THE BORDERLINE OF CRIME: THE CASE FOR REEVALUATING *UNITED STATES V. BOWMAN* & VIGOROUSLY APPLYING THE PRESUMPTION AGAINST EXTRATERRITORIALITY TO FEDERAL CRIMINAL STATUTES

Danielle T. Dominguez†

† J.D., Cornell Law School, 2023; B.A., Claremont McKenna College, 2019. A special thank you to Professor Muna Ndulo whose International Human Rights class inspired me throughout the note-writing process. Additional gratitude to the Editors of *Cornell Law Review* for all their help in preparing this Note for publication. This Note is dedicated to my parents, Ada and Ignacio, whose love and support shaped me into the person I am today.

INTRODUCTION

An Immigration and Customs Enforcement (ICE) agent killed in Mexico.[1] A conspiracy to kill two Drug Enforcement Administration (DEA) agents in Colombia.[2] A multi-national plot spanning from Spain to Romania to kill undercover DEA agents.[3] Two Federal Bureau of Investigation (FBI) agents shot and killed on an Indian Reservation.[4] In all of these federal criminal cases, defendants challenged the court's jurisdiction by alleging that the federal criminal statute prosecutors charged them under did not apply to the actions of non-United States citizens acting beyond the United States' territorial jurisdiction. 18 U.S.C. § 1114 ("§ 1114") punishes killing or attempting to kill U.S. officers or employees engaged in their official services or duties.[5] The defendants argued that, because Congress did not explicitly address the jurisdictional reach of § 1114, the statute could only reach domestic activities. In only one of the above cases, the murder of an ICE agent in Mexico, did this defense actually succeed, leading to a public outcry and fracas in Congress.[6]

Unlike other areas of the law that require explicit statutory language that allows extraterritorial enforcement of a federal statute, federal criminal statutes have, so far at least, been immune to such strict statutory interpretation. However, in 2020, the D.C. Circuit in *United States v. Garcia Sota* broke away from other federal circuit courts on this issue.

The D.C. Circuit departed from the other circuits on applying the presumption against extraterritoriality to federal criminal statutes and declined to apply § 1114 to actions committed abroad. The D.C. Circuit's decision caused a severe backlash in the media and Congress. Post-*Garcia Sota* news media sources declared that federal officers were now "unprotected" abroad because the D.C. Circuit had created a "loophole" in

---

1 United States v. Garcia Sota, 948 F.3d 356, 357 (D.C. Cir. 2020).

2 United States v. Benitez, 741 F.2d 1312, 1313 (11th Cir. 1984).

3 United States v. Al Kassar, 660 F.3d 108, 115–16 (2d Cir. 2011).

4 United States v. Peltier, 446 F.3d 911, 913 (8th Cir. 2006).

5 18 U.S.C. § 1114 (2002).

6 *See e.g.*, Press Release, Congressman Michael McCaul (TX-R), *Reps. McCaul, Cuellar, King Introduce Bill to Ensure the Safety and Security of Federal Officers and Employees Overseas* (May 20, 2020) https://mccaul.house.gov/media-center/press-releases/reps-mccaul-cuellar-king-introduce-bill-to-ensure-the-safety-and ("Unfortunately, earlier this year, an appeals court threw out the conviction for the cartel members for the murder of Special Agent Zapata because it was claimed that Congress was not clear that the underlying law applied to crimes committed outside the United States despite previous cases suggesting the contrary, this bill closes any ambiguity in the law.")

federal law. Moreover, news sources claimed that "[t]he current interpretation of the law could embolden criminals abroad and weaken the United States's [sic] international presence."[7] Additionally, two Congressmen, spurred into action by the *Garcia Sota* decision, introduced the Jaime Zapata and Victor Avila Federal Officers and Employees Protection Act. The Congressmen named the Act after the two ICE agents attacked by the defendants in *Garcia Sota*.[8] The goal of the Act was to amend § 1114 and add an extraterritoriality provision to the statute.[9] Due to the D.C. Circuit's decision to adhere to the Supreme Court's current analytical framework for extraterritorial analysis, Congress was animated to significantly alter a statute it had not touched in almost twenty years.[10]

By the end of November 2021, President Joseph Biden signed the Jaime Zapata and Victor Avila Act into federal law, marking the end of the short-lived, so-called statutory "loophole."[11] However, the effects of the D.C. Circuit's *Garcia Sota* decision are profound. By adhering to the presumption against extraterritoriality, the D.C. Circuit energized a deeply divided Congress into action and motivated Congress to provide clarity on a statute's applicability abroad.[12] The presumption against

---

7 Larry Cosme, *Federal Officials Abroad Are Unprotected—In a World of Increasing Volatility*, THE HILL (July 27, 2021), https://thehill.com/opinion/criminal-justice/564459-federal-officials-abroad-are-unprotected-in-a-world-of-increasing [https://perma.cc/X7ZB-L9BH] [*hereinafter* Cosme, *Federal Officials Abroad are Unprotected*]; *see also* Letter from Larry Cosme, National President, Federal Law Enforcement Officers Association, to Noel Francisco, Solicitor, U.S. Department of Justice Office of Solicitor General (Aug. 26, 2020), https://www.fleoa.org/news-story.aspx?id=9909 [https://perma.cc/W9JM-3JWS] ("The message this ruling sends is one of open season on federal law enforcement officers, who can now be targeted overseas"). Carly Ortiz-Lytle, *A federal court overturned the convictions of 2 Zetas cartel hit men who killed an ICE agent in Mexico*, BUSINESS INSIDER (Feb. 2, 2020) https://www.businessinsider.com/court-vacates-convictions-of-zetas-hitmen-in-jaime-zapata-killing-2020-2

8 *See* Jaime Zapata and Victor Avila Federal Law Enforcement Protection Act, S. 3732, 116th Cong. (2020).

9 *Id.*

10 For the 2002 amendment of § 1114 that repealed the 1996 amendments to the statute, see 18 U.S.C. § 1114 (2002).

11 Cosme, *Federal Officials Abroad are Unprotected*, *supra* note 7; *see also* Press Release, White House, Briefing Room, Legislation, Bills Signed: S. 921, S. 1502, S. 1511 (Nov. 18, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/18/bills-signed-s-921-s-1502-s-1511/ [https://perma.cc/QNC7-V826]; H.R. 2137, 117th Cong. (2021); 18 U.S.C. § 1114 (2021) (adding section (b): "There is extraterritorial jurisdiction over the conduct prohibited by this section.").

12 *See sources cited supra* note 11; *see also* Lisa Mascaro, *A Year After Jan. 6, Congress More Deeply Divided Than Ever*, AP NEWS (Jan. 6, 2022), https://apnews.com/article/jan-6-capitol-siege-congress-a7d6f4e19386b70e8126f1029c0fab3e [https://perma.cc/BP2T-Y7ZR] (quoting Representative Peter Welch

extraterritoriality serves a crucial function because it ensures that federal courts are not "speaking" for Congress. In this case, a circuit court's respect for the boundaries of its own power motivated Congress to speak for itself and clarify its position.

