d 970, 973 n. 3 (9th Cir. 1987)(suggesting that, under Connelly, suppression not required when involuntarily obtained by foreign police but declining to decide the issue). But see United States v. Yousef, 327 F.3d 56, 146 (2d Cir. 2003) (exclusionary rule may apply to a foreign confession when obtained under circumstances that “shock the judicial conscience”). Bottom line — assume that a coerced foreign confession is probably still inadmissible at a U.S. trial and presents a potential taint problem to subsequent confessions.

3. Dealing with the possibility of an antecedent coerced confession. You must attenuate the taint. See Brown v. Illinois, 422 U.S. 590, 603 (1975). Actions that will attenuate the taint: (1) lapse of time; (2) adequate warnings; (3) non-use during questioning of evidence
obtained as the result of the "coerced" confession; (4) changed conditions of questioning and different interrogators.

C.  **Miranda Requirements**

1. When are warnings required - is the subject "in custody?" Custody is determined by reference to the objective circumstances of the situation from the perspective of a reasonable person in the suspect's position. See e.g. Berkemer v. McCarty, 468 U.S. 420, 442 (1984). Detention by foreign law enforcement authorities under such circumstances constitutes "custody."


   relies upon the Verdugo trial right distinction and is therefore triggered by the possibility of the use of a confession at a U.S. judicial proceeding regardless of subject's nationality;

   requires the giving of Miranda warnings as an adjunct to that right and as a prerequisite to the use of a statement in a U.S. judicial proceeding;

   addresses the need to modify right to counsel advisement in a foreign country when defendant is in foreign custody;

   "because you are not in our custody and we are not in the United States, we cannot ensure that you will be permitted access to a lawyer, or have one appointed for you, before or during any questioning. However, if you want a lawyer, we will ask the foreign authorities to permit access to a lawyer or to appoint one for you. If the foreign authorities agree, then you can talk to that lawyer to get advice before we ask you any questions and you can have that lawyer with you during questioning. If you want a lawyer, but the foreign authorities do not permit access at this time to a lawyer or will not now appoint one for you, then you still have the right not to speak to us at any time without a lawyer present."

3. Miranda warnings are also required when the interrogation is a joint venture or when foreign interrogators are acting as our agents in conducting it. See Yousef, 327 F.3d at 146. United States v. Bagaric, 706 F.2d 42, 69 (2d Cir. 1983), abrogated on other grounds, 510 U.S. 249 (1994); United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980). They are not, however, required when the interrogation is conducted exclusively by foreign law enforcement authorities for their own purposes. Yousef, 327 F.3d. at 145-146.

4. The precise contours of the "joint venture" doctrine are not clearly defined, See Yousef, 327 F.3d at 146. It is likely that the doctrine will apply when U.S. law enforcement
authorities' provide questions to the foreign interrogators, the interrogation focuses upon violations of U.S. law or where U.S. law enforcement officials are overtly present during questioning. See United States v. Emery, 591 F.2d 1266, 1267 (9th Cir. 1978) (joint venture doctrine applied where DEA agent coordinated foreign arrest and was present during questioning by foreign police); but see United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir. 1970) (dicta) (Miranda rule has no application where arrest and interrogation focused upon violations of Canadian law despite presence of U.S. law enforcement officer). It is less likely that the doctrine will be applied where the questioning is in furtherance of legitimate law enforcement activity by the foreign state, even where the defendant's apprehension is effected by a tip from U.S. authorities, we have solicited foreign assistance, or where there is close international cooperation. See Bagarić, 706 F.2d at 69. It is also less likely that the doctrine will apply were a U.S. officer's presence is unobserved, or the officer simply furnishes ministerial support such as acting as an interpreter. See United States v. Trenary, 473 F.2d 680, 682 (9th Cir. 1983) (involvement of U.S. officer as interpreter during interrogation by foreign law enforcement authorities).

5. In some instances, U.S. military or intelligence authorities may have questioned a suspect following his/her apprehension overseas for purely force protection or intelligence gathering purposes. It is likely that such questioning will not be preceded by Miranda warnings and, as a consequence, you should assume that the fruits of such interrogation will be inadmissible. But see New York v. Quarles, 467 U.S. 649, 655-56 (1984) (unwarned police questioning concerning location of a gun reasonably prompted by public safety did not violate Miranda and the fruits not subject to exclusion). You should similarly assume that such antecedent unwarned questioning will constitute a basis for arguing that any subsequently obtained statement was tainted. Accordingly, where such unwarned questioning may have occurred, you should take the steps recommended in para. B3, supra, to attenuate any consequential taint. See also Oregon v. Elstad, 470 U.S. 298, 318 (1985) (where initial confession inadmissible because unwarned, subsequent confession is admissible if preceded by proper Miranda warnings).

6. As a prudential matter, you should not involve U.S. intelligence personnel in the interrogation of subjects when there is any possibility that admissions derived from the questioning will be introduced into evidence. The attempted introduction of the statements may require the intelligence operative's appearance as a witness to address the circumstances under which they were obtained and thereby jeopardize his or her position.

