UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 22-cr-392 (DLF)**
	:	
ABU AGILA MOHAMMAD MAS'UD KHEIR AL-MARIMI,	:	
	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF EXTRATERRITORIAL JURISDICTION

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this response in opposition to the defendant's motion to dismiss for lack of extraterritorial jurisdiction (ECF 252). For the following reasons, the motion should be denied.

BACKGROUND

This case arises from the bombing of Pan American Airways ("Pan Am") Flight 103 on December 21, 1988. Pan Am was a U.S.-based commercial passenger airline. At the time of its destruction, Pan Am Flight 103 was airborne over Scotland, having departed from London Heathrow airport with a scheduled destination of New York City. Of the 259 people aboard the aircraft, 190 were Americans. Everyone on the plane was killed in the attack. The aircraft itself was leased from and owned by a corporation created under the laws of the State of New York. *See generally* ECF 7 (Indictment). Based on his alleged participation in the bombing, the defendant is charged in a three-count indictment. *See id.*

Count One charges Destruction of an Aircraft Resulting in Death, in violation of 18 U.S.C. §§ 32(a)(2), 34, and 2. Section 32(a)(2) makes it a crime to willfully "place[] or cause[] to be placed a destructive device or substance in, upon, or in proximity to" any aircraft "in the special

aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign commerce." Section 34 provides for an enhanced penalty when death results.

Count Two charges Destruction of Aircraft Resulting in Death, in violation of 18 U.S.C. §§ 32(a)(1), 34, and 2. Section 32(a)(1) makes it a crime to willfully "set[] fire to, damage[], destroy[], disable[], or wreck[] any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce."

For purposes of both subsections of § 32(a), the term "special aircraft jurisdiction of the United States" includes, among other things, an "aircraft in flight" that is "a civil aircraft of the United States" or "another aircraft in the United States"[1] or "another aircraft outside the United States… that has its next scheduled destination or last place of departure in the United States, if the aircraft next lands in the United States."[2] *See* 18 U.S.C. § 31(b) (cross-referencing 49 U.S.C. § 46501(2)). The term "civil aircraft of the United States," in turn, means "an aircraft registered under chapter 441 of [Title 49 of the U.S. code]."[3] The aircraft carrying Pan Am Flight 103 was so registered.

Count Three charges Destruction of Vehicle Used in Foreign Commerce by Means of an Explosive, Resulting in Death, in violation of 18 U.S.C. § 844(i). That statute makes it a crime to

[1] The version in effect at the time of the offense was substantively the same but worded slightly differently: "any other aircraft *within* the United States." 49 U.S.C. § 1301(38)(c) (historical version); *see also* Pub. L. No. 103–429, October 31, 1994, 108 Stat 4377 (enacting Section 40102 as part of legislation "to revise, codify, and enact without substantive change certain general and permanent laws, related to transportation").

[2] At the time of the offense, "any other aircraft outside the United States… that has its next scheduled destination or last point of departure in the United States, if that aircraft next actually lands in the United States." 49 U.S.C. § 1301(38)(d) (historical version).

[3] At the time of the offense, "any aircraft registered as provided in this chapter." 49 U.S.C. § 1301(18) (historical version).

"maliciously damage[] or destroy[], or attempt[] to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." That last phrase is defined as follows:

> "Interstate" or foreign commerce means commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, and commerce between places within the same State but through any place outside of that State. "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

18 U.S.C. § 841(b).

ARGUMENT

"Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested." *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993). This presumption against extraterritoriality "is based on the assumption that Congress is primarily concerned with domestic conditions." *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). It also "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

The requisite manifestation of Congress's extraterritorial intent, however, need not be explicit. "Rather, courts should consider 'all available evidence about the meaning' of the statute, e.g., its text, structure, and legislative history." *United States v. Bin Laden*, 92 F. Supp. 2d 189, 193 (S.D.N.Y. 2000) (quoting *Sale*, 509 U.S. at 177). *See also Garvey v. Admin. Rev. Bd., United States Dep't of Lab.*, 56 F.4th 110, 122 (D.C. Cir. 2022) ("Where the text is not clear, we turn next

to assessing whether any indication of congressional intent overcomes the presumption against extraterritoriality" (citing *Sale*, 509 U.S. at 177)).[4]

The statutes charged in this case contain clear textual and contextual indications that they are meant to reach conduct outside the United States, especially the bombing of a U.S.-registered aircraft carrying numerous U.S. citizens *en route* to the United States. The relevant legislative history further buttresses the conclusion that the charged statutes apply extraterritorially.

