UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	**)**	
	)	
v.	**)**	**No. 1:22-cr-392 (DLF)**
	)	
ABU AGILA MOHAMMAD	**)**	
MAS'UD KHEIR AL-MARIMI,	**)**	
Defendant.	**)**	

REPLY IN SUPPORT OF MR. Al-MARIMI'S MOTION TO DISMISS FOR LACK OF EXTRATERRITORIAL JURISDICTION

The government argues there are sufficient indicia of Congress's intent to criminalize foreign conduct for 18 U.S.C. §§ 32(a)(1) and (2), as well as 18 U.S.C. § 844(i). However, the government fails to rebut the strong presumption against the extraterritorial application of U.S. law.

Regarding the § 32(a) provisions, the government correctly focuses on the statutory text. But its textual arguments miss the mark: even if the text and incorporated definitions cover certain aircraft outside of the United States, the statute does not clearly evince Congress's intent to criminalize *conduct* outside of the United States, as required to rebut the presumption.

Regarding § 844(i), the government cannot muster any serious textual arguments. Instead, it tries to associate that provision with others that are readily distinguishable, and it offers a radical interpretation of *Bowman* that would authorize the application of U.S. criminal law any time the government asserts a national interest related to harmed property, regardless of whether the property is privately owned. The Court should reject these arguments and dismiss Count Three.

This reply does not further brief the "nexus" argument under the Due Process Clause, which the parties agree is governed by binding circuit precedent. *See United States v. Ali*, 718 F.3d 929 (D.C. Cir. 2013). Mr. Al-Marimi may request the opportunity to make additional arguments on that topic, for the sake of preservation, depending on the outcome of his suppression motion.

I. Section 32(a)'s coverage of *aircraft* outside the U.S. does not clearly evince Congress's intent to cover *conduct* outside the U.S.

In its attempt to find a textual indication of Congress's intent for §§ 32(a)(1) and (2) to apply extraterritorially, the government identifies a clear answer to the wrong question. It argues both provisions apply to aircraft outside the United States, including Pan Am 103. But it does not follow from that textual interpretation that Congress intended the provisions to apply to *conduct* that occurs outside the United States, just as the same conclusion does not follow from a textual reference to violations of international law that sometimes occur outside the United States. *See Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 118 (2013) ("The [statute] covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States.").

None of the text highlighted by the government, either in § 32(a) or the definitions incorporated there from other titles, provides a clear statement of the sort the Supreme Court has indicated could rebut the presumption against extraterritoriality. *Cf. id.* at 117–18 (noting 18 U.S.C. § 1091(e), which criminalizes genocide "regardless of where the offense is committed"). Sections 32(a)(1) and (2) do

not provide for their application "regardless of where the offense is committed," 18 U.S.C. § 1091; or to "activity [that] takes place outside the United States," 18 U.S.C. § 37(b)(2); or to "conduct occurring outside the United States," 18 U.S.C. § 38(f).

The government suggests one would not expect to find similar language in § 32(a) because the statute's invocation of the "special aircraft jurisdiction of the United States" means such "jurisdictional" provisions are not needed. ECF No. 272, at 6. But whatever other purposes such language might serve, it remains true that language that might rebut the presumption against extraterritoriality is absent from § 32(a).[1] The contrast with § 38 is particularly telling, as that statute similarly applies to conduct affecting aircraft. Indeed, it applies to the importation and exportation of aircraft parts, § 38(a)(2), which the government elsewhere argues is an "inherently international transaction" that should not require any express statement of intended extraterritorial reach. ECF No. 272, at 9 (quoting *TianRui Grp. Co. v. Int'l Trade Comm'n*, 661 F.3d 1322, 1329 (Fed. Cir. 2011)). Yet Congress saw a need to clarify § 38 applies to "conduct occurring outside the United States." 18 U.S.C. § 38(f).

