The Long(er) Arm of the Law:
Extraterritorial Jurisdiction Over Public Corruption Offenses

By David H. Laufman

Introduction

In a unanimous opinion issued on December 18, 2012, the U.S. Court of Appeals for the Fourth Circuit strengthened the government's ability to prosecute public corruption by U.S. Government personnel in cases where all of the offense conduct occurred outside of the United States. In *United States v. Ayesh*, the court of appeals held that courts may exercise extraterritorial subject matter jurisdiction over individuals charged with "acts affecting a personal financial interest" (*i.e.*, conflicts of interest), in violation of 18 U.S.C. § 208(a)[1], and theft of public funds and property, in violation of 18 U.S.C. § 641.[2] *United States v. Ayesh*, 702 F.3d 162, 164-65 (4th Cir. 2012). The case is significant because no court previously had found that § 208(a) has extraterritorial application, and only one court – forty years ago -- previously had ruled that § 641 has extraterritorial reach.[3] *See United States v. Cotten*, 471 F.2d 744, 749-51 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973) (theft of U.S. Government property).

Factual Background

The defendant, Osama Ayesh, was a resident of Jordan employed by the U.S. Department of State to work as a shipping and customs supervisor at the U.S. Embassy in Baghdad, Iraq. He was responsible for helping local Iraqi vendors, with whom the embassy had Blanket Purchase Agreements, to facilitate shipments of personal property belonging to embassy personnel into and out of Iraq. *United States v. Ayesh*, 762 F.

Supp. 2nd 832, 834 (E.D. Va. 2011). While working at the embassy in Baghdad, Ayesh devised and executed a scheme to divert U.S. $243,416 in U.S. Government funds -- intended for local Iraqi vendors -- to a personal bank account in Jordan in his wife's name. *Ayesh*, 702 F.3d at 165.

All of the offense conduct at issue occurred in Iraq and Jordan. *Id*. at 167. Ayesh accomplished his fraudulent scheme by establishing a phony e-mail account purportedly belonging to an actual Iraqi vendor, which (using an embassy computer) he used to impersonate the vendor in communications with procurement officials at the embassy. *Id*. at 165. Employing a self-inking stamp bearing the name of the Iraqi vendor, Ayesh submitted fraudulent invoices and requests for wire transfer payments. *Id*. Ayesh lived on the grounds of the U.S. embassy in Baghdad, and instrumentalities of his scheme were found in his embassy living quarters. *Id*.

The government obtained personal jurisdiction over Ayesh by luring him to travel to the United States under the pretext of attending a training seminar. *Id*. In February 2011, Ayesh was convicted following a jury trial in the Eastern District of Virginia. On appeal, he argued that the district improperly exercised extraterritorial jurisdiction over him for violations of § 208(a) and § 641 occurring in Iraq.

General Principles Regarding Extraterritorial Jurisdiction

It is well established that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." *Equal Employment Opportunity Comm'n v. Arabian American Co*., 499 U.S. 244, 248 (1991) (citation omitted). As the Supreme Court has observed, however, [i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the

territorial jurisdiction of the United States.'" *Id.* (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Thus, there is a "presumption" against extraterritoriality absent the "clearly expressed" intention of Congress to extend jurisdiction beyond U.S. borders. *Id*.

Whether Congress intended that a statute apply extraterritorially "is a matter of statutory construction." *Id*. The threshold inquiry is whether Congress included explicit language in the statute to manifest its intent that the statute has extraterritorial application. *Id*.; *see In re French*, 440 F.3d 145, 151 (4th Cir. 2006). In the absence of express statutory language, however, congressional intent that a statute should apply extraterritorially may be *inferred* from the subject matter of the statute and the nature of a defendant's alleged offenses. *See United States v. Bowman*, 260 U.S. 94, 98 (1922); *Ayesh*, 702 F.3d at 166.

Inferring Congressional Intent in *Ayesh*

Neither § 208(a) nor § 641 contains language demonstrating that Congress intended the statutes to have extraterritorial reach. Accordingly, the court of appeals in *Ayesh* analyzed whether congressional intent to apply either statute extraterritorially could be inferred.

Like previous appellate courts examining the question of extraterritorial jurisdiction in the absence of express statutory language, the Fourth Circuit based its analysis on the Supreme Court's 1922 decision in *Bowman*. *See Ayesh*, 702 F.3d at 166. *Bowman* involved a false claims scheme to defraud a shipping corporation in which the U.S. Government was the sole stockholder. *Bowman*, 260 U.S. at 95. Pursuant to a statute that was silent as to extraterritorial jurisdiction, the government had charged four

defendants, among other things, with conspiracy to fraudulently bill the United States for 1,000 tons of fuel oil for delivery to one of the ships owned by the corporation – where the defendants planned to take only 600 tons aboard and pocket the money paid for the undelivered 400 tons. *Id*. The indictment charged that the conspiracy was hatched on board the ship while it was on a voyage to Brazil, and among the overt acts charged was the transmission of a wireless telegram from the ship while on the high seas. *Id*. at 95-96.

In seeking to divine congressional intent, the Supreme Court in *Bowman* drew a distinction between two types of crimes for purposes of extraterritoriality analysis. The Court stated that if Congress intends for overseas crimes "against private individuals or their property which affect the peace and good order of the community" to be punished in the United States, "it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." *Id*. at 98. "But that," the Fourth Circuit stressed in its application of *Bowman*, "is not the end of the analysis." *Ayesh*, 702 F.3d at 166. The Supreme Court in *Bowman* proceeded to add that the presumption of territoriality "should not be applied to criminal statutes which are, as a class, *not logically dependent on 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.*" *Bowman*, 260 U.S. at 98 (emphasis added). The Supreme Court explained that, to apply such a statute only territorially, "would be to *greatly curtail the scope and usefulness of the statute and leave open a large immunity from frauds as easily committed on the high seas, and in foreign countries as at home*." *Id*. (emphasis added). In those cases, "Congress has not thought it necessary to make specific provision in the law that the

locus [of jurisdiction] shall include the high seas and foreign countries, *but allows it to be inferred from the nature of the offense*." *Id*. (emphasis added).