Moreover, Due Process does not bar the application of the statutes to the defendant's overseas conduct. Accordingly, the defendant's motion should be denied.

A. Section 32 applies extraterritorially.

The statute charged in Counts One and Two, 18 U.S.C. § 32(a), expressly delineates its reach: "any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce." 18 U.S.C. § 32(a)(1).

As quoted above, "special aircraft jurisdiction" includes "any of" different categories of aircraft in flight, including "a civil aircraft *of* the United States" as well as "another aircraft *in* the United States."[5] 49 U.S.C. § 46501(2)(A), (C)) (emphasis added). The disjunctive structure of the definition plainly shows that jurisdiction is meant to extend to civil aircraft "of the United States" that are not "in the United States," or else the former category would be completely superfluous. *See generally Corley v. United States*, 556 U.S. 303, 314 (2009) (discussing "one of the most basic

[4] The defense argues that the D.C. Circuit "misinterpret[ed] the law" in *Garvey*. ECF 252 at 7. But the Supreme Court has commonly considered a statute's purpose when deciding extraterritoriality, including by consulting legislative history. *See, e.g.*, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 18 (1963) (discussing Court's "searching the language and the legislative history" in a prior case, *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 139 (1957)). Regardless, *Garvey* is binding.

[5] At the time of the offense, "any other aircraft *within* the United States." 49 U.S.C. § 1301(38)(c) (historical version) (emphasis added).

interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'" (cleaned up)). Removing any doubt about its extraterritorial reach, the definition also extends to other non-U.S. aircraft "outside the United States" where certain other criteria are satisfied. 49 U.S.C. § 46501(2)(D).[6] By expressly adopting this definition of "special aircraft jurisdiction of the United States," Congress unambiguously provided that § 32(a) would apply to conduct outside the United States like the crime charged in this case. In doing so, it validly exercised its Constitutionally enumerated powers. *See generally United States v. Georgescu*, 723 F. Supp. 912, 918-19 (E.D.N.Y. 1989).

Separately and additionally, Congress provided for extraterritorial application by extending the statute's reach to "any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce." Since the "special aircraft provision" discussed above already covered all aircraft "in the United States," as well as civil aircraft "of the United States" wherever located, this separate provision covering "any civil aircraft used, [etc.], in interstate, overseas, or foreign air commerce" must have separate effect, namely, to reach non-U.S. civil aircraft outside the United States.

The defense ignores § 32(a)'s invocation of "special aircraft jurisdiction," and they address "foreign air commerce" only in a footnote that argues that "the simple reference to foreign commerce, like the use of generic terms," does not overcome the presumption against extraterritoriality. *See* ECF 252 at 14 n.4 (citing *E.E.O.C. v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 251 (1991)). But Section 32(a) does not make "simple reference to foreign commerce"; it makes specific reference to "foreign air commerce," a statutorily defined term that refers to

[6] Previously codified at 49 U.S.C. § 1301(38)(D).

transportation "between a place in the United States and a place outside the United States when any part of the transportation or operation is by aircraft." 49 U.S.C. § 40102(a)(22).[7]

The statutory context cited by the defense, ECF 252 at 14-15, does not change the analysis but only reinforces it. Subsection (b) of the statute includes its own jurisdictional provision (applying to, among other things, aircraft with U.S. nationals on board) because, unlike subsection (a), it does not invoke the "special aircraft jurisdiction of the United States." Indeed, the operative provisions of subsection (b) presuppose conduct *outside* the "special aircraft jurisdiction," as they include the express qualifier that the affected civil aircraft must be "registered in a country other than the United States." Moreover, subsection (b)'s jurisdictional provision, which relies on among other things the "offender [being] a national of the United States" or being "afterwards found in the United States," nullifies the defense's argument that subsection (a) can "plausibly be read to cover the conduct of *Americans* that affect flights anywhere in the world" but not the conduct of foreign nationals. ECF 252 at 14. If Congress meant to limit subsection (a) in this way, it would have done so, as it did in subsection (b). The same is true of § 37, which applies to conduct on the ground at foreign airports, and § 38, which applies to aircraft parts — with no recourse to "special aircraft jurisdiction" for these provisions, Congress necessarily had to rely on other factors like the nationality of the offender to supply jurisdiction. These sections were also enacted on different occasions than § 32, further defeating the negative inference urged by the defense.