Yousef employed the same faulty reasoning the government now relies on, and it therefore is no surprise that the government's defense of that holding does not move the needle. Again, the Second Circuit's analysis in *Yousef* looked no deeper than the question of whether § 32(a) applied to aircraft flying overseas; the court did not identify any separate textual reason to think the law applied to foreign conduct

[1] The government is correct that 18 U.S.C. §§ 37 and 38 were enacted at different times than § 32. However, § 32 was amended in 1994 via the same legislation that enacted § 37. *See* Pub. L. 103-322, Sept. 13, 1994, 108 Stat. 1979; 108 Stat. 2148.

affecting such aircraft. *United States v. Yousef*, 327 F.3d 56, 86–87 (2d Cir. 2003). But a rule that permits extraterritorial application anytime a statute reaches foreign conduct flips the presumption against extraterritoriality on its head. Under the Second Circuit's approach, Congress would seemingly have had to carve out foreign conduct from § 32(a) for the statute not to apply to such conduct. In this way, *Yousef*'s reasoning runs counter to *Kiobel*, which held a law's apparent applicability to some foreign conduct—violations of international law by foreign nationals, an area no less inherently foreign than conduct affecting aircraft in the special aircraft jurisdiction of the United States—did not rebut the presumption against extraterritoriality. The lower court's analysis in *Yousef* is less focused but does not take a meaningfully different approach, and it is flawed for the same reasons. *See United States v. Yousef*, 927 F. Supp. 673, 678–80 (S.D.N.Y. 1996).

The legislative history behind § 32(a) should not factor into the analysis for the reasons discussed in Mr. Al-Marimi's motion.[2] *See* ECF No. 252, at 4–8. Notably, *Garvey* is the only case cited by the government on this point that postdates the Supreme Court's recent decisions that have emphasized the importance of textual

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[2] If the Court concludes the consideration of legislative history was necessary to the panel's holding in *Garvey* or another decision of a higher court, then Mr. Al-Marimi agrees the Court is bound by circuit precedent by that reasoning. *See United States v. Duvall*, 740 F.3d 604, 609–10 (D.C. Cir. 2013) (discussing vertical *stare decisis* and explaining that the result and necessary reasoning of a higher court bind lower courts). But that is not a certainty. *Garvey* held a different law did *not* apply extraterritorially, and it was clear there was no textual support for the law's extraterritorial application. *Garvey*, 56 F.4th 110, 123 (D.C. Cir. 2022). Under Supreme Court precedent, the court's discussion could and should have ended there. *See* ECF No. 252, at 4–8.

instructions from Congress regarding a statute's extraterritorial application. Besides *United States v. Bin Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000), an out-of-circuit district court case decided a decade before *Morrison*, it notes only *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957). ECF No. 272, at 3–4. In that case, like *Sale*, the Court noted that the legislative history of the NLRA did *not* support extraterritorial application; the Court did not express any opinion about when, if ever, a statute's legislative history could establish extraterritorial application. *Id.* at 144–45.

II. Section 844(i) does not apply extraterritorially.

A. *Neither text, nor context, nor legislative history (to the extent it matters) supports § 844(i)'s extraterritorial application.*

The government's textual argument on § 844(i) contrasts sharply with its robust analysis of § 32(a). It amounts to the contention that the statute's reference to "interstate or foreign commerce" provides for extraterritorial application.[3] ECF No. 272, at 8. The Supreme Court has rejected that contention: "boilerplate language which can be found in any number of congressional Acts," including express references to "foreign commerce," do not rebut the presumption against extraterritoriality. *E.E.O.C. v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 250–51 (1991) ("[W]e have repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply

[3] Despite relying heavily on *United States v. Reumayr*, 530 F. Supp. 2d 1210 (D.N.M. 2008), elsewhere in its brief, the government fails to acknowledge that even that court found no textual support for the extraterritorial application of § 844(i). *Id.* at 1218 (finding "Congress [did] not make such an intent [to reach conduct outside the United States] explicit in the statutory language").

abroad.").

