**Arrests and Detentions**

**Basic Rule — Vienna Convention**
- Detainees must be informed of their rights.
- Consulate notified of their arrest.
- Detainees can choose if they want consular notification.

**Special Rule — Bilateral Model**
- Notification must be made regardless of consent.

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**“Extraterritorial Jurisdiction”**
- The authority of a government to criminalize activity that occurs outside its territorial borders or to investigate or prosecute such activity.
- Constraints under international law — may limit the exercise of jurisdiction when such action infringes upon the rights of other sovereigns.

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**Congressional Authority**
- Congress has the authority to criminalize extraterritorial conduct when there is a connection between the prohibited conduct and the United States, or its vital interests.
- The bases for enactment of extraterritorial legislation include:
  - The authority to: "define and punish ... Offenses against the Law of Nations." Art. I §8, cl. 10.
  - The authority to: Implement treaties under the "necessary and proper clause" of Article 1 §8.
"McDade"; Consular Notification; Extraterritorial & Online Investigations

Office of the General Counsel

Represented "Parties/Persons"

- 28 U.S.C. 53013: so-called "McDade Amendment" requires all federal government attorneys to follow their State Bar Ethics Code. Ethics Codes may (and usually do) prohibit an attorney from contacting the client of another attorney without notifying that client's attorney.

- NOT a 5th or 6th Amendment issue. But may have the effect of precluding an agent from engaging in lawful investigation of persons "represented" by an attorney due to inability to obtain concurrence of an AUSA due to AUSA concern over possible Bar sanctions.

Consular Notification and Access

- The Vienna Convention on Consular Relations (VCCR) requires notifying an arrested person of:
  - The right to have their nearest consulate notified of the arrest.
  - If they wish, the consulate must be notified "without delay" and access to the arrested must be provided to any consulate representative.

- Treaty obligations apply to law enforcement officers when arresting a "foreign national" within the U.S.

- Treaties the U.S. has entered into with certain countries (38) require notification regardless of the wishes of the arrested, "Mandatory notification countries".

Right to Counsel Hypothetical

- 5th Amendment?
- 6th Amendment?
- McDade?

Represented "Parties/Persons"

- Defense attorneys have argued that the use of represented parties is a violation of these ethics codes.

- Sanctions for violation of legal ethics codes may include disbarment.

Treaties

Vienna Convention on Consular Relations
- Nearly 170 countries are party to the VCCR
- VCCR establishes standard for consular conduct

Bilateral Treaties
- Notification mandatory for 58 countries
- List of special rule countries on pocket cards
Statutes Implementing Treaties

- The United States is a party to a number of multilateral agreements ("treaties") designed to combat acts of terrorism which contain provisions requiring signatories to criminalize the proscribed conduct; and to either extradite or prosecute persons present within their territory who are believed to have committed prohibited acts.

“Terrorist Crimes”

- Statutes used to combat international terrorism often implement treaties and contain common jurisdictional provisions.
- For example:
  - 18 U.S.C. §§ 32, 37, 81, 175, 229, 831, 842(m) or (n), 844(f) or (i), 930(c), 556, 1114, 1115, 1203, 1301, 1362, 1363, 1366, 1751, 1992, 1993, 2155, 2156, 2280, 2281, 2332, 2333(a), 2334, 2335, 2340A.
  - 49 U.S.C. §§ 44902 or 60123(c).

Common Jurisdictional Provisions

- The United States, there is jurisdiction if the offender or victim is a national of the U.S. or a U.S. corporation; or the offender is thereafter found in the U.S.

Common Jurisdictional Provisions

- Convention on the Protection of Nuclear Materials (effective 03/03/1980).
- If committed outside of the United States, there is jurisdiction if the offender or victim is a national of the U.S. or a U.S. corporation; or the offender is thereafter found in the U.S.

Common Jurisdictional Provisions

- International Convention Against the Taking of Hostages (effective 01/06/1985).
- Jurisdiction: If committed outside the United States, there is jurisdiction if the offender or victim is a U.S. national or the offender is thereafter found in the United States; or the government or organization sought to be compelled is the United States.

Common Jurisdictional Provisions

- International Convention for the Suppression of Terrorist Bombings (effective 06/26/2002).
- Implementing Legislation: 18 U.S.C. §2332f (prohibits bombing places of public use with the intent of causing extensive damage).
- Jurisdiction: If committed outside the U.S., there is jurisdiction if the offender is a U.S. national or a stateless person habitually residing in the U.S.; or the victim is a U.S. National; or if the offender is found in the U.S.; or if the act is done to compel the U.S. to do or abstain from doing an act; or is committed against U.S. property or on a U.S. vessel or aircraft.
Common Jurisdictional Provisions

- Convention on Offenses and Certain Other Acts Committed on Board Aircraft ("Tokyo Convention" effective 10/01/1969)
- Implementing Legislation: 49 U.S.C. §46502 (aircraft piracy)
- Jurisdiction: When committed in flight outside the special aircraft jurisdiction of the U.S., there is jurisdiction if a U.S. national was co-pilot; or the offender is a U.S. national or the offender is afterwards found in the U.S.