In *Garcia Sota*, the D.C. Circuit examined recent Supreme Court rulings on extraterritoriality and found that U.S. criminal laws are inapplicable outside U.S. territorial boundaries unless Congress has "'affirmatively and unmistakably instructed that the statute will' apply abroad."[13] Therefore, the D.C. Circuit concluded that § 1114 is entirely domestic in scope due to Congress's silence on the issue of extraterritorial application. Consequently, the two Mexican defendants from *Garcia Sota*, charged with killing one ICE agent and wounding another in Mexico, could not be prosecuted for the killing and wounding under the statute.[14]

In *Garcia Sota*, the U.S. government, arguing for the applicability of § 1114 to non-U.S. defendants for crimes committed abroad, primarily rested its argument on the 1922 Supreme Court case *United States v. Bowman*.[15] The government urged the D.C. Circuit to broadly read the holding of *Bowman* such that criminal statutes aimed at protecting U.S. interests have extraterritorial application for crimes committed abroad.[16] The D.C. Circuit rejected the government's argument and adopted a narrower interpretation of *Bowman*.[17] The D.C. Circuit's reading of *Bowman* primarily considers congressional intent and then considers the probability of the criminal conduct occurring abroad.[18] Crucially, the court reasoned that a broad reading of *Bowman* belies the core principle of statutory interpretation that federal statutes should only apply when and where Congress intends for them to.[19]

(D-Vt.) as describing Congress as "this no man's land, where basically anything goes, and that's a very unsettling place to be in a legislative body").

13 United States v. Garcia Sota, 948 F.3d 356, 358 (D.C. Cir. 2020) (quoting RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 335 (2016)).

14 *Id.* at 356.

15 *See generally* 260 U.S. 94, 98 (1922).

16 *Garcia Sota*, 948 F.3d at 360.

17 *Id.* at 357.

18 *Id.* at 360.

19 *See* Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1069-73 (2018) (expressing skepticism regarding the continued relevance of *United States v. Bowman* in modern Supreme Court jurisprudence).

Considering *Bowman*, in light of other major Supreme Court decisions that urge a strict textual approach to statutory interpretation, the reasoning espoused in *Bowman* needs to be reevaluated. Therefore, this Note argues that the D.C. Circuit's approach to analyzing federal criminal statutes under the presumption against extraterritoriality is the ideal analysis method because it respects congressional power and international policy concerns. Moreover, this Note posits that the Supreme Court should reevaluate *Bowman* and clarify that the presumption against extraterritoriality is applicable to the field of federal criminal statutory interpretation.

In Part I, this Note will provide background information on extraterritoriality. This Note will define extraterritoriality and expand upon the crucial role of the presumption against extraterritoriality in determining the jurisdictional reach of federal statutes. This Note will also expand on the unique history of extraterritoriality in federal statutory jurisprudence. Furthermore, this Note will identify the tension of the Supreme Court's decision in *Bowman* with the Supreme Court's later decisions about federal statutes and the presumption against extraterritoriality. In Part II, this Note will analyze the approaches that other circuit courts have taken regarding the issue of extraterritoriality and federal criminal law. Then, this Note will break down the D.C. Circuit's analysis in *Garcia Sota*. It will also expand upon the D.C. Circuit's interpretation of the statutory history of § 1114 before the statute's revision in November 2021.[20]

To conclude, in Part III, this Note will argue that, although the D.C. Circuit's opinion stands apart from the other circuits and has been criticized by Congress and the media, the D.C. Circuit's analysis for federal criminal statutes conforms with the Supreme Court's strict adherence to the presumption against extraterritoriality. Lastly, this Note will argue that the Supreme Court should consider clarifying the contours of *Bowman* and reexamining its continued relevance in the field of federal criminal statutory interpretation.

---

20 *See* 18 U.S.C. § 1114 (2002).

I
EXTRATERRITORIALITY—APPLYING FEDERAL STATUTES TO ACTIONS COMMITTED ABROAD

A nation's law applies extraterritorially when the law reaches acts committed outside that nation's borders.[21] In the United States, extraterritoriality allows federal statutes to be applied to actions that take place outside U.S. territorial boundaries.[22] Extraterritoriality has been a complex issue for as long as Congress has been drafting statutes.

One of the oldest principles regarding the applicability of federal statutes abroad is the presumption against extraterritoriality. This principle activates when Congress is silent on the issue of a statute's applicability outside U.S. territorial boundaries.[23] Unfortunately, since the Supreme Court first articulated the presumption, it has been inconsistently and often only facially applied by lower courts. The presumption also offers little guidance and is often ignored in some areas of statutory interpretation, like federal criminal statutes.[24]

A. The Inception, the Decline, and the Resurgence of the Presumption Against Extraterritoriality

One of the earliest articulations of the presumption against exterritoriality stems from Justice Holmes's majority opinion in the 1909 Supreme Court case *American Banana Co. v. United Fruit Co.*[25] In *American Banana*, an American businessman named McConnell moved to Panama[26] and decided to buy a banana plantation.[27] After this seemingly innocuous transaction, a series of tumultuous events occurred. The United Fruit Company (UFC), backed by military forces, threatened to shut down McConnell's plantation if he did not sell to UFC.[28] Working-class Panamanians revolted for independence and the birth

---

21 Ryan Walsh, *Extraterritorial Confusion: The Complex Relationship Between* Bowman *and* Morrison *and a Revised Approach to Extraterritoriality*, 47 VAL. U. L. REV. 627, 631 (2013).

22 *Id.*

23 *See* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 179.

24 *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (deciding that the federal court had jurisdiction in antitrust case under the Sherman Act to adjudicate the suit against foreign reinsurers).

25 213 U.S. 347 (1909).

26 In the early 1900s (i.e., when the events that precipitated American Banana took place) Panama was not yet an independent nation and was part of the United States of Colombia. *See id.* at 354.