The government tries to sideline *Aramco* and the cases it discussed on the ground that they were civil lawsuits that had the potential to impose "new obligations" on foreign employers "with respect to matters like nondiscrimination and collective bargaining" that are "fraught with the potential for" conflicts between U.S. and foreign laws. ECF No. 272, at 8. This novel distinction finds no support in precedent. The Supreme Court has clearly held the presumption against extraterritoriality applies "in all cases," civil and criminal, "preserving a stable background against which Congress can legislate with predictable effects." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 261 (2010). When the D.C. Circuit ruled 18 U.S.C. § 1114—a criminal law—did not apply extraterritorially in *Garcia Sota*, it did not note the presumption applied less strongly by virtue of a reduced potential for conflicting international laws. *United States v. Garcia Sota*, 948 F.3d 356, 358 (D.C. Cir. 2020); *see also United States v. Delgado-Garcia*, 374 F.3d 1337, 1344 (D.C. Cir. 2004) (in criminal context, noting the presumption "makes sense because we assume that Congress desires to avoid conflict with other nations"). Rather, it observed the general truth that the presumption against extraterritoriality "serves to avoid the international discord that can result when U.S. law is applied in foreign countries." *Id.* (quoting *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 335 (2016)).

Moreover, a distinction based on how much U.S. law conflicts with foreign law is untenable. U.S. courts are capable, but they are not well positioned to opine on foreign legal systems, what foreign laws require in specific situations, or whether

certain conduct might violate foreign criminal laws (including applicable defenses and procedural requirements). The judiciary's deference to the separation of powers on this point underpins the presumption against extraterritoriality. *See, e.g.*, *Kiobel*, 569 U.S. at 116 ("The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."). And for good reason. Different countries employ different legal and legislative systems. *See, e.g.*, Mohamed Lafi & Mahmoud Salem Sawan, *Libya's Legal System and Legal Research*, GlobaLex (Dec. 2019), https://www.nyulawglobal.org/globalex/libya1.html (discussing Libya's legal system). Certainly, despite asserting the criminalization of "destruction of property by explosives . . . poses no risk of creating conflicting obligations[,]" the government has not attempted to brief the applicability of any foreign criminal law. In any event, criminal procedure is no less "fraught" with the potential for conflicts than the labor or anti-discrimination laws discussed in *Aramco*. 499 U.S. at 251–52 (collecting and discussing cases).

The government next turns to context, but its arguments on that front are weaker still. It first notes other provisions in § 844 and neighboring statutes do not "explicitly provide for extraterritorial jurisdiction in a way that would support a negative inference" about § 844(i). ECF No. 272, at 8. But the absence of a clear negative inference does not undermine Mr. Al-Marimi's argument with respect to § 844(i). A negative inference is just one way that courts may divine congressional

intent. It is not necessary such that its absence cuts in favor of extraterritoriality. In other words, the presence of a negative inference, as discussed above with respect to § 32(a), supports application of the presumption against extraterritoriality, whereas the absence of a negative inference does not alter the analysis one way or the other.

The government further observes that several of § 844(i)'s neighboring provisions target the importation of explosives, an "inherently international transaction" that courts have held supports an inference that Congress intended a statute's extraterritorial reach.[4] ECF No. 272, at 9 (citing cases). Even accepting that premise, the government does not explain its conclusion that the same inference extends to § 844(i) simply because it "was enacted together with several of" the other provisions. *Id.* Section 844(i) is not concerned with importation. The government's specious reasoning seems to urge extraterritoriality by association. But here too, there is no support in precedent for such a rule. Why would an inference arising from a law's targeting of inherently international conduct extend to a law that does not target inherently international conduct?

