The Rodchenkov Act: When Taking Our Ball and Going Home Is Unconstitutional

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Introduction

The United States' Rodchenkov Anti-Doping Act (RADA) criminalizes conspiracy in doping schemes involving international sport. Under RADA, anyone involved in international doping conspiracies, especially doctors, coaches, trainers, and financiers ("conspirators"), would be subject to criminal sanctions, even if they have never set foot in the U.S., the doping scheme takes place outside the U.S., and the cheating athletes compete entirely on foreign soil. RADA is both unconstitutional and a death sentence to international sporting cooperation. It risks the accomplishments of the global sporting community to date, and jeopardizes the survival and efficacy of any existing international sporting regulations. While the West's concerns over international enforcement capabilities are justified, RADA is an imperfect and improper solution. This paper examines several of the difficult constitutional challenges RADA faces, and explains why it is unlikely to survive them.

RADA makes it illegal "for any person, other than an athlete, to knowingly carry into effect, attempt to carry into effect, or conspire with any other person to carry into effect a scheme in commerce to influence by use of a prohibited substance or prohibited method any major international sports competition."[1] For RADA to apply, the alleged violations must occur related to a competition "in which one or more United States athletes and three or more athletes from other countries participate."[2] Second, the event must be governed by the World Anti-Doping Code. Third, the competition organizer or sanctioning body receives sponsorship or financial support from

[1] RODCHENKOV ANTI-DOPING ACT OF 2019, PL 116-206, December 4, 2020, 134 Stat 998
[2] *Id.*

an organization doing business in the United States; or the competition organizer or sanctioning body receives compensation for the right to broadcast the competition in the United States. Finally, the definition includes competitions that are a single event or a competition that consists of a series of events held at different times which, when combined, qualify an athlete or team for an award or other recognition.[3] Finally, RADA provides that "There is extraterritorial Federal jurisdiction over an offense under this section."[4]

RADA is unconstitutional for three main reasons. First, RADA likely lacks a sufficient foreign commercial nexus with the United States to satisfy its constitutional basis requirement. Second, even if the commercial nexus with the United States is deemed sufficient, enforcing RADA extraterritorially against foreign nationals is unsupported by accepted international law theories. This renders RADA's enforcement arbitrary and unfair, and thus unconstitutional. Lastly, RADA falls on the wrong side of the foreign concern question, since the United States' interests allegedly defended by RADA do not justify the trampling of foreign, independent States' sovereignty abroad.

I. RADA's Intended Targets Lack Sufficient, Foreign Commercial Nexus 'With' the United States to Constitutionally Entrench Itself by the Foreign Commerce Clause

Laws purporting to extend extraterritorial jurisdiction face severe constitutional challenges. Our constitution grants limited, enumerated powers to the federal government, with which all legislation must comply. Professor Anthony J. Colangelo, an international law expert, notes "[C]ourts presently accept that the notion of a government of limited and enumerated powers extends to legislation with extraterritorial reach."[5] Even more stringent constitutional limits apply to

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[3] *Id.*
[4] *Id.*
[5] Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 Cornell L. Rev. 1303, 1316 (2014)

American law prescribed or enforced abroad. "Constitutional challenges to the extraterritorial exercise of prescriptive jurisdiction essentially challenge either the law or its application (or both) as ultra vires on the theory that no basis in the Constitution exists to authorize the law's enactment or [the] application in a particular case."[6] This means that a law intending to exercise extraterritorial jurisdiction can be held as either categorically unconstitutional, or invalid case-by-case (for violating the rights of the individual charged under the law). RADA's extraterritorial provision has not yet been challenged, but when it is, it likely will not survive.

When Congress invokes the Foreign Commerce Clause to constitutionally validate extraterritorial jurisdiction—as it has in RADA's case—the law must first clear a threshold hurdle. This hurdle has been called "[t]he nexus requirement, which derives from the Constitution's grant of power only to regulate commerce "*with* foreign Nations[.]"[7] The foreign commerce clause is "…not a general, global power to regulate commerce 'among foreign Nations.'….That is, there must be a U.S. nexus."[8] Because of this nexus requirement, RADA's extraterritorial provision will not likely survive a constitutional challenge.