III. THE SIXTH AMENDMENT RIGHT TO COUNSEL

"[T]he right to counsel granted by the Sixth Amendment means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him ..." Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality decision).
A. **Time of Attachment**

Sixth Amendment counsel rights attach at or after the commencement of a prosecution or the initiation of adversarial judicial proceedings "whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Kirby v. Illinois*, 406 U.S. at 689. The filing of a criminal complaint and the issuance of an arrest warrant, however, do not constitute the initiation of adversarial criminal proceedings for purposes of the Sixth Amendment. See *Von Kahl v. United States*, 242 F.3d 783, 789 (8th Cir. 2001).

B. **Applicability Overseas**

The Sixth Amendment right to counsel attaches to any person who has been formally charged. Thus, when seeking to question an indicted person overseas, the Sixth Amendment right to counsel should be scrupulously honored with respect to offenses charged in the indictment. Of course, in cases where an overseas subject is in custody, adherence to the "right to counsel" requirements of *Miranda*, will ordinarily satisfy the Sixth Amendment as well.

C. **Consequences Of Attachment**

1. The Sixth Amendment right to counsel applies to all critical stages of the prosecution, including questioning either by law enforcement authorities or persons acting on their behalf.

2. The government cannot use as direct evidence at trial incriminating statements *deliberately elicited* from the accused without the presence or the waiver of counsel. This is a separate and distinct test from the question of whether the defendant is "in custody" for purposes of the Fifth Amendment and the ancillary right to counsel requirements of *Miranda v. Arizona*. See *Fellers v. United States*, 124 S.Ct. 1019, 1022-23 (2004). The "deliberately elicited" test embraces surreptitious means of questioning by any person acting on behalf of the government. See *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

3. The Sixth Amendment right to counsel also applies to post-indictment lineups. See *United States v. Wade*, 388 U.S. 218 (1967). Even if the right is violated, however, i.e., a lineup is conducted without the presence of counsel, the typical remedy is the suppression of the lineup identification; the observer can make an in-court identification if such is independently reliable.

C. **The Sixth Amendment Right To Counsel Is "Offense Specific"**

Unlike the Fifth Amendment right to the presence of an attorney during a *custodial interrogation* secured by *Miranda*, the Sixth Amendment right to counsel is "offense specific."
Thus, even where a defendant is the subject of formal charges with respect to one offense, law enforcement authorities can interrogate him without the presence of counsel concerning uncharged offenses. See McNeil v. Wisconsin, 501 U.S. 171 (1991). The Blockburger test governs the question whether an offense not specifically alleged in the indictment etc., is an "uncharged" offense for purposes of the attachment of the Sixth Amendment right to counsel.

D. Ethical Constraints In Questioning Represented Persons

Even when the Sixth Amendment right to counsel has not yet attached, state rules of professional responsibility, modeled upon American Bar Association (ABA) Model Rule of Professional Conduct 4.2, may preclude contact with represented persons by an attorney for the government or a person acting on the attorney's behalf. Such rules govern the actions of federal prosecutors. See the "McDade-Murtha Amendment," 28 U.S.C. § 530B. On March 12, 2004, the Department's Professional Responsibility Advisory Office (PRAO) issued an opinion addressing the application to Department of Justice attorneys of state bar "no contact" rules modeled upon ABA Rule 4.2 in the context of foreign interrogations. The inquiry that triggered the opinion concerned situations where such a person is in the custody of a foreign government, and the prospective questioning by U.S. authorities involves a matter for which the person has not yet been formally charged in the United States. PRAO concluded that "preindictment interrogation of a person in the custody of a foreign government would fall within the 'authorized . . . by law' exception to Rule 4.2 and therefore would not constitute a violation of the Department attorneys' obligations under the relevant version of Rule 4.2." Additional questions you may have with respect to the application of 28 U.S.C. § 530B and state bar rules to extraterritorial investigations should be addressed to your ethics counselor or to the PRAO ((202) 514-0458).

*ABA Model Rule of Professional Conduct 4.2 (2000) provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation by a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
ADDENDUM I

International Agreements Authorizing Extraterritorial Jurisdiction

We enumerate below a number of international agreements designed to thwart acts of terrorism to which the United States is a party. We have also identified the federal legislation that implements those agreements, and the bases under which such legislation authorizes the assertion of jurisdiction over such offenses. Note that, in a number of instances, federal jurisdiction can vest over a person charged with a treaty-implementing offense merely by virtue of his presence in the U.S. and without regard to the location of the crime.


Implementing Legislation - 49 U.S.C. 46502(b) (penalizes commission of any offense embraced by the Hague Convention, such as the seizure or attempted seizure of an aircraft in flight when outside the "special aircraft jurisdiction").

Jurisdictional Predicates - commission on an aircraft "in flight" outside of the "special aircraft jurisdiction of the United States" and one of the following: (A) a U.S. national was aboard the aircraft; (B) the offender was a U.S. national; or (C) the offender is afterwards found in the United States. See Rezaq, 134 F.3d at 1131-32 (the phrase "afterwards found" includes the defendant's forcible return).