Given the clarity of the text, no examination of legislative history is necessary. Regardless, the legislative history of § 32(a) confirms that Congress knew what it was doing when it drafted

[7] At the time of the offense, "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between… a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." 49 U.S.C. § 1301(23) (historical version).

the statute to apply extraterritorially. The offense was created "as part of the Aircraft Sabotage Act,… enacted in 1984 to fulfill this country's responsibilities under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ('the Montreal Convention')," which "include[d] an obligation on the parties to punish or extradite offenders, even when the offense was not committed within their territory or by a national." *United States v. Yousef*, 927 F. Supp. 673, 679 (S.D.N.Y. 1996). Accordingly, "[a] principal purpose of the act was to provide federal jurisdiction over individuals who were accused of committing crimes involving aircraft sabotage and over whom the courts would not otherwise have jurisdiction under domestic law." *Id.* (citing Section 2012 of Pub. L. No. 98–473).

Because the matter is so clear, the Second Circuit required no more than two paragraphs[8] in *United States v. Yousef* to rule that Section 32(a) applies extraterritorially. 327 F.3d 56 (2d Cir. 2003). The defense asserts that *Yousef* was "wrongly decided" and "cannot stand in the wake of" the Supreme Court's subsequent decision in *Kiobel.* ECF 252 at 14 (citing 569 U.S. at 118). But they spend just one sentence developing that argument, and it only states a truism: "[t]he fact that a statute's text may reach some foreign conduct is not sufficient to rebut the presumption against extraterritoriality." *Id.* That statement is correct (otherwise virtually every criminal statute would apply extraterritorially, since few offenses are defined with express territorial limitations), but it is a straw-man argument. The Second Circuit's point in *Yousef*, and the government's point above, is not that Section 32(a) is drafted so generally that it "may reach some foreign conduct." The point is that Section 32 is drafted *specifically* to reach *certain* foreign conduct. Nothing in *Kiobel* casts

[8] Of course, the Second Circuit's ruling in *Yousef* was an affirmance of a decision below on extraterritoriality, which included a lengthier discussion of the issue. *See Yousef*, 927 F. Supp. at 678-80.

any doubt on the application of extraterritorial jurisdiction in these circumstances. Accordingly, *Yousef* was rightly decided at the time, and it remains so today.

B. Section 844(i) applies extraterritorially.

The statute charged in Count Three, 18 U.S.C. § 844(i), criminalizes the destruction by fire and explosives of, among other things, any "vehicle… used in interstate or foreign commerce." Pan Am Flight 103 was a vehicle that was being used in foreign commerce at the time it was destroyed by explosives. By the plain terms of the statute, the charged conduct is covered.

In resisting that conclusion, the defense cites *Aramco* for the proposition that "references [to interstate and foreign commerce] do not suffice to rebut the presumption against extraterritoriality." ECF 252 at 16. But *Aramco*, and the cases discussed therein, are distinguishable because (among other reasons) they are civil cases. The defense says that feature is "irrelevant," ECF 252 at 11, but it matters for several reasons. For one, extraterritorial application of the civil statutes in those cases would have imposed new obligations on employers overseas with respect to matters like nondiscrimination and collective bargaining – areas fraught with the potential for "conflicts with the laws of other nations," *Aramco*, 499 U.S. at 256, which the presumption against extraterritoriality is designed to prevent. Criminalizing the destruction of property by explosives, by contrast, poses no risk of creating conflicting obligations. Moreover, because § 844 is a criminal statute, the doctrine of *United States v. Bowman*, 260 U.S. 94, 95 (1922), requires the Court to infer Congress's purposes in a way that is forbidden for civil statutes. As discussed further below, "that Congressional purpose requires § 844(i) to be applied extraterritorially." *United States v. Reumayr*, 530 F. Supp. 2d 1210, 1218 (D.N.M. 2008).