Finally, the government looks again to legislative history. Unlike with § 32(a),

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[4] The government also points at § 844(f), which does not target importation. Rather, that provision targets the damage or destruction of United States property. 18 U.S.C. § 844(f)(1). Other courts indeed have held § 844(f) applies extraterritorially, but those holdings relied on the prevailing interpretation of *Bowman*, which requires the criminal offense harm the U.S. government. *See United States v. Khatallah*, 151 F. Supp. 3d 116, 134 (D.D.C. 2015) (discussing *United States v. Bowman*, 260 U.S. 94 (1922)); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 198 (S.D.N.Y. 2000) (same). The rationale for § 844(f)'s extraterritorial application, whether or not it is sound, thus does not extend to § 844(i), which does not similarly focus on U.S. government-owned property.

however, the legislative history for § 844(i) is silent on the issue of extraterritorial application. Finding no references in the legislative record to extraterritorial conduct, the government instead highlights several references to Congress's intent for the statute's broad coverage of *different kinds of private property*, including police stations, churches, and private homes. ECF No. 272, at 9–10. Even if such remarks could serve as a substitute for textual or contextual evidence, a legislator's intent to cover "all business property" is no more indicative of a statute's intended extraterritorial reach than Congress's use of broad, generic terms like "any" or "every." *See Kiobel*, 569 U.S. at 118; *United States v. Al-Imam*, 373 F. Supp. 3d 247, 257–58 (D.D.C. 2019) (collecting cases). There is nothing clearly extraterritorial about such broad coverage.

B. *Bowman* does not apply to § 844(i).

Perhaps recognizing the weakness of its interpretative arguments on § 844(i), the government seeks refuge under this circuit's interpretation of *Bowman*, which lowers the bar for certain criminal statutes. *See Garcia Sota*, 948 F.3d at 360 (discussing *Bowman*, 260 U.S. at 98). But § 844(i) fails the first requirement under *Bowman*, and the law's extraterritorial application cannot rest on that case and its progeny.

Bowman separated crimes "against private individuals or their property, like . . . arson . . . , which affect the peace and good order of the community"—crimes that must "be committed within the territorial jurisdiction of the government" to be prosecuted—from crimes that are (1) enacted because of the right of the government

to defend itself against obstruction, or fraud wherever perpetrated," and (2) "not logically dependent on their locality for the government's jurisdiction[.]" *Bowman*, 260 U.S. at 98. Regarding the latter class of crimes, the Court alternatively described them as laws passed "to protect [the United States] itself and its property." *Id.* at 102. Such crimes include fraud against the U.S., misconduct by U.S. officers, desertions from service, and conduct affecting the disposition of U.S. property. *See Garcia Sota*, 948 F.3d at 360. On that basis, courts have read *Bowman* to apply narrowly to criminal laws that prescribe conduct that directly harms the U.S. government. *Id.*; *see, e.g.*, *Al-Imam*, 373 F. Supp. 3d at 258–59 (stating each of the crimes discussed by the *Bowman* Court as having extraterritorial reach "had evidently been designed to forestall some tangible or intangible harm to the U.S. Government" and concluding "satisfying *Bowman* first requires proof that a criminal offense directly harms the U.S. Government").

Section 844(i) is not such a law. It is not targeted at conduct that harms U.S. government property, and it is not applied in this case to conduct that harmed U.S. government property. Rather, it is applied here to alleged conduct that destroyed a private, civilian aircraft.

The government argues for an extremely broad reading of *Bowman* that would expand the narrow class of laws discussed above to include any and all "crimes against private individuals where the crime at issue implicates a security interest of the United States." ECF No. 272, at 11 (quoting *Reumayr*, 530 F. Supp. 2d at 1215). *But see Garcia Sota*, 948 F.3d at 360 (quoting government's appellate brief that

acknowledged *Bowman* extended to "criminal statutes that protect the United States government from harm"). What determines when a U.S. security interest is at stake? The government does not say, and it does not offer any standard courts can use to answer that question.[5] Rather, it boldly asserts "an attack on a U.S. passenger plane is tantamount to an attack on the United States as a nation[,]" seemingly because such aircraft are marked with the U.S. flag. *Id.*