Implementing Legislation - 49 U.S.C. §§ 46502(a) (aircraft piracy); 46504 (assault upon or interference with aircrew member); 46503 (carrying a weapon or explosive on an aircraft); 46506 (commission of certain crimes, such as assault, aboard an aircraft).

Jurisdictional Predicates - 49 U.S.C. § 46502(a) - (A) commission of offense in the special aircraft jurisdiction of the United States; or (B) attempted commission in the special aircraft jurisdiction although the aircraft is not "in flight" at the time of the attempt, if it would have been "in flight" had the offense been consummated; 49 U.S.C. § 46504 - commission of the offense in the "in the special aircraft jurisdiction of the United States:" 49 U.S.C. § 46505 -

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\(^5\) The "effective dates" connotes the dates when the United States became a party to the particular convention. In many instances the effective date of the implementing legislation is also governed by that date.
commission or attempted commission of offense on an aircraft in or intended for operation "in air transportation or intrastate air transportation;" 49 U.S.C. § 46506 - commission on board an aircraft in the special aircraft jurisdiction of an offense punishable if committed in the special maritime and territorial jurisdiction of the U.S. or under the District of Columbia Code.


Implementing Legislation - 18 U.S.C. § 32 - destruction of aircraft or aircraft facilities

Jurisdictional Predicates - § 32(a)(1) (setting fire to, damaging, destroying aircraft) - any aircraft in special aircraft jurisdiction; or any civil aircraft used in interstate, overseas or foreign commerce; § 32(a)(2) (placing destructive device on "any such aircraft") see subsection (a)(1); § 32(a)(3) (disabling an aircraft navigation facility) must jeopardize "any such aircraft in flight" - see subsection (a)(1); § 32(a)(4) (setting fire to, damaging, placing destructive device etc. on appliances, structures, ramps, etc.) - facility must be used in connection with aircraft defined in subsection (a)(1); § 32(a)(5) (acts of violence against persons on "any such aircraft" if that act is likely to endanger "the safety of such aircraft") - the aircraft must be one defined in subsection (a)(1); § 32(a)(6) (knowing communication of false information that endangers safety of aircraft) - the aircraft must be one defined in subsection (a)(1). Section 32(b) (acts of violence against any individual aboard an aircraft registered in a country other than the United States so as to endanger its safety, destruction of such aircraft, placing destructive device on such aircraft) - jurisdiction where: (1) a U.S. national is on board (or would have been on board the aircraft), (2) the offender is a U.S. national, or (3) the offender is afterwards found in the United States. See United States v. Yousef, 327 F.3d at 88-89 (approving exercise of extraterritorial jurisdiction for placing a bomb on a civil aircraft registered in another country where defendant was "afterwards found in the United States").


Implementing Legislation - 18 U.S.C. § 37 - prohibits use of any device, substance or weapon to perform an act of violence against a person serving in

6 The term "air transportation" is defined as "foreign air transportation, interstate air transportation or the transportation of mail by aircraft." See 49 U.S.C. § 40102(5).
civil aviation or damage to airport facilities such that it endangers or is likely to endanger safety at that airport.

**Jurisdictional Predicates** - (1) the prohibited activity takes place in the U.S.; (2) the prohibited activity takes place outside the U.S. and (A) the offender is later found in the U.S.; or (B) an offender or victim is a U.S. national.

5. **Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons** ("IPP Convention") (effective Jan. 6, 1985)

**Implementing Legislation** - 18 U.S.C. § 112 (assaults upon or intimidation of foreign official, foreign guest or internationally protected person (IPP)); 18 U.S.C. § 878 (threats and extortion against a foreign official, official guest or IPP); 18 U.S.C. § 1116 (murder or manslaughter of foreign official, official guest or IPP); 18 U.S.C. § 1201(a)(4) (kidnapping foreign official etc.).

**Jurisdictional Predicates** - 18 U.S.C. § 112 - jurisdiction where victim is a foreign official, "official guest," or IPP outside the U.S. if (1) he is an employee or agent of the U.S.; (2) the offender is a U.S. national; (3) the offender is "afterwards found" in the U.S. 18 U.S.C. § 878 - as above (see 18 U.S.C. § 878(d)). 18 U.S.C. § 1116 - as above (see 18 U.S.C. § 1116(c)). 18 U.S.C. § 1201(a)(4) - as above (see 18 U.S.C. § 1201(e)).

6. **International Convention Against the Taking of Hostages** ("Hostage-Taking Convention") (effective Jan. 6, 1985)

**Implementing Legislation** - 18 U.S.C. § 1203 - hostage taking

**Jurisdictional Predicates** - 18 U.S.C. § 1203(b)

If the offense is extraterritorial, there is jurisdiction if the offender or the victim is a U.S. national; (B) "the offender is found in the United States"; (C) the government or organization sought to be compelled is the United States. See 18 U.S.C. § 1203(b)(1).

If the offense occurred inside the United States (and there are no other extraterritorial aspects to the offense), there is federal jurisdiction where the entity sought to be compelled is the United States. See 18 U.S.C. § 1203(b)(2).