27 *Id.*

28 *Id.*

of an independent Panama.[29] McConnell merged his plantation with the American Banana Company.[30] McConnell's plantation was seized by Costa Rican military forces and eventually sold to a mystery buyer.[31] In turn, the mystery buyer sold McConnell's plantation to UFC.[32] McConnell ultimately sued UFC in the United States under the Sherman Act, alleging an unlawful monopoly.[33]

This case eventually wound its way up to the Supreme Court, where the Court faced the novel legal question of applying American statutes extraterritorially. Justice Holmes, writing for the majority, declined to find jurisdiction, and surmised:

> the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.
>
> . . . .
>
> . . . in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.[34]

American Banana effectively defined for lower courts the rigid presumption against extraterritoriality. Without a clear directive from Congress that a statute applies to criminal activities abroad, the statute's applicability is purely domestic. The *American Banana* Court's concern in interpreting the extraterritorial application of the Sherman Act was Congress's authority to "regulate activities abroad."[35] Holmes was concerned with "Congress' authority under the Constitution and international law to regulate particular conduct."[36] In the immediate aftermath of *American Banana*, courts rigidly adhered to Justice Holmes's mandate, finding that domestic statutes were inapplicable abroad without express congressional authorization.[37]

However, in the decades following *American Banana*, the Supreme Court and lower federal courts began applying the

---

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 354–55 (noting that McConnell strongly suspected that the "mystery buyer" was a shell for UFC).

33 *Id.* at 353.

34 *Id.* at 356–57.

35 Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 604 (1990).

36 *Id.*

37 *Id.*

presumption against extraterritoriality with less vigor,[38] most notably in securities and antitrust cases, especially when foreign commerce *and* U.S. economic interests were involved.[39] The underlying principles for applying the presumption against extraterritoriality less rigidly were based on alternative jurisdictional theories.[40] Under an objective theory of territoriality, a state has the authority to reach actions that take place within the state—regardless of the territorial effects of the conduct.[41] On the other hand, under a subjective theory of territoriality, a state has territorial jurisdiction whenever the actions have "territorial effects"—meaning that a state has jurisdiction over actions that *affect* the state's interest regardless of where the initial actions took place.[42] These competing theories of territorial jurisdiction eroded the rigid *American Banana* application of extraterritoriality. Instead, the presumption against extraterritoriality became a *rebuttable* presumption that American laws only apply domestically.[43]

The Supreme Court canonized the rebuttable nature of the presumption against extraterritoriality in the 1949 case, *Foley Bros. v. Filardo*.[44] In *Foley Bros.*, the Supreme Court examined whether the Eight Hour Law, a prohibition against workdays longer than eight hours, applied to a private contractor working abroad.[45] The Supreme Court reaffirmed its holding in *American Banana* but also went further by explaining that the presumption against extraterritorial jurisdiction "is based on the assumption that Congress is primarily concerned with domestic conditions."[46] As Professor Turley surmises, "[w]hat began in *American Banana* as a prohibition against the perceived violation of international law through extraterritorial regulation became simply a legal test for subject matter jurisdiction. The presumption, however, retains some of the strong anti-extraterritorial bias of *American Banana*."[47] *Foley Bros.* took *American Banana* one step further by establishing that Congress's

38 William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85–86 (1998).

39 *Id.*

40 Turley, *supra* note35, at 604–05.

41 *Id.* at 605.

42 *Id.*

43 *Id.*

44 *See generally* 336 U.S. 281 (1949).

45 *Id.* at 282.

46 *Id.* at 285.

47 Turley, *supra* note35, at 607.

legislative activities are generally confined to the territorial boundaries of the United States.[48]

The Supreme Court's emphasis in *Foley Bros.* on labor laws and prohibitions regulating working conditions set the stage for an individualized approach to the presumption against extraterritoriality. As a result, courts generally do not hold that employment discrimination or environmental protection statutes apply abroad,[49] But these same courts generally hold that antitrust and securities laws do apply abroad.[50] As Professor Turley highlights, "[f]or those statutes not geared toward preserving free financial markets, therefore, the presumption has become little more than a perfunctory judicial *coup de grâce* to arguments in favor of extraterritorial application."[51]

Splits in the law soon began to develop, with circuits developing their own tests to deal with the issue of extraterritorial application of federal statutes abroad.[52] The presumption against extraterritoriality was vigorously upheld in environmental and civil rights cases.[53] Whereas in other categories like antitrust disputes, courts employed balancing approaches that considered foreign states' interests and U.S. economic and commercial interests.[54] As a result, what was once a clear principle fractured. For many decades, it seemed like the pre-

48 *Foley Bros.*, 336 U.S. at 284–85; *see also* Blackmer v. United States, 284 U.S. 421, 437 (1932) ("While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question" of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.").

49 Turley, *supra* note35, at 608.

50 *Id.*

51 *Id.*

52 *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) (finding the Sherman Act applicable abroad because "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders that the state reprehends"); *see also* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976) (developing a balancing test for extraterritorial application of federal statutes and determining the "interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority"); United States v. Plummer, 221 F.3d 1298, 1304–05 (11th Cir. 2000) ("On authority of *Bowman*, courts in this Circuit . . . have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm.").

53 *See* Turley, *supra* note35, at 608; *see also* Dodge, *supra* note38, at 118-19 (explaining that Congress's concern with "domestic conditions" spills over beyond the United States' borders in certain areas of the law) .

54 Dodge, *supra* note 38, at 98.

sumption against extraterritoriality was relegated to simply being an antiquated Holmesian quote with little relevance in modern jurisprudence.[55]

In the early 1990's, an *American Banana*-esque rigid presumption against extraterritoriality resurged with vigor in the Supreme Court. Justice Rehnquist, in *E.E.O.C. v. Arabian Am. Oil Co.*, declared, "Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute."[56] The Supreme Court adopted a strict textualist approach to extraterritoriality: in the absence of definite statutory language or a "clearer evidence of congressional intent" for the statute to apply abroad, extraterritorial application of the statute will be rejected.[57] Despite the Supreme Court developing this "clear" statement rule for extraterritoriality, lower courts have continued to use their own tests and find extraterritorial jurisdiction.[58] Moreover, globalization and rapid technological developments have further complicated extraterritorial jurisdiction analysis.[59]

The presumption against extraterritoriality is not a one-size-fits-all kind of rule—extraterritoriality is not solely found in a plain reading of a statute.[60] For instance, the Supreme Court has itself looked to "all available evidence" to determine extraterritoriality—including policy considerations for and against upholding the presumption against extraterritoriality.[61] In 2010, the Supreme Court in *Morrison v. National Australian Bank Ltd.* unambiguously found that the presumption against extraterritoriality applied to the Securities Exchange Act—a statute lower federal courts had been applying extrater-

---

55 *Id.* at 86 (quoting a comment from the 1987 edition of the Restatement (Third) of Foreign Relations Law stating that the presumption against extraterritoriality "does not reflect the current law of the United States"); *see also* S. Lynn Diamond, Empagran*, the FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT'L L. 805, 814 (2006) ("[The Restatement] came to be criticized as leaving too much discretion over political decisions to judges, rather than to the executive and legislative branches where such decisions arguably belong.").

56 499 U.S. 244, 258 (1991); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 585 (1992) (Stevens, J., concurring) ("As with all questions of statutory construction, the question whether a statute applies extraterritorially is one of congressional intent.").

57 *Arabian Am. Oil Co.*, 499 U.S. at 255.