Besides *Reumayr*, there is no support for such a broad reading of *Bowman*. In this circuit, application of *Bowman* consistently has required some harm directly suffered by the U.S. government arising out of the criminalized conduct. *See Al-Imam*, 373 F. Supp. 3d at 262–66 (addressing various offenses). In *Delgado-Garcia*, for example, the immigration offenses at issue harmed the U.S. government by impairing the government's ability to implement its immigration policies and to protect the nation's territorial integrity from those with hostile intent. *Delgado-Garcia*, 374 F.3d at 1345–46. That logic aligns with the *Bowman* Court's suggestion that the bribery of a U.S. official harms the U.S. government; while nothing physical may be damaged, the government's own integrity and ability to implement its policies is harmed. *See Bowman*, 260 U.S. at 99.

The harm caused by the alleged destruction of a civilian aircraft is thus categorically different, regardless of whether the aircraft is painted with the

[5] The answer cannot be an unreviewable determination by the executive. Such a rule is flatly inconsistent with the Supreme Court's recent guidance on the presumption against extraterritoriality and its focus on legislative intent.

American flag or carrying Americans on board.[6] Pan Am is not analogous to the Emergency Fleet Corporation at issue in *Bowman*, which was created indirectly by the U.S. government and in which the U.S. government was the sole stockholder. *Bowman*, 260 U.S. at 101. Even the Ninth Circuit cases relied on by *Reumayr* to support its "security interest" statement fail to support such a broad rule. Instead, both cases reflect uncontroversial applications of *Bowman*'s requirement that the U.S. government be harmed directly: both addressed the murder of government officials or agents. *See United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991) (murder of DEA agents); *United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988) (murder of members of Congress).

Finally, Mr. Al-Marimi briefly responds to the government's suggestion that this offense occurred within the special maritime and territorial jurisdiction of the United States, "in that the defendant attempted to destroy an aircraft belonging to a U.S. corporation while it was in flight over the high seas[,]" such that § 844(i) would be applied to domestic rather than extraterritorial conduct. ECF No. 272, at 14–15 n.12. The government cites 18 U.S.C. § 7(5), which applies to aircraft "in flight over

[6] The D.C. Circuit's *dicta* in *Delgado-Garcia* about "the crime of conspiring to commit a terrorist act against an American target" is not informative here. First, § 844(i) does not target terrorist attacks; it targets the destruction of property writ large. Second, the *dicta* lacks context explaining what the panel meant by "an American target"—it could refer to a U.S. government target as easily as a civilian one. Third, to the extent Congress might deem the application of § 844(i) to acts of terrorism to be of crucial importance to national security, it could express that policy conclusion in the statute's text. It has not done so, and "such decisions are to be made by Congress, and not the courts." *Delgado-Garcia*, 374 F.3d at 1357–58 (Rogers, J., dissenting). In any event, the statement was *dicta* and does not bind this Court.

the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State." [7] It is not clear how Pan Am 103 could have been in flight over the high seas when it departed from London and tragically crashed in Scotland. To the extent the government intends to argue it was temporarily covered by § 7(5) while passing over some unidentified body of water, the government does not attempt to explain how anything violative of § 844(i) happened during such a period. Mr. Al-Marimi was never on board the plane, and no damage or destruction occurred until the aircraft was over land. The defense is not aware of any caselaw that remotely supports the use of § 7(5) here, and the Court should not take the government's argument seriously.

CONCLUSION

The extraterritorial application of U.S. law to Mr. Al-Marimi is improper. The Court should dismiss the indictment.

Respectfully submitted,

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[7] The cited case, *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000), does not support the government's novel argument. That case addressed § 7(3) and explained why the presumption against extraterritoriality is a non-issue for such jurisdictional statutes. *Id.* at 1171.

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