**Implementing Legislation** - 18 U.S.C. § 331 - prohibited transactions involving nuclear materials
Jurisdictional Predicates - (1) commission of the offense in the U.S., the special maritime and territorial jurisdiction, or the special aircraft jurisdiction; (2) the offender or victim is (A) a national of the U.S. or (B) a U.S. corporation; (3) the defendant is thereafter found in the U.S., even if the offense is extraterritorial.


Implementing Legislation - 18 U.S.C. § 2280 - prohibits, inter alia, seizure or exercise of control of a ship by force; acts of violence against a person on board a ship, if likely to endanger the vessel, destruction of the vessel or cargo.

Jurisdictional Predicates - (1) In the case of a "covered ship," there is jurisdiction if: (A) the activity is committed (i) against or on board a ship flying the U.S. flag; (ii) in the United States; (iii) by a U.S. national or a stateless person who habitually resides in the U.S.; (B) during the commission of such activity, a U.S. national is seized, threatened, injured or killed; or (c) the offender is later found in the U.S. (2) In the case of a ship navigating or scheduled to navigate solely within the territorial sea or international waters of a country other than the U.S., if the offender is later found in the U.S. after such activity is committed; and (3) in the case of any vessel, if the activity is committed in an attempt to compel the U.S. to do or abstain from doing any act.


Implementing Legislation - 18 U.S.C. § 2281 - prohibits, inter alia, efforts to seize control of a fixed platform, commit an act of violence against persons on board a fixed platform or commit other acts likely to endanger its safety.

Jurisdictional Predicates - See 18 U.S.C. § 2281(b). (A) the fixed platform is located on the continental shelf of the United States; (B) the platform is located on the continental shelf of another country but the offense is committed by a U.S.

7 A "covered ship is one navigating or scheduled to navigate into, through or from waters beyond the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country." 18 U.S.C. § 2280(e).

8 A "fixed platform" means an artificial island, installation or structure permanently attached to the seabed for the purpose of exploration or exploitation of natural resources or for other economic purposes." 18 U.S.C. § 2281(d), para. 2.
national or a stateless person who habitually resides in the U.S.; (C) the victim of any such activity is a U.S. national; (D) the platform is located outside the U.S. continental shelf but "the offender is later found in the United States."


*Implementing Legislation* - 18 U.S.C. § 229 (prohibits development, production, stockpiling, retention, use or threat to use any chemical weapon, with certain exceptions and exemptions).

*Jurisdictional Predicates* - (1) the offense takes place within the U.S.; (2) the offense is committed by a U.S. national outside the U.S.; (3) the offense is committed against a U.S. national outside the U.S.; (4) the offense is committed against property outside the U.S. that is owned, leased or used by the U.S. or any U.S. department or agency.


*Jurisdictional Predicates* - None stated – by virtue of the nature of the offenses, jurisdiction not extraterritorial.


*Implementing Legislation* - 18 U.S.C. § 2332f (prohibits placing or discharging an explosive with extensive destruction, and such destruction results or is likely to result).

*Jurisdictional Predicates* - See 18 U.S.C. § 2332f(b). (1) The offense occurs in the U.S. and (A) it is committed against another state or facility of such state; or (B) is committed in an attempt to compel another state or the U.S. to do or abstain from doing an act; (C) the offense is committed on board a vessel flying the flag of another state, an aircraft registered in another state, or belonging to another state; (D) the perpetrator is found outside the United States; (E) the perpetrator is a national of another state or a stateless person. (2) The offense occurs outside the U.S. and (A) the perpetrator is a U.S. national or stateless
person habitually residing in the U.S.; (B) a victim is a U.S. national; (c) the perpetra-
tor is found in the United States; (D) the offense is committed in an attempt to compel the U.S. to do or to abstain from doing an act; (E) the offense is committed against a state or government facility of the U.S.; (F) the offense is committed against a U.S. flag vessel or U.S. registered aircraft; (G) the offense is committed on board a U.S. operated aircraft.

13. **International Convention for the Suppression of the Financing of Terrorism**
   ("Terrorist Financing Convention") (effective June 25, 2002)

   **Implementing Legislation** - 18 U.S.C. § 2339C (prohibits providing or collecting funds with the intention or knowledge that such funds are – (A) to be used to carry out an act which constitutes an offense under one of a number of enumerated treaties relating to terrorist activity; or (B) any other act intended to cause death or serious bodily injury to any civilian or any other person not taking part in hostilities, when the purpose of the act is to intimidate a population, or to compel a government or international organization to do or abstain from doing an act).