Section 844(i)'s context supports the same conclusion. None of the surrounding provisions of Section 844, nor of its neighboring code provision, Section 842, explicitly provide extraterritorial jurisdiction in a way that would support a negative inference from Section 844(i)'s

silence on the issue. And despite the absence of express extraterritoriality, several of the neighboring provisions involve the importation of explosives. *See* 18 U.S.C. §§ 842(a)(1), (f), (m)(1); 844(l). Importation is an "inherently international transaction" that supports an "assum[ption] that Congress was aware, and intended, that the statute would apply to conduct (or statements) that may have occurred abroad." *TianRui Grp. Co. v. Int'l Trade Comm'n*, 661 F.3d 1322, 1329 (Fed. Cir. 2011) (citing *United States v. Villanueva*, 408 F.3d 193, 199 (5th Cir. 2005); *United States v. Delgado–Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004)); *see also United States v. Ubaldo*, 859 F.3d 690, 700 (9th Cir. 2017) (holding that statute criminalizing importing weapons applies extraterritorially because "importing weapons into the United States by its very nature targets conduct that almost always originates outside the United States"). The nature of these offenses compels an inference that they are meant to apply extraterritorially even without an express provision to that effect, and that inference extends to Section 844(i), which was enacted together with several of them.[9] *Cf. Bowman*, 260 U.S. at 98 (explaining "natural inference" that "the sea would be a probable place" for commission of various offenses found in same statutory chapter as the crime at issue). Indeed, at least one of the neighboring subsections, Section 844(f), has already been found to apply extraterritorially by multiple courts. *See United States v. Khatallah*, 151 F. Supp. 3d 116 (D.D.C. 2015); *United States v. Bin Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000).

The legislative history of Section 844(i) confirms all of the above. As the Supreme Court has explained, the statute's "legislative history indicates that Congress intended to exercise its full power to protect 'business property'… as well as some additional property that might not fit that

[9] *See* Pub. L. No. 91–452, title XI, § 1102(a). The exceptions are § 842(m)(1) and § 844(l), which were added later.

description," like "police stations and churches." *Russell*, 471 U.S. at 860-62 (citing *House Judiciary Committee Hearings* at 37). While the drafters "recognized that the coverage of the bill was extremely broad," they also recognized that property outside the scope of Congress's commerce power, like "a private home," would not be covered. *Id.* (citing 116 Cong. Rec. 35359 (1970)). At the very least, though, the bill was "intended to protect all business property," *id*., a category to which a U.S. commercial airliner clearly belongs, wherever it happens to be at the time it is destroyed.

That legislative history, along with the statute's text, shows why the Supreme Court's reasoning in *Bowman* is fully applicable here. The defense concedes that *Bowman*, and the D.C. Circuit's cases applying it, are binding, and that the arguments on pages 11-12 of their brief are only "to preserve the issues for appeal." ECF 252 at 11 n.1. *See also United States v. Al-Imam*, 373 F. Supp. 3d 247, 257 (D.D.C. 2019) ("*Bowman* remains binding on the lower courts.").[10] The Court therefore can and should disregard these arguments and proceed directly to the *Bowman* analysis, which provides an additional reason to find Section 844(i) applicable to the defendant's overseas conduct.

Bowman's test involves two prongs. The first is a question of the nature of the interest being protected and the source of the enacting legislature's jurisdiction. On the one hand, "[c]rimes against private individuals or their property,… which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government,"

[10] In fact, Congress has provided reason to believe that *Bowman* remains as important as ever. In *United States v. Garcia Sota*, 948 F.3d 356 (D.C. Cir. 2020), the D.C. Circuit applied *Bowman* narrowly, holding that 18 U.S.C. § 1114 did not apply extraterritorially. Congress subsequently amended the statute, expressly in response to the decision, explaining in the enacting legislation that "it has become necessary for Congress to *clarify the original intent*" that the offense can be prosecuted extraterritorially. *Jaime Zapata and Victor Avila Federal Officers and Employees Protection Act*, Pub. L. No. 117-59, 135 Stat 1468 (2021) (emphasis added).

and are accordingly subject to the presumption against extraterritoriality. 260 U.S. at 98. On the other hand, the presumption does not apply to crimes that 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."[11] For offenses in the latter category, the Court must consider whether "the character of the offense" makes an extraterritorial location "a probable place for its commission." *Id.* at 99. If so, the statute applies extraterritorially.