Absent territorial or national jurisdiction, an alleged RADA violation will often be too far removed from the actual harm committed[9] to constitute a nexus '*with'* the United States. For example, when applied to foreign conspirators whose actions take place on foreign soil, RADA's actual connection to the United States will often be so attenuated that it cannot serve as a sufficient, foreign, commercial nexus 'with' the United States.

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[6] *Id.* at 1316

[7] Colangelo, *The Foreign Commerce Clause*, 96 Va. L. Rev. 949, 954 (2010) [emphasis added]

[8] *Id.*

[9] The harm being a doped athlete's participation in the international competition to the detriment of one or more American athletes. Congress went even further—finding, in draft legislation that it was the American viewing public who is harmed by third-party doping conspirators. This finding, among the other potential 'victims' raises fascinating questions as to what restitution might look like. See 116th CONGRESS 1st Session S. 259

While there is little debate that Congress' control over the regulation of 'channels and instrumentalities' of commerce can subject doctors, coaches, trainers, and financiers providing prohibited substances to athletes on American soil to RADA, these are not the conspirators that RADA aims to curtail. Organizations like United States Anti-Doping Agency (USADA), the World Anti-Doping Agency (WADA), the International Olympic Committee (IOC), and the Court of Arbitration for Sport (CAS) already cooperate with national and international institutions alike, to hand down sanctions for violations on this side of the pond and elsewhere. Rather, RADA permits the United States to haul into American criminal courts— foreign conspirators who allegedly dope foreign athletes, competing entirely within foreign countries (and often already subject to their own laws and athletic regulations). The implications for this sort of intrusive, imperial, legislation are stunning. Indeed, if Congress's wishes are granted and the 'foreign conspirator in a foreign land' nexus is deemed sufficient interest 'with' the United States, then almost nothing escapes the tendrils of the foreign commerce clause.

Scholars attest that "Congress cannot independently create comprehensive global regulatory schemes over international markets[.]"[10] If Congress could do such a thing, treaties with foreign states incapable of drastic response would be pointless at worst, and obsolete at best. RADA comprises of nothing if not a global regulatory scheme over international markets—markets already governed by the WADA, CAS, and UNESCO, and the sovereign governments of foreign states.

II. RADA's Extraterritoriality Against Foreign Nationals Is Unsupported By Accepted International Law Theories That Renders RADA's Enforcement Arbitrary And Unfair, And Thus Unconstitutional

[10] Colangelo, *What Is Extraterritorial Jurisdiction?*, at 1321

Even if there is sufficient connection 'with' the United States to be considered within the scope of the foreign commerce clause, extraterritorial "application of a law nonetheless still may be unconstitutional if it violates individual rights because the application is fundamentally unfair [to the accused]."[11]

RADA, if applied and enforced as designed, is fundamentally unfair since in those situations it is intended to govern, it violates the Fifth Amendment's Fair Notice requirement. But Circuits have varying ideas for what satisfies Fair Notice in the context of extraterritorial jurisdiction. On one hand, the First Circuit holds that a criminal statute's extraterritorial jurisdiction requires no proof of nexus between the defendant and the United States, but that jurisdiction may be precluded on Fair Notice grounds based on "whether or not the extraterritorial application of [a] U.S. criminal statute was "arbitrary or fundamentally unfair[.]"[12] On the other hand, "[t]he Second and Ninth Circuits have held that…a due process analysis must be undertaken to ensure the reach of Congress does not exceed its constitutional grasp."[13] This process requires there "be a sufficient nexus between the defendant and the United States so that such application would not be arbitrary."[14]

As detailed below, since RADA will often lack a sufficient nexus when targeting foreign nationals on foreign soil, it will often be viewed as arbitrary and unfair—and thus unconstitutional—in nearly every circumstance it was intended to apply.

A. Neither The Universality Principle nor the Offenses Clause Support the Constitutional Application of RADA's Extraterritorial Jurisdiction

[11] *Id.* at 1315

[12] Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 Hastings Int'l & Comp. L. Rev. 323, 357 (2012)

[13] *Id.* at 360, citing United States v. Cardales, 168 F.3d 548, 553 (1999).