   **Jurisdictional Predicates** - See 18 U.S.C. § 2339C(b). There is jurisdiction over such offenses when: (1) the offense takes place in the U.S. and – (A) the perpetrator was a national of another nation or a stateless person; (B) on board a vessel flying a foreign flag or an aircraft registered under the laws of another state; (C) on board an aircraft operated by another state; (D) the perpetrator is found outside the U.S.; (E) was directed toward or resulted in the carrying out of a predicate act against – (i) a national of another state; (ii) another state or government facility; (F) was directed toward or resulted in the carrying out of a predicate act committed in attempt to compel another state or international organization to do or abstain from doing an act; (G) was directed toward or resulted in the carrying out of a predicate act against – (i) a U.S. owned, leased or used property; (ii) any person or property within the U.S.; (iii) any U.S. national or the property of such national; (iv) any property of a legal entity organized under U.S. law, including any state, etc. (3) the offense is committed aboard a U.S. flag vessel or a U.S. registered aircraft; (4) the offense is committed on board an aircraft operated by the U.S.; (5) the offense was directed toward or resulted in the carrying out of a predicate act committed in an attempt to compel the U.S. to do or abstain from doing any act.
EXTRATERRITORIAL OFFENSE?

YES

DOES THE STATUTE CONTAIN A VENUE PROVISION?

NO

ANY OVERT ACT/ELEMENT OF OFFENSE COMMITTED BY DEFENDANT OR ANY CO-CONSPIRATOR WITHIN THE DISTRICT?

NO

HAS DEFENDANT BEEN ARRESTED/"FIRST BROUGHT" INTO THE DISTRICT?

NO

DO YOU KNOW THE LAST KNOWN ADDRESS OF DEFENDANT OR ANY ONE OF TWO OR MORE OF THE OFFENDERS?

NO

VENUE IN D.C.

YES

DO YOU KNOW THE LAST KNOWN ADDRESS OF DEFENDANT OR ANY ONE OF TWO OR MORE OF THE OFFENDERS?

YES

VENUE IN LOCATION OF LAST KNOWN ADDRESS IF DEFENDANT NOT ALREADY CHARGED BY INDICTMENT/INFORMATION

VENUE IN THAT DISTRICT IF DEFENDANT NOT ALREADY CHARGED BY INDICTMENT/INFORMATION

VENUE AS DIRECTED BY STATUTE

VENUE IS PERMISSIBLE WITH THAT DISTRICT

VENUE IN THAT DISTRICT IF DEFENDANT NOT ALREADY CHARGED BY INDICTMENT/INFORMATION

VENUE IN D.C.
ADVICE OF RIGHTS

We are representatives of the United States Government. Under our laws, you have certain rights. Before we ask you any questions, we want to be sure that you understand those rights.

You do not have to speak to us or answer any questions. Even if you have already spoken to the authorities, you do not have to speak to us now.

If you do speak with us, anything that you say may be used against you in a court in the United States or elsewhere.

In the United States, you would have the right to talk to a lawyer to get advice before we ask you any questions and you could have a lawyer with you during questioning. In the United States, if you could not afford a lawyer, one would be appointed for you, if you wish, before any questioning.

Because we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questioning.

If you decide to speak with us now, without a lawyer present, you will still have the right to stop answering questions at any time.

You should also understand that if you decide not to speak with us, that fact cannot be used as evidence against you in a court in the United States.

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed: ____________________________

Date: ____________________________

Witness: ____________________________ Time/Date: ____________________________

Witness: ____________________________ Time/Date: ____________________________
BEGIN E-MAIL FROM BAGHDAD

FBI023537CBT

The following email is a collaborative effort of M. Chris Briese and

Re:

OIG-REQ 02/18/05-PART. 9 DOJOIG 007219 FBI0000543
Doesn't seem to change what was said yesterday.

I re-read the entire Geneva III convention last night looking for any notice provisions and found language that: should the Detaining Power decide to institute judicial proceedings (criminal prosecution), the EPW is entitled to counsel of his choice, the calling of witnesses, an interpreter and: "He shall be advised of these rights by the Detaining Power in due time before the trial." The counsel conducting the defense "shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused."
Precedence: PRIORITY
Date: 01/27/2004

To: Counterterrorism
Attn: AD Bald, CTD
Room 5829

From: EAD Pistole
Attn: M. Chris Briese
Section Chief ITOS II
Room 4972

Attn: Valerie Caproni
General Counsel
Room 7429

Contact: Valerie Caproni

Approved By: Pistole John
Bald Gary M
Caproni Valerie F

Drafted By: Bowman M

Case ID #: (U) 315E-HQ-1448534 (Pending)

Title: (U) Saddam Hussein
IT-IRAQ

Synopsis: (U) HPV-1 Interrogation team, Baghdad, seeks authority to question the subject without reading the subject warnings under Miranda v. Arizona, to video tape questioning of subject, and to identify themselves only as from U.S. Government.

Details: (U) The FBI: Legal Handbook for Special Agents Section 7-3.2 provides that Special Agents conducting interviews must identify themselves by name and official identity and advise the person interviewed of their rights under Miranda. MIOG PART 2, Section 7.1 provides that credentials shall be showed by Special Agents interviewing a subject.
To: Counterterrorism  From: EAD Pistole
Re: (U) 315E-HQ-1448534, 01/27/2004

(U) Electronic recording of statements, including surreptitious recordings may be approved by an SAC, sensitive circumstances must be reported to the appropriate Assistant Director at FBIHQ. Legal Handbook Section 7-8, MIOG Sections 10-10.10.