58 Walsh, *supra* note 21, at 644. .

59 *Id.* at 645.

60 Dodge, *supra* note38, at 96–97.

61 *Id.*

ritorially for decades.[62] In overturning the Second Circuit's decision, the Supreme Court highlighted that judicial neglect for the presumption against extraterritoriality did not originate with the Second Circuit panel from *Morrison*.[63] The disregard for the presumption "has been repeated over many decades by various Courts of Appeals in determining the application of the Exchange Act."[64] Lower federal courts have developed a wide array of tests "for divining what Congress would have wanted, complex in formulation and unpredictable in application."[65] *Morrison* captures a genuine concern for the Supreme Court—that U.S. courts would become the go-to forum for foreign plaintiffs seeking redress for injuries abroad.[66]

However, this policy consideration is less of a concern in federal criminal cases against non-U.S. citizens. Generally, lower federal courts have found that domestic concerns have outweighed the rights of non-U.S. citizens charged in U.S. courts under federal law. Although the resurgence in a strict application of the presumption against extraterritoriality has occurred, its application is still determined by subject matter—and remains fragmented. As one international law legal scholar described, due to recent Supreme Court interest in reviving the presumption against extraterritoriality, the doctrine has become a Frankenstein-like monstrosity that consists of "a motley patchwork of eccentric and sometimes contradictory doctrines seemingly stitched together for one, and only one, mission: to deprive plaintiffs the right to sue in U.S. courts for harms suffered abroad."[67] In essence, the tests for whether the presumption applies, whether it be a federal criminal statute or not, are anything but clear.

---

62 *See* 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of extraterritorial application, it has none.").

63 *Id.* at 255–56.

64 *Id.*

65 *Id.*

66 Richard D. Bernstein, James C. Dugan, & Lindsay M. Addison, *Stronger Restrictions on Foreign Plaintiffs in U.S. Courts*, 30 GPSOLO 64, 64 (2013) (quoting Justice Scalia's colorful phrase that U.S. courts must avoid becoming "the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets"); *see also* RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 335 (2016) (reasoning that the presumption against extraterritoriality "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries").

67 Anthony J. Colangelo, *The Frankenstein's Monster of Extraterritoriality Law*, 110 AM. J. INT'L L. UNBOUND 51, 51 (2016) (describing the presumption as a Frankenstein monster-like creature that "lumbers along, blithely squashing precedent, principle, statutory text, and legislative intent—all to heed its abiding and single-minded obsession").

Regarding federal criminal statutory interpretation, circuits have been developing and applying their own tests for decades, generally finding that federal criminal statutes apply abroad. Especially in a post-9/11 world, with the U.S. government focused on international terrorism, the presumption against extraterritoriality seldom poses an issue when prosecuting non-American citizens under U.S. criminal statutes.[68] Principally relying on *Bowman*, lower federal courts have consistently found domestic statutes applicable to actions committed by non-U.S. citizens.[69]

However, *Garcia Sota* represents a vital turning point—the D.C. Circuit rejected *Bowman*'s applicability by considering the Supreme Court's strict adherence to the presumption against extraterritoriality in its landmark decisions like *Morrison*, *Kiobel*, *Nabisco*, and others.[70] In the coming years, the presump-

---

68 *See* United States v. Siddiqui, 699 F.3d 690, 696 (2d Cir. 2012) (affirming convictions for attempted murder of U.S. officers and employees when "mass casualty attack" plans against United States officials were found on Siddiqui's person when she was detained in Ghazni City, Afghanistan); United States v. Yousef, 327 F.3d 56, 87 (2d Cir. 2003) (finding extraterritorial jurisdiction over the crimes of conspiracy to place a bomb on an aircraft); United States v. Bin Laden, 92 F. Supp. 2d 189, 222 (S.D.N.Y. 2000) (finding that a "plausible" case could be made for extraterritorial jurisdiction over the deaths of foreign victims because "universal jurisdiction is increasingly accepted for certain acts of terrorism").

69 *See, e.g.*, *Yousef*, 327 F.3d at 87 ("[T]he Supreme Court as long ago as 1922 in *Bowman*, [decided] that Congress is presumed to intend extraterritorial application of criminal statutes where the nature of the crime does not depend on the locality of the defendants' acts and where restricting the statute to United States territory would severely diminish the statute's effectiveness."); United States v. Leija-Sanchez, 602 F.3d 797, 799 (7th Cir. 2010) ("Whether or not . . . post-1922 decisions are in tension with *Bowman*, we must apply *Bowman* until the Justices themselves overrule it. . . . The Supreme Court has neither overruled *Bowman* nor suggested that the courts of appeals are free to reconsider its conclusion."); United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991) ("The statute under which Felix was charged does not expressly provide for extraterritorial application. However, we will infer congressional intent to provide for extraterritorial jurisdiction for crimes that are not dependent on the locality in which they were committed . . . . For such crimes, limiting jurisdiction to the territorial bounds of the United States would greatly curtail the scope and usefulness of the penal statutes.").

70 *See* United States v. Garcia Sota, 948 F.3d 356, 358 (D.C. Cir. 2020); *see also Morrison*, 561 U.S. at 247; Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 115 (2013) ("This presumption [against extraterritoriality] 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" (quoting E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)); *RJR Nabisco*, 579 U.S. at 336–37; Jesner v. Arab Bank, 138 S. Ct. 1386, 1390 (2018) ("[T]he presumption against extraterritoriality . . . 'guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.'" (quoting *Kiobel*, 569 U.S. at 124)); Nestle USA, Inc. v. Doe, 141 S.Ct 1931, 1937 (2021) (reasoning that if "operational decisions" by corporations

tion against extraterritoriality is likely to become an increasingly important issue in the field of criminal statutory interpretation—an issue ripe for the Supreme Court to resolve.

B. *United States v. Bowman* & Tension with the D.C. Circuit's Application of the Presumption Against Extraterritoriality to a Federal Criminal Statute

In *Bowman*, the Supreme Court held that a federal conspiracy statute could be applied extraterritorially because the U.S. was a stockholder and a victim.[71] In *Bowman*, the Supreme Court considered a steamboat engineer's plot to defraud the U.S. Shipping Board Emergency Fleet Corporation ("U.S. Shipping Board"). According to Bowman and his co-conspirator's indictment,[72] the plot to defraud the U.S. Shipping Board was planned while Bowman was aboard a steamer ship on its way to Rio de Janeiro, Brazil.[73] The act that cemented the conspiracy was a telegram message, along with other actions on the high seas, in the port of Rio de Janeiro, and within the Brazilian city.[74]

Bowman's only defense was that because the conspiracy acts were committed on the high seas or within Brazil's jurisdiction, the U.S. could not prosecute under the federal criminal code.[75] Bowman's objection is consistent with an *American Banana* view of extraterritoriality because the statute Bowman was charged under was silent as to whether it applied to crimes committed abroad.[76] However, in an era of rapidly evolving technology of steamships and telegrams, *Bowman* articulates an inconsistent view of extraterritoriality—different from court opinions that had come before—that sets apart *criminal* statutes from other areas of the law.[77] Accordingly, in the majority opinion, Justice Taft distinguishes *American Banana* from

---

abroad sufficed in an extraterritoriality analysis, "[t]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case" (quoting *Morrison*, 561 U.S. at 266)).