1. Section 844(i) protects U.S. national security.

A passenger jet — especially one registered with the U.S. Federal Aviation Administration and carrying 190 U.S. citizens *en route* to the United States — is not an ordinary species of private property. Air travel is a highly regulated industry that forms a critical part of the nation's transportation infrastructure. And international passenger flights are highly visible embodiments of national identity, typically bearing the flag of the registering country and carrying numerous of its citizens. Consequently, an attack on a U.S. passenger plane is tantamount to an attack on the United States as a nation. Certainly, that is how the defendant and his co-conspirators intended the bombing of Pan Am Flight 103, and that is how the United States and much of the international community responded. This case is accordingly a powerful example of the principle that "the *Bowman* analysis" applies "to crimes against private individuals where the crime at issue implicates a security interest of the United States." *Reumayr*, 530 F. Supp. 2d at

[11] The quote continues, "…especially if committed by its own citizens, officers, or agents," but the D.C. Circuit has held that under the *Bowman* analysis "the citizenship of the defendants[] is irrelevant." *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004)

1215 (citing *United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988); *United States v. Felix–Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991); *United States v. Bredimus*, 234 F. Supp. 2d 639, 647-50 (N.D. Tex. 2002)). *See also id.* at 1216 ("To the extent Defendant argues that the Government can have no security interest in private property, the Court roundly rejects such a contention.").

Moreover, bombings of vehicles used in foreign commerce, like the one here, are "not logically dependent on their locality for the government's jurisdiction"; rather, jurisdiction arises from the commerce clause, which Congress sought to invoke to the "fullest… constitutionally permissible" extent. *Russell*, 471 U.S. at 862 (quoting H.R. Rep. No. 91-1549, pp. 69-70 (1970)).

This analysis is consistent with the D.C. Circuit's application of *Bowman*. In *United States v. Delgado-Garcia*, the majority acknowledged that the crime in question — an immigration offense — was not "fraud against the United States" like in *Bowman*, but that distinction did not "lessen *Bowman*'s force as applied to this case" because the immigration offense still "necessarily concern[ed] the national security and foreign affairs of the United States," even more than fraud against government corporations. 374 F.3d 1337, 1346 (D.C. Cir. 2004). In rejecting the dissent's premise that *Bowman* should not apply because the "harm to the United States government" posed by immigration offenses was "less direct and immediate," the majority explained that "[s]uch policy reasoning is for Congress, not this Court." *Id.* The majority added, "[a]nyway, it is difficult to see how the harm threatened by attempted illegal immigration is any less 'direct and immediate' than, say, the crime of conspiring to commit a terrorist act against an American target." *Id.* That hypothetical "terrorist attack," which the majority treated as clearly within *Bowman*'s scope, is exactly what we have here, placing this case is within the *Bowman* class as conceived by the D.C. Circuit in *Delgado-Garcia*.

Accordingly, this application of Section 844(i) satisfies the first step of the *Bowman* analysis.

2. Bombings of vehicles used in foreign commerce are likely to happen abroad.

In *Bowman* the entity to be protected, a shipping corporation, "was expected to engage in, and did engage in, a most extensive ocean transportation business." 260 U.S. at 101. The same is true of U.S. commercial airlines: they are "expected to engage in, and [do] engage in, a most extensive [international] transportation business." As noted above, when Congress passed Section 844(i) it "intended to protect all business property" to the full extent of its jurisdiction, *Russell*, 471 U.S. at 862, and when legislating with that intent Congress must have recognized the "great likelihood that the outlawed conduct would occur abroad," *United States v. Garcia Sota*, 948 F.3d 356, 360 (D.C. Cir. 2020). Indeed, the statute expressly protects "vehicle[s]… used in… foreign commerce," signaling a specific understanding that the property in question would sometimes move across national boundaries. It would be senseless for Congress to fully utilize its constitutionally enumerated powers to maximally protect commercial vehicles full of U.S. passengers when they are in U.S. territory but revoke that protection as soon as they cross the border. Like in *Bowman*, crimes against such targets are "as easily committed by citizens on the high seas and in foreign countries as at home." 260 U.S. at 98.

* * *

For all these reasons, the only other court to face the question whether Section 844(i) applies extraterritorially decided correctly that it did. *See United States v. Reumayr*, 530 F. Supp. 2d 1210. That case involved a defendant in Canada who plotted to destroy an oil pipeline owned by a consortium of publicly traded companies and who took several steps, all in Canada, toward that end. After a thorough discussion of Section 844(i)'s legislative history, and an analysis of the *Bowman* principle (including its viable application to statutes protecting private property), the

court concluded that it "must infer… that Congressional purpose requires § 844(i) to be applied extraterritorially." *Id.* at 1218.