(U) Interviews of HDV-1 are to proceed as per guidance within this EC.

COUNTERTERRORISM
AT WASHINGTON, DC

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Discussion

A. Prisoner of War

With regard to the interrogation of EPWs, GIII prohibits the use of coercion or physical and mental torture to secure information of any kind from EPWs. See GIII, Article 17. Additionally, EPWs who refuse to answer questions may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind. Id. Moreover, EPWs must also be provided with proper food, water, clothing, showers, sanitary conditions and medical attention during their detention. See id. at Articles 25-30.

B. Enemy Combatant
Memorandum
Re: Saddam, 01/27/2004

302 vs EC

The interviews should be documented in a classified transcript. For each interview, a 302 cover transmittal document shall be prepared documenting that the interview took place. The 302 should be classified but state that it is unclassified when the transcript is removed. No classified information should be placed in the 302. Any classified information, other than the transcript of interview, is to be transmitted in a classified EC.
The meeting continued in the same vein, but I would like to touch upon the highlights:

DAG reps stated that they would speak to the DAG as soon as possible and Mr. Bald stated we would proceed as planned unless we heard otherwise from DOJ.

For what it's worth, I was incredibly impressed with the thorough and professional presentation by the FBI reps (Mr. Bald and Mr. Breise). I am available to assist in clarifying any of the above or engaging with DOJ as necessary.
I'm going to let you clarify this point since you are more intimately involved in this. Thanks

-----Original Message-----
Date: 02/05/2004 07:33 am -0500 (Thursday)
From:          
To:           Valerie Caproni
CC:           
Subject: Re: Fwd: HVD-1

Please advise.

The Team

Guidance from NSL.

---
George -

Document your interviews as follows: Use a 302 to document the time, place and attendees. Then summarize your interview on an official FBI b6 b7c 302. Insert w/ case number etc. This 302 should be classified if the info in the Insert is classified. The Insert should go in a 1A envelope, and if classified, the 302 with above info should be classified with the caveat that "while classified this 302 is unclassified when the 1A is not attached."

I hope this makes sense, this is consistent with the guidance from EAD Pistole's EC, the only change being that the word "transcript" should be replaced with summary." This interpretation was approved by

-----Original Message-----
From: PIRO, GEORGE
Sent: Friday, February 06, 2004 2:03 PM
To: [blank]
Subject: RE: Fwd: HVD-1

-----Original Message-----
Date: 02/05/2004 10:08 am -0500 (Thursday)
From: [blank]
To: [blank]
CC: PIRO, GEORGE Briese, M
Subject: RE: Fwd: HVD-1

-----Original Message-----
---OIG-REQ 02/18/05-PART 9

DOJOIG 007227
From: Briese, M Chris  
Sent: Monday, February 09, 2004 12:39 PM  
To:  
Cc:  
Subject: Fwd: HVD-1 meeting with DAG's office and Criminal Division

I think this answers the dissemination question for the moment. OGC will advise when this changes.

-----Original Message-----
Date: 02/05/2004 02:55 pm -0500 (Thursday)
From: Bald, Gary M., Briese, M Chris
To: Caproni. Valerie E. 
CC:  
Subject: HVD-1 meeting with DAG's office and Criminal Division

The meeting continued in the same vein, but I would like to touch upon the highlights:

DAG reps stated that they would speak to the DAG as soon as possible and Mr. Bald stated we would proceed as planned unless we heard otherwise from DOJ.

For what its worth, I was incredibly impressed with the thorough and professional presentation by the FBI reps (Mr. Bald and Mr. Breise). I am available to assist in clarifying any of the above or engaging with DOJ as necessary.
After we got off the phone, I found the attached email which we sent to General Hiller last year. Also, there is a copy of the military's use of approved coercive techniques which are quite different I am sure from the Bureau guidelines you are preparing.

----Original Message-----
Date: 12/09/2002 10:46 am -0500 (Monday)
From: [Email Address]
To: [Email Address]
Subject: GTMO

It was good to talk with you the other night. I look forward to reading your response to the outlandish accusations made by the inspectors and... 

Attached are two documents - 1) a one-page description of a matter concerning interview/interrogation which we spoke to the Commanding general about and 2) An outline of the coercive techniques in the military's interviewing tool kit.

I will also send our Interview Plan for Detainee # 63, Mohamed Alqatani. When I return to D.C., I will bring a copy of the military's interview Plan... You won't believe it!
INTERVIEW STRATEGIES – GUANTANAMO BAY

As we approach the one-year anniversary of the confinement of Al Qaeda/Taliban detainees at GTMO, perhaps it is a good time to revisit our interrogation strategies which may be in need of revision.

Since last year, detainees have been interrogated by representatives of the Defense Human Intelligence Services (DHS) and by members of the FBI/CITF in an effort to obtain valuable intelligence. In this sense, the missions appear to be identical. However, both the FBI and the CITF have additional responsibilities. While the FBI is working to obtain information to strengthen existing terrorism investigations for prosecution, the CITF is trying to ensure that incriminating information gathered from the detainees is done in a manner acceptable for military tribunals.