71 United States v. Bowman, 260 U.S. 94, 102–03 (1922).

72 Bowman and three of his co-conspirators were American citizens. Only one of the co-defendants was not an American citizen. *See id.* at 95–96.

73 *Id.* at 95.

74 *Id.* at 96.

75 *Id.* at 96–97.

76 *See id.* at 98.

77 Christopher L. Blakesley & Dan E. Stigall, *The Myopia of* U.S. v. Martinelli*: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 8–9 (2007).

Bowman based on the difference in subject matter— a civil statute versus a criminal statute:

> [Some offenses] are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.[78]

The Supreme Court justified the extraterritorial application of the conspiracy statute by the "right of the Government to defend itself."[79] Moreover, the Supreme Court reasoned that because the statute criminalizing conspiracy does not logically depend on where the criminal activity took place, the criminal statute could be applied extraterritorially.[80] This locality-based analysis has enabled many courts over the decades to determine that a wide array of federal criminal statutes apply to actions committed abroad.[81] Even without express congressional intent, *Bowman* has been cited on numerous occasions by lower federal courts for the proposition that "extraterritorial jurisdiction is grounded, not only in the power of Congress to regulate conduct of U.S. nationals, but also in the power to protect state interests."[82] *Bowman* has been read broadly by lower federal courts to apply to an array of criminal cases such

---

78 *Bowman*, 260 U.S. at 98.

79 *Id.*

80 *Id.*

81 *See, e.g.*, United States v. Hayes, 653 F.2d. 8, 15 (1st Cir. 1981) (using *Bowman* in its reasoning, the First Circuit found that the defendants, captured on the high seas in the Caribbean, could be prosecuted for the thirteen tons of marijuana on their vessel because it was evident that they would distribute the marijuana in the U.S.); United States v. Harvey, 2 F.3d 1318, 1327 (3d Cir. 1993) (holding that the Protection of Children from Sexual Exploitation Act applies extraterritorially despite Congress's silence on the issue because "the dissemination of child pornography 'relies heavily on the use of the mails and other instrumentalities of interstate and foreign commerce'"); United States v. Brown, 549 F.2d 954, 957 (4th Cir. 1977) (finding that the defendant could be indicted under federal law for conspiracy to import heroin from West Germany despite the lack of express extraterritorial jurisdiction and reasoning that "[t]he present statutory sanctions against importation of narcotics so precisely match the proscriptions in *Bowman* that further citation would be superfluous"); United States v. Villanueva, 408 F.3d 193, 197–99 (5th Cir. 2005); United States v. Neil, 312 F.3d. 419, 422 (9th Cir. 2002) ("Under the territorial principle, the United States may assert jurisdiction when acts performed outside of its borders have detrimental effects within the United States.").

82 James Thuo Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335, 344 (2003).

as sex crimes, drug trafficking, and assault—crimes that do not involve the conspiracy or fraud charges considered by the *Bowman* court.[83] Moreover, unlike in *Bowman*, where the Supreme Court expressed deep concern that the victim of the fraud conspiracy was the U.S. Government,[84] lower federal courts have found extraterritoriality for statutes aimed at protecting private entities and citizens.[85]

However, recent Supreme Court jurisprudence demonstrates that the Court has taken a robust presumption against extraterritorial application of federal statutes without clear congressional intent. The future applicability of *Bowman* is uncertain, considering these recent Supreme Court decisions.[86] Under a strict application of extraterritoriality, it is unlikely that the federal government can continue relying on *Bowman* to justify the extraterritorial application of federal criminal statutes that do not have explicit extraterritorial jurisdictional hooks. However, even in light of this clear directive from the Supreme Court, some lower federal courts have resisted robustly applying the presumption against extraterritoriality for criminal statutory interpretation. For example, the Seventh Circuit in *United States v. Leija-Sanchez* rejected the defendant's contention that *Bowman* was no longer good law in light of the Supreme Court's vigorous adherence to the presumption against extraterritoriality.[87] Instead, the Seventh Circuit declared that "[w]hether or not *Aramco* and other post-1922 decisions are in tension with *Bowman*, we must apply *Bowman* until the Justices themselves overrule it."[88]

In *Garcia Sota*, the D.C. Circuit took a different approach from the other circuit courts. It rejected the Government's position that *Bowman* is controlling authority on the presumption against extraterritoriality analysis for federal criminal statutes without an express extraterritorial hook.[89] Instead, the D.C. Circuit reasoned that a broad reading of *Bowman*, as applied in other federal circuits, seemingly "rebut[s] the pre-

---

83 *See* O'Sullivan, *supra* note 19, at 1071–72.

84 *See Bowman*, 260 U.S. at 98.

85 *See, e.g.*, *Harvey*, 2 F.3d at 1327 (reasoning that although a federal child pornography statute did not have an extraterritoriality provision, "Congress enacted its statutory scheme 'as part of its continuing effort to contain the evils caused on American soil by foreign as well as domestic suppliers of [child pornography]'" (quoting United States v. Wright-Barker, 784 F.2d 161, 167 (3d Cir. 1986)).

86 *See, e.g.*, O'Sullivan, *supra* note 19, at 1069-73 .

87 *See* 602 F.3d 797, 799 (7th Cir. 2010).

88 *Id.*

89 *See* United States v. Garcia Sota, 948 F.3d 356, 360 (D.C. Cir. 2020).

sumption against extraterritoriality in broad swaths of the U.S. Code" without engaging in the kind of extraterritorial analysis demanded by the Supreme Court.[90] Although the Supreme Court has not overruled *Bowman*, the D.C. Circuit's reluctance to defer to it demonstrates that the Supreme Court's "clear and unequivocal commitment to the presumption" against extraterritoriality is slowly transforming the way lower federal courts analyze the extraterritorial application of federal criminal statutes.[91]