Applying these principles from *Bowman*, the Fourth Circuit in *Ayesh* found that "[c]learly….congressional intent to exercise overseas jurisdiction can be inferred from the nature of the offenses criminalized in 18 U.S.C. §§ 208(a) and 641.[4] "Otherwise," the court reasoned, government employees, contractors, or agents like Ayesh – be they United States citizens or foreign nationals – would be at liberty to pilfer public money or engage in acts of self-dealing with impunity so long as they did so abroad." *Ayesh*, 702 F.3d at 166.

Compliance with International Law

Responding to another argument raised by the defendant on appeal, the Fourth Circuit found that extraterritorial application of § 208(a) and § 641 also "comported with international law…." *Id*. The court of appeals agreed with the government that "[t]he district court's exercise of jurisdiction is supported by the protective principle of international law, which 'permits a nation to assert subject matter jurisdiction over a person whose conduct outside the nation's territory threatens the national interest.'" *Id*. (quoting *United States v. Alomia-Riascos*, 825 F.2d 769, 771 (4th Cir. 1987)). The court added that "[e]xtraterritorial jurisdiction was also appropriate under the territorial principle, which permits jurisdiction 'over all acts which take effect within the sovereign even though the author is elsewhere.'" *Id*. (quoting *Rivard v. United States*, 375 F.2d 882, 886 (5th Cir. 1967) (citation omitted)). Both § 208(a) and § 641, the court explained, "criminalize conduct that has effects within the United States and threatens the operation of this nation's governmental functions." *Ayesh*, 702 F.3d at 166-67.

Compliance with Due Process

Finally, the Fourth Circuit in *Ayesh* addressed an issue not raised by the defendant on appeal: whether the district court's exercise of extraterritorial jurisdiction violated constitutional principles of due process. *Id*. at 167. In the Fourth Circuit, as in the Second and Ninth Circuits, "[t]o apply a federal criminal statute to a defendant extraterritorially without violating due process, 'there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.'" *United States v. Mohammad-Omar*, 323 Fed. Appx. 259, 261 (4th Cir. 2009) (quoting *United States v. Yousef*, 327 F.3d 56, 111 (2nd Cir. 2003)); *see United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990). This "'nexus requirement serves the same purpose as the minimum contacts test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who should reasonably anticipate being haled into court in this country.'" *Mohammad-Omar*, 323 Fed. Appx. at 261 (quoting *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998)). In the *Ayesh* case, the due process issue was particularly germane, given the defendant's status as a foreign national employed at a U.S. embassy overseas.

The Fourth Circuit held that extraterritorial application of § 208(a) and § 641 to Ayesh's offense conduct satisfied due process. *Ayesh*, 702 F.3d at 167 (citing *United States v. Brehm*, 691 F.3d 547, 552 (4th Cir. 2012)). The court of appeals observed that "Ayesh's 'employment with the Department of State at the United States Embassy in Baghdad was central to the commission of his alleged crimes.'" *Id*. (quoting district court opinion in joint appendix). The court also reasoned that "Ayesh lived on the embassy compound, and was provided with a copy of the Foreign Service National

Handbook, which advised him that he was subject to the laws and regulations of the United States." *Id.*

Consequences

The Fourth Circuit's decision in *Ayesh* gives the Department of Justice ("DOJ") explicit judicial precedent, where none previously existed, to support prosecutions of financial self-dealing by U.S. Government employees working overseas. Thus, DOJ has a new weapon to combat public corruption by U.S. Government personnel -- whether U.S. citizens or foreign nationals – who work on procurement matters at U.S. diplomatic and military facilities around the world. In addition, the case's holding that 18 U.S.C. § 641 has extraterritorial application will buttress DOJ's litigation position in future prosecutions for theft of U.S. Government property and funds in foreign military and economic reconstruction theaters, a problem that has been especially prevalent in Iraq and Afghanistan.

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[1] 18 U.S.C. § 208(a) states, in pertinent part, that "[w]hoever, being an officer or employee of the Executive Branch of the United States Government, or of any independent agency of the United States….participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving….or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest….[s]hall be subject to the penalties set forth in [18 U.S.C. § 216]." In cases of willful conduct, Section 216 of Title 18 provides a maximum statutory penalty of five years of imprisonment in addition to a criminal fine.

[2] 18 U.S.C. § 641 states, in pertinent part, that "[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department of agency thereof, or any property made or being made under contract for the United States or any department of agency thereof….shall [if the aggregate value exceeds $1,000] be fined under this title or imprisoned not more than ten years, or both…."

[3] The author was the lead prosecutor in the *Ayesh* case while serving as Special Trial Attorney at the Fraud Section of the Department of Justice.

[4] In so holding, the Fourth Circuit's decision comported with other recent precedent finding extraterritorial jurisdiction over public corruption offenses. *See United States v. Campbell*, 798 F. Supp. 2d 293, 302-04 (D.D.C. 2011) (applying *Bowman* in finding extraterritorial jurisdiction over bribery in Afghanistan by Australian national concerning a program receiving federal funds, in violation of 18 U.S.C. § 666(a)(1)B)); *United States v. Finch*, 2010 WL 3938176, *4 (D. Haw. 2010) (invoking *Bowman* to find that 18 U.S.C. § 201, prohibiting bribery of federal officials, reaches extraterritorial conduct).

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