[14] *Id.*

International law recognizes five separate, accepted, legal bases which can create the nexus necessary to determine when extraterritorial jurisdiction is proper. Assuming the law passes the relevant constitutional threshold, extraterritorial nexus may exist via these principles. Here, the universality and passive personality principles are the most salient and controversial, but neither supports the extraterritorial authority of RADA.

The 'universality' principle may justify extraterritorial jurisdiction in some cases, even absent a United States nexus, or when application might otherwise be arbitrary or unfair. The Supreme Court explained that under the universality principle, "Due process does not require a nexus between such an offender and the United States because the universal condemnation of the offender's conduct puts him on notice that his acts will be prosecuted by any state where he is found."[15] Colangelo explains that "[B]ecause the legal prohibition on universal crimes is fundamentally international—that is, it is not a matter of just U.S. national law alone, but also of a pre-existing and universally applicable international law—defendants cannot claim lack of notice of the law as applied to them."[16] The corollary to this is that "[b]y prosecuting perpetrators of universal crimes, U.S. courts simply adjudicate the substance of an international law to which the defendant is already and always subject."[17]

The universality principle is similar to Congress's ability to use the Offenses Clause to punish 'Offenses Against the Law of Nations.'[18] But both the Offences Clause and the universality principle fail to support RADA for one key reason: doping international athletes is not likely to be understood as an offense against the law of nations, even if Congress defines it as an international problem.

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[15] *United States v. Shi, 525 F.3d 709*, 723 (9th Cir. 2008) quoting *United States v. Martinez–Hidalgo*, 993 F.2d 1052, 1056 (3d Cir.1993)
[16] Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121, 168 (2007)
[17] *Id.*
[18] ArtI.S8.C10.1.2

The Eleventh Circuit emphasized that "the related Supreme Court precedent and the text, history, and structure of the Constitution confirm that the power to 'define [offenses]' is limited by the law of nations."[19] The Court then asserted that "the word 'define' would not have been understood to grant Congress the power to create or declare offenses against the law of nations, but instead to codify and explain offenses that had already been understood as offenses against the law of nations."[20]

The Eleventh Circuit reasoned that "[a]lthough a number of specially affected States—States that benefit financially from the drug trade—have ratified treaties that address drug trafficking, they have failed to comply with the requirements of those treaties, and the international community has not treated drug trafficking as a violation of contemporary customary international law."[21] RADA has a far more attenuated claim to a place among the "law of nations" than international drug trafficking does. This is the case even though 196 member states have signed UNESCO's Convention Against Doping in Sport, and even though several Anti-Doping Organizations maintain their status as World Anti-Doping Code Signatories. Still, member States continue to turn a blind eye to—or worse sponsor—international doping conspiracies. Therefore, doping conspiracies in international sport do not violate customary international law, and thus neither the universality principle, nor the offenses clause, further its claim to legitimacy.

B. Passive Personality Also Does Not Support RADA's Constitutional Validity

The passive personality principle of international law asserts that "[a] state may exercise prescriptive jurisdiction with respect to certain conduct committed outside its territory by a person

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[19] *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1249 (11th Cir. 2012)
[20] *Id.* 1250
[21] *Id.*

who is not its national if the victim of the conduct was its national."[22] But the fact that foreign citizens' conduct, which occurs completely within foreign borders, allegedly harming an American citizen somewhere down the line, does not grant the United States carte blanche to simply invoke the passive personality principle and charge foreign nationals en masse. Case law identified by legal advocates on RADA's behalf does not actually help RADA's claim to legitimacy. In *U.S. v. Hill*, the Ninth Circuit did not base its extension of jurisdiction on passive personality theories alone. Rather, the Ninth Circuit actually asserted that "[i]n the instant case, the territorial, national, and passive personality theories combine to sanction extraterritorial jurisdiction."[23] In a separate scenario, *United States v. Neil*, the Ninth Circuit stated Congress "invoke[d] the passive personality principle by explicitly stating its intent to authorize extraterritorial jurisdiction, to the extent permitted by international law, when a *foreign vessel departs from or arrives in an American port and an American national is a victim*."[24] The *Neil* nexus is both much more clear, and more narrowly applied than those nexus RADA claims to establish, and thus is clearly distinguishable and inapplicable in the context of RADA. Both these cases do not support RADA's extraterritorial validity, since they either rely on several other international nexus theories cumulatively, or require an obvious, statutorily identified nexus. RADA's nexus requirement is simply far too broad to warrant application by either of these principles.