Central to the gathering of reliable, admissible evidence is the manner in which it is obtained. Interrogation techniques used by the DHS are designed specifically for short-term use in combat environments where the immediate retrieval of tactical intelligence is critical. Many of DHS’s methods are considered coercive by Federal Law Enforcement and UCMJ standards. Not only this, but reports from those knowledgeable about the use of these coercive techniques are highly skeptical as to their effectiveness and reliability. Since nearly all of the GTMO-detainees have been interviewed many times overseas before being sent here, the FBI/CITF believe that a different approach should be undertaken in terms of trying to elicit information from them. The FBI/CITF favors the use of less coercive techniques, ones carefully designed for long-term use in which rapport-building skills are carefully combined with a purposeful and incremental manipulation of a detainee’s environment and perceptions. A model of this approach was offered recently in an FBI/CITF interview plan for detainee 063.

FBI/CITF agents are well-trained, highly experienced and very successful in overcoming suspect resistance in order to obtain valuable information in complex criminal cases, including the investigations of terrorist bombings in East Africa and the USS Cole, etc. FBI/CITF interview strategies are most effective when tailored specifically to suit a suspect’s or detainee’s needs and vulnerabilities. Contrary to popular belief, these vulnerabilities are more likely to reveal themselves through the employment of individually designed and sustained interview strategies rather than through the haphazard use of prescriptive, time-driven approaches. The FBI/CITF strongly believes that the continued use of diametrically opposed interrogation strategies in GTMO will only weaken our efforts to obtain valuable information.

A second problem with the current interrogation strategy is that detainees are smarter now than when they first arrived. No longer are they susceptible to suggestions for early release or special consideration. Indeed, no one seems to know when the military tribunals will begin. As TDY interrogators continue to interview and re-
interview detainees utilizing every theme imaginable, detainees have become increasingly cynical of any concessions offered. Moreover, they appear to have become better conditioned for almost all interrogation approaches with many detainees simply refusing to answer any questions. Complicating matters is the structural set-up of Camp Delta, which enables detainees to exchange counter-interrogation resistance strategies with relative ease while at the same time strengthening their solidarity.

Except for a recently enacted reward system offering minor creature comforts to cooperative detainees, there is a lack of major incentives which could encourage detainees to provide more information. Major incentives are greatly needed. Recently, investigators from Italy were successful in retrieving valuable information and cooperation from some detainees after they were provided with guarantees of judicial leniency.

In addition to reviewing interrogation strategies, the FBIHQ representatives wish to discuss with the Commanding General the following issues:

1. Projected long term FBI Agent and Professional Support presence in support of JTF GTMO mission
2. FBI continued technical support
3. DOJ prosecutorial interest in GTMO detainees
FEDERAL BUREAU OF INVESTIGATION

Precedence: .PRIORITY Date: 05/26/2004

To: Counterterrorism Attn: EAD John S. Pistole

From: Counterterrorism

Contact: UC

Approved By: Bald Gary M

Drafted By:

Case ID #: (U) 66F-HQ-A-1258990 (Pending)

Title: (U) Treatment of Prisoners and Detainees

Synopsis: (U) Further clarify EC from General Counsel on Treatment of Prisoners and Detainees.

Details: (U) This EC reiterates and memorializes existing FBI policy with regard to interviews/interrogations of prisoners, detainees and other persons under US control (PUCS). The proven template for the success of FBI personnel during interviews is a rapport-based approach. The established FBI guidelines clearly state that FBI personnel may not obtain statements during interrogations by use of force, threats, and or physical abuse should be adhered to regardless of the operating environment.

During the course of the ongoing Global War on Terrorism, FBI personnel have been placed in extreme operating environments to include active battlefields. Individuals have been captured, detained and interviewed during these conflicts. These individuals have been interviewed by multiple government agencies with varying interview policies. Regardless, FBI interview policy for FBI personnel conducting these interviews does not waiver. FBI policy requires issuance of Miranda warnings during custodial interrogations, however, the nature of these interviews require a case by case determination of the appropriate advisement of rights. FBI personnel should contact
To: Counterterrorism
From: Counterterrorism
Re: (U) 66F-HQ-A-1258990, 05/26/2004

their chain of command and appropriate legal authorities for
guidance prior to the interview.

If an FBI agent(s) is present when the interrogation of
an individual falls outside the prescribed FBI policy the agent
must immediately stop the interview and redirect the interview to
conform with existing FBI policy, or remove himself/herself from
the interview process.

If, in the opinion of FBI personnel present, interview
techniques being applied exceed lawfully authorized practices, it
is his/her responsibility to report this fact to the FBI On Scene
Commander (OSC). The OSC is responsible for assessing the
situation and for reporting to appropriate authority such matters
as he/she deems necessary.

Although it is unusual for FBI personnel to operate in
these environments, it is necessary to bring investigative
expertise to the scene to evaluate information discovered or to
interrogate individuals in custody when that is appropriate. The
requirement for FBI personnel to operate with specialized units
does not authorize participation in practices that fall outside
the realm of FBI policy. Nor does assignment with these
specialized units bring FBI personnel within their operational
command.