II
HOW THE D.C. CIRCUIT BROKE AWAY FROM OTHER CIRCUITS ON CRIMINAL STATUTORY EXTRATERRITORIAL ANALYSIS

A. How Circuit Courts Dealt with Jurisdictional Challenges to § 1144.

One of the earliest cases that challenged the extraterritorial application of § 1114 made its way up to the Ninth Circuit in the late 1970s. In the 1978 case of *United States v. Adams*, Adams and his co-defendant Pinkerton robbed and murdered a postal worker named Solat—stealing his uniform, mail truck, pouches of mail and shooting him after he gave over the keys to his mail truck.[92] Adams argued that the indictment for Solat's murder did not assert a federal offense because § 1114 by cross-referencing § 18 U.S.C. § 1111 "limits federal jurisdiction over the murder of postal employees to those occurring in special maritime and territorial jurisdictions of the United States."[93] The Ninth Circuit dismissed Adams's contention that he could not be charged for Solat's murder under § 1114 because the statute had limited domestic jurisdiction as "frivolous."[94] The Ninth Circuit did not perform any statutory analysis of § 1114.[95]

In later decades, the issue of the territorial reach of § 1114 was revisited by other circuit courts. For example, in *United States v. Al Kassar* and *United States v. Benitez*, the Second and Eleventh Circuits also found that § 1114 applied extraterritorially and that a jurisdictional nexus existed because the

90 *Id.*
91 O'Sullivan, *supra* note 19, at 1073.
92 581 F.2d 193, 196 (9th Cir. 1978).
93 *Id.* at 200.
94 *Id.*
95 *See id.*

criminal activities aimed to harm the United States or U.S. citizens.[96]

In *Al Kassar*, a Spanish national was caught up in a DEA sting operation for a multi-national illegal weapons deal and charged under § 1114 for conspiracy to kill a DEA agent.[97] Al Kassar argued that the government lacked the jurisdiction to prosecute.[98] Relying on *Bowman*, the Second Circuit found that the presumption against extraterritoriality "does not apply to criminal statutes."[99] Moreover, the Second Circuit reasoned that although § 1114 has no explicit extraterritoriality provision because the statute centers on U.S. officers and employees in their official capacity, it applies to activities abroad. The court reasoned that a "significant number" of U.S. employees carry out their duties abroad.[100] Accordingly, the Second Circuit adopted the reasoning of its district courts and other circuit courts and held that § 1114 applies extraterritorially.[101]

Additionally, in *Al Kassar*, the court rejected the defendant's argument that applying § 1114 extraterritorially would violate due process.[102] Al Kassar had argued that even if § 1114 applied to his actions, an application of the statute would be "fundamentally unfair" because his conduct was unrelated to U.S. interests and he lacked "fair warning" that his conduct abroad would expose him to federal prosecution in the U.S.[103] In determining the extraterritorial applicability of § 1114, the court relied on a "sufficient nexus" test the Ninth Circuit set out in *United States v. Davis*.[104] In *United States v. Davis*, the Ninth Circuit reasoned that "to apply extraterritorially a federal criminal statute to a defendant consistently with 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."[105] Although

---

96 United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011); United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984).

97 *Al Kassar*, 660 F.3d at 115–16.

98 *Id.* at 117.

99 *Id.* at 118.

100 *Id.*

101 *Id.* (citing the Eleventh Circuit case *United States v. Benitez* and the Southern District of New York case *United States v. Bin Laden* for the proposition that § 1114 applies extraterritorially).

102 *Id.* at 119.

103 *Id.*

104 *Id.* at 118.

105 905 F.2d 245, 248–49 (9th Cir. 1990) (involving a British shipping vessel with over 7,000 tons of marijuana aboard where the ship's captain-defendant was a non-U.S. citizen who raised due process concerns about the extraterritorial application of the statute he was charged under) (internal citation omitted).

the sufficient nexus test in *Davis* tries to address due process concerns over extraterritoriality, there is a valid concern about U.S. authority being exerted outside U.S. territorial boundaries without explicit congressional authority. Judicial opinions, not congressional approval, would establish the constitutional scope of U.S. regulatory power abroad.[106]

In *Al Kassar*, the majority determined that a jurisdictional nexus existed notwithstanding the defendant's citizenship or the location of the undercover operation because the conspiracy threatened the "security or government functions of the United States."[107] So far, lower federal courts have refrained from striking down the extraterritorial application of federal criminal statutes on due process grounds.[108] However, non-U.S. criminal defendants continue to make these due process claims, and lower federal courts lack a uniform test for addressing them.[109]

In *Benitez*, the defendant, a Colombian fugitive, was the target of a DEA drug-related undercover operation in Colombia. The defendant, *inter alia*, shot and wounded two DEA covert operatives.[110] Benitez challenged the court's jurisdiction to try him under § 1114 because he was a Colombian citizen, and the principal actions took place in Colombia.[111] The Eleventh Circuit, relying on the Ninth Circuit's extraterritorial analysis of a criminal statute criminalizing theft of government property,[112] surmised that "attempted murder of DEA agents is exactly the

---

106 Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1323–25 (2014) (finding no coherent test among the lower courts for due process and extraterritoriality and that the law is "fractured" and offers no guidance to actors abroad about when U.S. law will apply to their activities).

107 *Al Kassar*, 660 F.3d at 118.

108 Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L. J. 121, 163 (2007).

109 *Id.* at 164; *see, e.g.*, United States v. Suerte, 291 F.3d 366, 375, 377 (5th Cir. 2002) (rejecting the Ninth Circuit's nexus requirement finding that due process is satisfied if enforcement is not "arbitrary" or "fundamentally unfair"); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) ("We decline to follow *Davis* as we see nothing fundamentally unfair in applying section 1903 exactly as Congress intended—extraterritorially without regard for a nexus between a defendant's conduct and the United States."); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) (rejecting the *Davis* test but using principles of international law to determine if extraterritorial application is "unfair" and violates due process).

110 United States v. Benitez, 741 F.2d 1312, 1313 (11th Cir. 1984).

111 *Id.* at 1316.

112 *See, e.g.*, United States v. Cotten, 471 F.2d 744, 750 (9th Cir. 1973) (using *Bowman* as a starting point for analyzing the extraterritorial application of a theft statute).

type of crime that Congress *must* have intended to apply extraterritorially."[113] Therefore, according to the Eleventh Circuit, § 1114 had extraterritorial application.

The Eighth Circuit has also spoken on the issue of § 1114's applicability in the context of federal agents killed on reservation land. In *United States v. Peltier*, the defendant was charged under § 1114 for shooting and killing two FBI agents on the Pine Ridge Indian Reservation.[114] Peltier argued that his murder sentence for acts committed on an Indian reservation was invalid under § 1114 because it was an unconstitutional exercise of congressional power.[115]

However, the Eighth Circuit rejected Peltier's argument and found that § 1114 was a statute of general applicability, meaning that the site of the crime is irrelevant, and that the statute is applicable in Indian country.[116]

The Eighth Circuit's interpretation of § 1114 adds a layer of complexity as it cuts against tribal jurisdiction and sovereignty. Analyzing the Eighth Circuit's decision in light of the presumption against extraterritoriality, § 1114 applicability would turn on whether Congress explicitly considered whether the statute's jurisdictional language extended to Indian lands.[117] In *Cherokee Nation v. Georgia*, the Supreme Court refused to recognize native tribes as "foreign nations" but defined the relationship as "domestic dependent nations."[118] The "foreign" and "domestic" binary expounded upon in this Marshall-era landmark decision has a more nuanced meaning when considering its implications on the extraterritorial application of criminal statutes and indigenous sovereignty.[119]

---

113 *Benitez*, 741 F.2d at 1317 (emphasis added).

