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## The First Amendment's Trans-Border Dimension

Posted By [Timothy Zick](#) On September 8, 2011 @ 11:00 am In [Uncategorized](#) | [1 Comment](#)

My book, *The Cosmopolitan First Amendment*, will propose that we have not one, but three, First Amendments. The intra-territorial First Amendment is the most familiar of these. It encompasses expressive and religious activities that occur within the territorial borders of the U.S. The territorial First Amendment's domain encompasses expressive and religious activities that intersect with the nation's territorial borders. Finally, the extra-territorial First Amendment operates beyond our shores.

My project focuses on the latter two — territorial and extra-territorial — First Amendments. This is the First Amendment's trans-border dimension. In this post, I want to highlight some of the activities and issues that are implicated in a study of this dimension.

Within the trans-border dimension, U.S. citizens cross international borders for purposes of information-gathering, protest, or missionary work; publish communications and information while in foreign lands; communicate and associate with aliens, including foreign leaders, who are located abroad; and seek access to materials and information distributed abroad (including national propaganda). U.S. officials seek to regulate these and other trans-border activities, engage in extensive communications of their own in foreign lands and forums, and fund sectarian projects abroad. As well, as they long have, state and local governments continue to play some role in foreign affairs and foreign relations forums and dialogues.

Aliens are also present and active in the First Amendment's trans-border dimension. They seek entry to the United States for purposes of academic, artistic, and other forms of exchange; may wish to contribute resources to and participate in American political campaigns; are subject to U.S. spending conditions while communicating abroad; attempt to have foreign libel and other judgments enforced in U.S. courts; and distribute information across international borders that could be harmful to American interests at home and abroad. Moreover, foreign regimes (courts and other government institutions) are pressing to have their own laws applied to domestic speech and other activities by U.S. citizens. Multi-jurisdictional speech conflicts have become more frequent as speech has migrated to the Web.

There are a number of unanswered or, at least to my mind, inadequately resolved First Amendment issues in this dimension.

Some of these unresolved issues relate to cross-border expressive and, to a lesser but still important extent, religious activities. To what extent does the First Amendment's Free Speech Clause apply to and protect cross-border communications and associations? Does the First Amendment's free speech guarantee apply to citizens' speech that is directed solely to foreign audiences? What is the relationship between international travel and the First Amendment? Does the First Amendment prohibit exclusion or deportation of aliens on the basis of ideology, belief, association, or religious beliefs? Does it prohibit an outright ban on aliens' campaign contributions in American elections? Should there be a First Amendment exception to broad federal border search authority? To what extent can or should foreign laws or judgments regarding free expression and religious belief be enforced inside the United States?

Other longstanding questions relate to the beyond-border or extraterritorial activities of U.S. citizens and aliens. To what extent does the First Amendment apply beyond U.S. shores? Are aliens located abroad ever entitled to free speech or other First Amendment protections? Does the First Amendment place any limits on the federal government's extensive propaganda and other communications programs abroad? Do individuals, corporations, non-governmental organizations, or sub-national governments have free speech rights or interests in foreign affairs discussions and forums?

Globalization and digitization will push some of these questions to the fore, demanding

careful consideration and clearer answers. These and other contemporary forces will also raise new questions regarding the First Amendment's trans-border dimension. For example, as I mentioned in my last post, can a citizen's domestic expression can be restricted on the ground that it will incite violence abroad? Can speech conveyed on the Web that is favorable to or legitimizes foreign terrorist organizations ever be criminalized for that reason? Assuming it is logistically and legally possible to do so, should the U.S. prosecute foreign distributors of confidential or secret governmental information? Can U.S. courts resist importation of Sharia and other "foreign" religious laws by refusing to enforce them? Is First Amendment exceptionalism likely to be imperiled by treaties or other forms of trans-national engagement? Finally, what are the limits of the government's power to punish citizens living abroad, who distribute harmful, inciting communications to global audiences? In this regard, consider the targeted killing order issued against [Anwar al-Awlaki](#) <sup>[1]</sup>, a Yememi-American cleric who has posted inciting content on the Web and is alleged to have rendered other material assistance to terrorists throughout the world.

Of course, in considering these specific issues and the First Amendment's trans-border dimension more generally, I plan to address the significant influence of digitization and other forces of modernity on trans-border expressive and religious activities. To what extent does digitization facilitate the exercise of trans-border liberties? To what extent does it obstruct or undermine governmental efforts to regulate, control, or punish trans-border activities?

These are, as I see it, some of the most pressing concerns implicated by the First Amendment's trans-border dimension. Resolution of these issues can inform U.S. policies in areas ranging from immigration, to access to new technologies, to foreign affairs.

The book will propose that we address these concerns from a cosmopolitan orientation or perspective. My next post will explain the basic precepts of First Amendment cosmopolitanism.

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URLs in this post:

[1] Anwar al-Awlaki: [http://en.wikipedia.org/wiki/Anwar\\_al-Awlaki](http://en.wikipedia.org/wiki/Anwar_al-Awlaki)

[2] : <http://www.amazon.com/Constitution-Japan-Contextual-Analysis-Constitutional/dp/1841137928/>

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