Approved________________________

Marion Bowman (title)

Approved________________________

Valerie Caproni (title)
To: Counterterrorism
From: Counterterrorism
Re: (U) 66P-HQ-A-1258990, 05/26/2004

LEAD(s):
Set-Lead 1: (Action)

ADMINISTRATIVE SERVICES
AT FBIHQ
(U) OGC

**

OIG-REQ 02/18/05-PART 9
DOJOIG 007234
FBI023595CBT

FBI0000601
From: (OGC) (FBI)
Sent: Friday, May 28, 2004 9:06 AM
To: Caproni, Valerie E. (OGC) (FBI); BOWMAN, MARION E. (OGC)

Subject: RE:

--- Original Message ---

CONFIDENTIAL
RECORD 66F-HQ-A-1258990

For what it's worth, I think analytical outline is right on. But, I think the decision that it is in the Nation's best interests to have FBI interviewers on-scene has in fact been made, sub silentio, at the executive levels in the FBI and the DOJ at least (albeit w/o this lawyer-like analysis of risk versus benefit) by the mere act of sending our guys there in company with the other agency personnel. And from what those agents told us the other day, it sounds like there is value added by our presence. Perhaps, it should be made in writing by FBI and sent to the Department to be blessed—albeit after the fact.

If we get hung up too much on what we view as words of art (but which agents and others will view as semantics), i.e., "participating" "condoning" "reaping the benefits of," we will get accused of either trying to draw a line that can't be drawn; being disingenuous by putting a pretty caption under a dirty picture; and mainly we will risk giving agents over there unworkable guidance.

Suggest we just limit our distinctions to allowing our agents to be present, to interview these people whenever the agents deem it appropriate and productive but to avoid actually engaging in interview techniques that violate FBI standards—and have that policy blessed at the highest levels like suggested—understanding full well the probability that the FBI will get tarred by any taint that comes out of the conduct of others but that our leadership recognizes that and will support our agents when that happens.

--- Original Message ---

From: Caproni, Valerie E. (OGC) (FBI)
Sent: Thursday, May 27, 2004 7:08 PM
To: Caproni, Valerie E. (OGC) (FBI); BOWMAN, MARION E. (OGC) (FBI)

Subject: RE:

--- Original Message ---

CONFIDENTIAL
RECORD 66F-HQ-A-1258990

For what it's worth these are my opinions:

1-So long as the DOD interrogation techniques are lawful, I do not believe it is unlawful for FBI agents, consistent with FBI guidelines, to question detainees after DOD techniques are used.
2- FBI is participating (or certainly will be viewed as participating) in aggressive but lawful DOD techniques where FBI agents are embedded with the military interrogators and merely as a policy absent themselves from the rough stuff and then come back in (minutes, hours or days later) to question the detainee;
3-If there is a decision that the FBI's continued involvement in the interrogation of detainees is in the best interests of the Nation, that decision must be confirmed at the highest levels of the Department in order to give the men and women of the FBI the comfort that down the road they will be hung out to dry.
4-Without clear statement of benefits versus the risks, I believe that extreme forward deployment of FBI must be reconsidered.
From: (OGC) (FBI)  
Sent: Monday, January 10, 2005 8:59 AM  
To: (OGC) (FBI)  
Subject: FW: timeline?

Assistant General Counsel  
Counterterrorism Law Unit 1  
FBI GTMO  
US Naval Base, Guantanamo Bay, Cuba  

THIS IS A PRIVILEGED ATTORNEY-CLIENT WORK PRODUCT/COMMUNICATION AND IS NOT TO BE DISTRIBUTED OUTSIDE OGC WITHOUT PRIOR APPROVAL.

-----Original Message-----  
From: (CTD) (FBI)  
Sent: Thursday, January 06, 2005 8:28 AM  
To: (OGC) (FBI)  
Subject: FW: timeline?

SECRET  
RECORD  

Thanks...will close hold...on items with question marks, here is some info at your discretion:

- Pg. 6, 19 July 2003 entry
- Pg 16, 5 Aug 2004 entry
- Pg 18, 1 Dec 2004 entry, RE: 

Let me know if you need anything else. Thanks

-----Original Message-----  

-----Original Message-----  
From: (CTD) (FBI)  
Sent: Tuesday, January 04, 2005 5:49 PM  
To: (CTD) (FBI)  
Subject: RE: timeline?
Message

NON-RECORD

Original Message
From: (CTD) (FBI)
Sent: Tuesday, January 04, 2005 5:21 PM
To: (CTD) (FBI)
Subject: timeline?

UNCLASSIFIED
NON-RECORD

Whatever happened to the GTMO timeline project? Is there a work in progress I can review? Thanks

CTD/ORS/MLDU

X-1 Room 35-200

UNCLASSIFIED

DERIVED FROM: G-3 FBI Classification Guide G-3, dated 1/97. Foreign Counterintelligence Investigations
DECLASSIFICATION EXEMPTION 1
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