114 446 F.3d 911, 913 (8th Cir. 2006).

115 *Id.* at 914.

116 *Id.*

117 *See, e.g.*, United States v. Kagama, 118 U.S. 375, 378 (1886) (acknowledging that there is no express constitutional provision that allows Congress to regulate criminal activity on Indian lands); *see also* McGirt v. Oklahoma, 140 S. Ct. 2452, 2453 (2020) (holding that for criminal matters, land reserved for the Creek Nation since the 19th century remains Indian country subject to tribal jurisdiction). *But see* Oklahoma v. Castro-Huerta, 142 S.Ct. 2486, 2491 (2022) (reasoning that states have concurrent jurisdiction on Indian lands to prosecute non-Indians for crimes committed against Indians).

118 30 U.S. 1, 17–18 (1831).

119 *Id.* at 14; *see also* Joseph Ezzo, *The Leonard Peltier Case: An Argument in Support of Executive Clemency Based on Norms of International Human Rights*, 38 AM. INDIAN L. REV. 35, 75 (2013) (emphasizing that the Eighth Circuit placed significant emphasis on the fact that the FBI agents were carrying out their "official" duties on the Indian reservation).

In *Garcia Sota*, rather than following in the footsteps of the other circuits, the D.C. Circuit examined § 1114 facially and in the context of its legislative history to determine its extraterritorial application because Congress had remained silent up to that point on the extraterritorial application of § 1114.[120] The D.C. Circuit's approach is straightforward and offers guidance to lower courts and actors abroad on when federal criminal statutes will have extraterritorial application absent a congressional directive.

B. A New Take on the Extraterritorial Application of § 1114—The D.C. Circuit's 2020 Decision in *United States v. Garcia Sota* & the Aftermath

In the D.C. Circuit case *Garcia Sota*, two Mexican cartel members were charged with attacking two U.S. federal officials, wounding one official and killing the other in Mexico.[121] The defendants challenged their convictions under § 1114 by arguing that the statute does not apply extraterritorially.[122] The D.C. Circuit agreed with Garcia Sota and his co-defendant.[123]

At the beginning of its analysis of the extraterritorial application of § 1114, the D.C. Circuit acknowledged that "[i]n recent years the Supreme Court has applied the canon [of the presumption against extraterritoriality] with increased clarity and insistence."[124] Unlike the other circuits who have resolved the issue of the extraterritorial application of a federal criminal statute, the D.C. Circuit engaged in a multi-pronged analysis to determine whether the presumption against extraterritoriality could be displaced. First, the D.C. Circuit, using various sources, looked at whether it was the "affirmative" intention of Congress that the law applies abroad.[125]

First off, the plain language of § 1114—"Protection of Officers and Employees of the United States," read:

---

120 *See* United States v. Garcia Sota, 948 F.3d 356, 358–60 (D.C. Cir. 2020); *see also* Donald J. Mihalek & Richard Frankel, *An ICE Agent Was Killed Overseas, But His Killing Is Not a Crime Under US Law: Analysis*, ABC NEWS (Feb. 21, 2020), https://abcnews.go.com/Politics/ice-agent-killed-overseas-killing-crime-us-law/story?id=69108435 [https://perma.cc/98LR-VFEF] ("The reason for the court's ruling was due to the language of Section 1114, which, according to the panel on the U.S. Circuit court, did not specify extraterritorial jurisdiction for the murder charge, and could not be applied outside the United States.").

121 *Garcia Sota*, 948 F.3d at 357.

122 *Id.*

123 *Id.*

124 *Id.* at 358.

125 *Id.* at 358–60.

> Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished . . . .[126]

Scanning the statute, the words "abroad" or "extraterritorial" are not used, and an on-the-surface reading of § 1114 did not provide a direct extraterritorial jurisdictional hook.[127] As the D.C. Circuit surmised, "[o]n its face, § 1114 does not speak to extraterritorial application one way or the other, thus leaving the presumption against extraterritoriality unrebutted."[128]

However, the D.C. Circuit's extraterritorial analysis did not stop here, and the D.C. Circuit looked at the statutory history of § 1114 to determine if, despite the lack of explicit extraterritorial grant, Congress intended for the statute to apply abroad. The current version of § 1114 appears in the Anti-Terrorism and Death Penalty Act of 1996 ("AEDPA").[129] AEDPA is a body of law that completely overhauled habeas corpus review in capital and non-capital criminal cases.[130] Moreover, in 1996, when Congress adopted and revised AEDPA, they included extraterritorial provisions on nearby statutes, including 18 U.S.C. §§ 1111 and 1116.[131] Congress decided not to include an extraterritoriality provision in § 1114.

Additionally, the significant change Congress made to § 1114 was to eliminate the lengthy, comprehensive list of categories of federal workers that § 1114 protects and replace the list with the generic statement of "any officer or employee."[132] The D.C. Circuit also observed,

---

126 18 U.S.C. § 1114 (2002).

127 *Cf.* United States v. Al Kassar, 582 F. Supp. 2d 488, 497 (S.D.N.Y. 2008) ("[T]his statute, on its face, is clearly aimed at the Government's right to defend itself, and unquestionably prohibits a 'crime against the United States Government.'" (quoting United States v. Bin Laden, 92 F. Supp. 2d 189, 202 (S.D.N.Y. 2000))).

128 *Garcia Sota*, 948 F.3d at 358.

129 *See id.* at 358–59 (citing Pub. L. 104-132, 110 Stat 1214 (1996)).

130 *See* James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 412 (2001) (providing an in-depth overview of the history and impact of AEDPA on capital and non-capital crimes).

131 18 U.S.C. §§ 1111, 1116; *see also Garcia Sota*, 948 F.3d at 358 ('Strengthening the inference from § 1116 against extraterritorial application of §. 1114 is that Congress gave both provisions their current form in [AEDPA]".

132 *Garcia Sota*, 948 F.3d at 359.

> [I]t's far from obvious that the innumerable categories used in the prior version of § 1114 covered a material number of individuals whose work would occur only (or even largely) overseas. Even security officers for the Department of State and Foreign Service perform quite a range of *domestic* tasks, as well as work overseas.[133]

From the generic language of § 1114 and the statute's history, the D.C. Circuit could not determine that the statute unequivocally applied abroad.