III. Finally, Even If A Satisfactory Nexus Exists So As To Constitute Fair Notice, RADA Still Faces Serious Difficulties Through The Foreign Concern Question

RADA faces a plethora of other, practical enforcement difficulties. First, RADA defies foundational principles of modern statehood and national sovereignty. "[E]ven though jurisdiction

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[22] Restatement (Fourth) of Foreign Relations Law § 411 (2018)
[23] *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002)
[24] *United States v. Neil*, 312 F.3d 419, 423 (9th Cir. 2002) quoting 18 U.S.C.A. § 2244 (West)

could be obtained in cases where there was an effect on U.S. commerce, the interests of other nations could serve to limit an otherwise proper extraterritorial extension of U.S. criminal law."[25] Courts must undertake "an additional analysis…in order to determine whether the interests of the United States in the matter "are sufficiently strong, vis-A-vis those of other nations, to justify an assertion of extraterritorial authority."[26] It would be surprising indeed if the United States declared a defeat of its national bobsled team in Austria, based on a conspiracy within Ukraine, sufficient to upset the entrenched system of international state sovereignty.

Further, "That American law covers *some* conduct beyond this nation's borders does not mean that it embraces all, however. Extraterritorial application is understandably a matter of concern for the other countries involved."[27] Political questions abound, as "[t]hose nations have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts."[28] RADA falls hard on the wrong side of the foreign concern question. It serves as an impermissible intrusion of the commerce clause into foreign sovereignty, completely unintended by the founders. Scholars find that the Founder's "notions of jurisdictional noninterference strongly oppose Congress disparaging the sovereignties of foreign nations by purporting to "impose a rule on" them via a Clause that permits only the power to regulate commerce "with" them."[29]

RADA not only stands in foolhardy opposition to fundamental political theory, but also the foundations of American jurisprudence. Justice John Marshall said, "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not

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[25] Stigall, at 343 (2012)
[26] *Timberlane Lumber Co. v. Bank of America* 549 F.2d 597, 603 (9th Cir. 1976)
[27] *Id.* at 608.
[28] *Id.*
[29] Colangelo, *The Foreign Commerce Clause*, 96 Va. L. Rev. 949, 977 (2010)

imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."[30] This statement is one of the foundational principles of western political thought. RADA ignores it completely.

But this deference to state sovereignty was not limited only to the founding justices. Hamilton too identifies that "the power to make laws is 'the power of pronouncing authoritatively the will of the Nation as to all persons and things over *which it has jurisdiction*… But it can have no obligatory action whatsoever upon a foreign nation or any person or thing within the jurisdiction of such foreign Nation."[31] Hamilton quickly dismantles RADA's validity with a simple statement—"Though a Treaty may effect what a law can, yet a law cannot effect what a Treaty may."[32]

In conclusion, RADA is unconstitutional for three reasons. First, it likely lacks a sufficient foreign commercial nexus with the United States for its relevant constitutional basis in the commerce clause. Second, even if the commercial U.S. nexus is deemed sufficient, enforcing the RADA extraterritorially against foreign nationals is arbitrary and unfair, and thus unconstitutional on these grounds as well. Finally, in those rare circumstances when a criminal defendant falls within several, concurrent international law which work together to create a cumulative U.S. nexus, the courts must still struggle with the highly volatile foreign concern question. Likely, they will find that the political fallout, legal gymnastics, and trampled international sovereignty are not worth it. After all, chances are high that the accused will simply take their ball and go home.

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[30] *The Schooner Exch. v. McFaddon,* 11 U.S. 116, 136, 3 L. Ed. 287 *(1812)*
[31] *The Defence No. XXXVI,* [2 January 1796]
[32] Id.