Extraterritorial Investigations

- General Rule: FBI Agents do not have authority to conduct investigations in other countries.
- Investigations (including searches) must be coordinated through the appropriate Legal.
  - Letter of Request: a request from a judge in the U.S. to a judicial officer in a foreign country for assistance.
  - Mutual Legal Assistance Treaty (MLAT) Request: a direct, formal procedure for making and receiving requests between Justice Ministries.

Investigative Jurisdiction of the FBI

- The FBI has worldwide jurisdiction with respect to any federal offense. However, when exercised in the territory of another sovereign, such authority is constrained by:
  - International Law (sovereignty of the host nation - activity requires approval of the host government).
  - Statutes (e.g., 22 U.S.C. §3927(b) - requires notification of the chief of mission of activity in a foreign country).
  - Internal Regulations (e.g., AG Guidelines for Extraterritorial FBI Operations and Criminal Investigations/Development and Operation of FBI Criminal Informants and Cooperative Witnesses in Extraterritorial Jurisdictions).

Investigative Jurisdiction of the FBI

- All international investigation - including travel for any purpose - not specifically authorized is strictly prohibited; whether it be conducted in person or by telephone, over the Internet, or in other ways.
  - Approvals: The removal of an offender by a country from its territorial boundaries. The U.S. obtains from another country the surrender of a suspected or convicted criminal.
  - The consequences of breaching agreements, treaties, or international laws can be counterproductive. It can cause evidence to be lost, agents to be detained and expelled from countries and long-standing international relationships to be negatively impacted.

Extraterritorial Apprehension

- As a practical matter, to apprehend a fugitive residing in a foreign nation, that nation's consent is required.
- Rule 4(c)(2): A warrant may be executed anywhere a federal statute authorizes an arrest.
  - 18 U.S.C. §§3041, 3042: Provide authority to issue arrest warrants for any offense against the U.S. This authority applies in any country where the U.S. exercises extraterritorial jurisdiction for the arrest and removal of a fugitive charged with a violation against the U.S.
- However, use of this authority must be reconciled with the sovereignty of the nation in which the fugitive is located.

Extraterritorial Apprehension

- Methods for securing the return of an offender from a foreign country:
  - Extradition: A formal process governed by treaty in which one country requests and obtains from another country the surrender of a suspected or convicted criminal.
  - Expiration: The removal of an offender by a country from its territorial boundaries. The U.S. may itself arrange for the asylum nation to assume custody for eventual extradition or transfer. "Deportation" is a form of expulsion that refers exclusively to the removal of foreigners from a country by that country.
Extraterritorial Apprehension

- Methods for securing the return of an offender from a foreign country (cont.):
  - Extraordinary Rendition: An extrajudicial activity in which an offender is transferred from one country to another for arrest, detention, and/or interrogation or for return to the U.S. for trial.

Collection of Evidence

- Evidence - including interviews, documents, or information provided by law enforcement in the host country - can be obtained through leads set forth to the appropriate Legal.
  - Direct contact with host country citizens by FBI agents via telephone, mail, Internet or in person requires authorization.
  - Some countries may allow some level of informal contact with its citizens by the Legal with the concurrence of local law enforcement.
- Formal procedures include Letters Rogatory and MLAT requests.

Collection of Evidence

- As a general rule, any type of investigative assistance which would require compulsory process to accomplish in the U.S. (e.g., federal grand jury subpoena, search warrant, court order) must be sought by a Letter rogatory or MLAT request.
  - Letters Rogatory: A request from a judge in the U.S. to a judicial officer in a foreign country for assistance.
  - MLAT: The U.S. has entered into a number of Mutual Legal Assistance Treaties with other countries that have the force of law and define the obligation to provide assistance and the scope of assistance.

Applicability of the Fourth Amendment

- Applies when the U.S. government acts against U.S. citizens (and probably lawful permanent resident aliens) overseas.
- The warrant requirement may not apply overseas. Rather, a general reasonableness standard is applied.
- Several Courts have ruled that a foreign search is reasonable under the Fourth Amendment if it conforms to the requirements of foreign law.

Applicability of the Fifth Amendment

- The Fifth Amendment, like the Fourth, affords no protection against interrogation conducted exclusively by foreign officials.
- It does apply to the introduction of coerced statements made during interrogation conducted by U.S. officials. Unlike the Fourth, any defendant regardless of nationality or citizenship can invoke the protections of the Fifth Amendment at trial.
- Therefore, if U.S. law enforcement desires to use the statement in a U.S. trial - Miranda should be followed, modified only to acknowledge the impact of the laws of the foreign sovereign upon their rights.

Fifth Amendment Issues

- 5th Amendment protects "persons" subjected to custodial interrogation by U.S. officials.
  - Modified Miranda warnings:
    - Silence
    - Attorney - vary depending on foreign laws
    - Language of FD-395
    - ALDA consultation
    - Rights afforded by foreign country