Rather than dispute the merits of *Reumayr*'s reasoning, the defense twice accuses the court of engaging in "motivated reasoning." ECF 252 at 17. But by asserting that the *Reumayr* court was indulging its "own concerns" when it observed, for example, that the U.S. government has a security interest in some private property, the defense does nothing to undercut the soundness of that conclusion. And while framing the court's view of the legislative history as a product of the court's own "belie[f]," the defense omits to identify any faults in that analysis. That is because *Reumayr*'s reasoning is sound, and the Court should reach the same result here.

It finally bears noting that, to deny the defendant's motion to dismiss Count Three, the Court does not need to hold that Section 844(i) applies to all foreign conduct with any conceivable effect on commerce with the United States. It is enough to decide that *this* application of the statute — to the midair bombing of a U.S.-registered aircraft owned by a U.S. company and carrying U.S. citizens *en route* to the United States — is within the scope of what Congress sought to authorize. That modest ruling would mirror the approach of the *Reumayr* court, which recognized "the potential overbreadth of reading the inclusion of the word 'foreign' to implicate any explosion anywhere in the world" but stressed that "the issue before the Court is not such an explosion." 530 F. Supp. 2d at 1216. On the facts of this case, the defendant directly and purposefully attacked the national security of the United States by destroying property that Congress legislated fully to protect — and, as a consequence of that destruction, causing 270 deaths. The statute was clearly intended to reach such conduct.[12]

[12] If the Court disagrees and rules that Section 844(i) does not apply extraterritoriality, the government reserves the right to argue to the jury that the offense occurred within the special maritime and territorial jurisdiction of the United States in that the defendant attempted to destroy

C. This prosecution does not offend Due Process.

The defense lastly argues that punishing the defendant for his alleged conduct overseas would violate Due Process. *See* ECF 252 at 17-19. They concede, however, that binding D.C. Circuit precedent forecloses that argument. *Id.* at 19. That is correct.

The D.C. Circuit "has yet to decide 'whether the Constitution limits the extraterritorial exercise of federal criminal jurisdiction.'" *United States v. Ballestas*, 795 F.3d 138, 148 (D.C. Cir. 2015) (quoting *United States v. Ali*, 718 F.3d 929, 943 (D.C. Cir. 2013)). Deciding that question has not yet been necessary because, in the cases where it has been presented, the facts have clearly satisfied Due Process even under the most rigorous possible standard.

In *United States v. Ali*, the court found that the charged statute "fulfill[ed] U.S. treaty obligations under the widely supported International Convention Against the Taking of Hostages," a treaty that "provide[d] global notice that certain generally condemned acts are subject to prosecution by any party to the treaty," which was more than sufficient to satisfy the Due Process clause. 718 F.3d at 943-44.

In *United States v. Ballestas*, the D.C. Circuit framed the "ultimate question" as "whether 'application of the statute to the defendant [would] be arbitrary or fundamentally unfair,'" 795 F.3d at 148 (quoting *Ali*, 718 F.3d at 944), and noted that some courts of appeals had "require[d] a showing of sufficient nexus between the defendant and the United States" to prevent such unfairness, *id.* (quoting *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990) (internal quotation mark removed)). In that case, the defendant's admissions established that he was part of

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an aircraft belonging to a U.S. corporation while it was in flight over the high seas. *See* 18 U.S.C. § 7(5). This would be a domestic application of the statute. *Cf. United States v. Corey*, 232 F.3d 1166, 1171 (9th Cir. 2000) ("Land subject to subsection 7(3) is not 'extraterritorial,' as the Supreme Court has defined the term.").

a drug-smuggling organization that trafficked cocaine bound ultimately for the United States, making it "neither arbitrary nor fundamentally unfair" to punish him in the United States for that conduct. *Id.*

Here, like in those cases, the facts foreclose any Due Process challenge regardless of what test is applied. Like in *Ali*, there exists a treaty (the Montreal Convention, discussed above) that "provide[s] global notice that certain generally condemned acts are subject to prosecution by any party to the treaty." 718 F.3d at 944. And like in *Ballestas*, the defendant's admissions (in his signed statement) establish that he knew his conduct was targeting U.S. victims, providing "sufficient nexus between the defendant and the United States." 795 F.3d at 148. Accordingly, the defense is right to note their Due Process argument only to preserve it for appeal.

CONCLUSION

For the above reasons, the defendant's motion should be denied.

Respectfully submitted,

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