The government in *Garcia Sota* first conceded,

> [T]he general rule that if a statute is intended to include offenses 'committed out side of the strict territorial jurisdiction [of 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.'[134]

However, the government argued that *Bowman* is the main source of authority for criminal statutory interpretation. The government argued that *Bowman* applies to any "criminal statutes that protect the United States government from harm."[135] The D.C. Circuit went on to question the government's reliance on *Bowman* in light of the Supreme Court's recent decisions that reinforce the presumption against extraterritoriality in cases where federal statutes do not have an express extraterritorial provision.[136] Moreover, the government also pointed to the Eleventh Circuit's *Benitez* opinion for further evidence that § 1114 applied extraterritorially. However, the D.C. Circuit rejected the argument that because other appellate courts found that § 1114 applied extraterritorially, Congress endorsed the Eleventh Circuit's holding.[137] Generally, congressional silence cannot be taken as an endorsement for extraterritorial application.[138] All in all, the D.C. Circuit found that "[n]either of the two requirements for congressional ratification is met here: Congress did not simply reenact [the statute] without change, nor was the supposed judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it."[139]

---

133 *Id.*
134 *Id.* at 359–60 (quoting United States v. Bowman, 260 U.S. 94, 98 (1922)).
135 *Id.* at 360.
136 *Id.*
137 *Id.*
138 *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010) (noting that "using congressional silence as a justification for judge-made rules violates the traditional principle that silence means no extraterritorial application").
139 *Garcia Sota*, 948 F.3d at 360.

The public reaction to the D.C. Circuit's opinion was swift. Law professors were "surprised" that the D.C. Circuit had broken away from the other circuits on this issue.[140] Media sources denounced the D.C. Circuit's decision, with outlets proclaiming that the ICE agent-victims were deprived of justice.[141] In direct response to *Garcia Sota*, law enforcement unions and other organizations heavily lobbied Congress to reform § 1114 to include an explicit extraterritoriality provision.[142] Congress introduced the Jaime Zapata and Victor Avila Federal Law Enforcement Protection Act describing the actions of the *Garcia Sota* case as "a violent attack" against two law enforcement officers.[143] The Act further reasoned that the Second, Ninth, and Eleventh Circuits interpreted § 1114 correctly to "protect" federal officers and that the D.C. Circuit did not.[144] The Act concludes that, "in light of" the D.C. Circuit's decision, "it has become necessary" for Congress to clarify the intent that § 1114 "applies extraterritorially."[145] In less than a year, both the House of Representatives and the Senate passed the Jaime Zapata and Victor Avila Federal Law Enforcement Protection Act. Shortly thereafter, President Biden signed the Act into law.[146]

---

140 *'Extraterritorial' Factor in the Vacated Murder Convictions*, KRGV NEWS, https://www.krgv.com/videos/extraterritorial-factor-in-the-vacated-murder-convictions/ [https://perma.cc/VK92-DH3Q] (Professor Geoffrey Corn of South Texas College of Law stated, "Personally, I was a little bit surprised. . . . [W]hat [the *Garcia Sota* decision] does is it tells the Department of Justice that if an American official is killed abroad, murdered abroad, you cannot use this statutory provision as a basis to prosecute the individual.") (last visited Nov. 4, 2022).

141 *See* Susy Castillo, *Special Report: Former Federal Agent Ambushed 10 Years Ago Continues Seeking Justice for His Partner's Death—D.C. Court of Appeals Dismissed the Murder Charge*, KTSM NEWS (May 17, 2021), https://www.ktsm.com/local/el-paso-news/special-report-former-federal-agent-ambushed-10-years-ago-continues-seeking-justice-for-his-partners-death/ [https://perma.cc/H3TV-DWD5].

142 *See id.* (Avila, one of the ICE agent victims from the *Garcia Sota* case, stated, "There is a lot of anger. I'm working a lot with the senators, federal law enforcement association. There is a bill right now in the legislation; it's a bipartisan bill that changes the wording of that law.").

143 S. 921, 117th Cong. § 2 (2021).

144 *Id.*

145 *Id.*

146 *See* Eric Katz, *Measure to Close Loophole for Prosecuting Perpetrators of Attacks on Federal Employees Heads to Biden's Desk*, GOV'T EXEC. (Oct. 27, 2021), https://www.govexec.com/workforce/2021/10/measure-close-loophole-prosecuting-perpetrators-attacks-federal-employees-heads-bidens-desk/186414/ [https://perma.cc/359B-9E33].

III
THE SUPREME COURT SHOULD REEVALUATE *UNITED STATES V. BOWMAN* AND APPLY THE PRESUMPTION AGAINST EXTRATERRITORIALITY TO FEDERAL CRIMINAL STATUTES

United States v. Bowman represents an understanding of the relationship between domestic and international law that no longer applies today. The Supreme Court decided *Bowman* when, amongst federal courts, the presumption against extraterritoriality had faded away in favor of an "effects" approach to statutory interpretation.[147] In the middle of the twentieth century, federal courts only considered whether the United States had a significant interest in prohibiting the activity abroad. If they determined that the U.S. had such an interest, the statute applied extraterritorially. This is no longer the situation today. With the Supreme Court's recent resurging interest in reinforcing the presumption against extraterritoriality in its statutory interpretation analysis, any federal court considering the application of a domestic criminal statute abroad should begin its analysis by considering whether this presumption can be rebutted.[148]

Lower federal courts have broadly applied *Bowman* to federal criminal statutory interpretation questions and have sidestepped applying the presumption against extraterritoriality in the process. If the presumption is raised, it is often only superficially dealt with, and the court's analysis of *Bowman* will supersede the presumption against extraterritoriality. Lower federal courts have reasoned and held that federal criminal statutes apply to non-U.S. citizens abroad when the U.S. has the "right to defend itself" and has a significant interest in applying the statute abroad.[149] The statutory analysis in *Bowman* leaves open avenues for significant discretion to lower federal courts and has led to an overreliance by the federal government and by lower courts on this one holding.[150] Almost

---

147 O'Sullivan, *supra* note 19 at 1030. .

148 *See* Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 116–17 (2013).

149 *Id.*; *see also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255–56 (2010).

150 *See, e.g.*, United States v. Ayesh, 702 F.3d 162, 166 (4th Cir. 2012) ("Clearly, as with the statute in *Bowman* . . . , congressional intent to exercise overseas jurisdiction can be inferred from the nature of the offenses criminalized by 18 U.S.C. §§ 208(a) and 641."); United States v. Weingarten, 632 F.3d. 60, 66 (2d Cir. 2011) (doubting that the presumption against extraterritoriality even applies to federal criminal statutes); United States v. Belfast, 611 F.3d 783, 814 (11th Cir. 2010) ("[W]e have upheld extraterritorial application of statutes where the nature of the activities warranted a broad sweep of power." (quoting United

twenty years after *Bowman*, the Supreme Court decided the case of *Skiriotes v. Florida*. In *Skiriotes*, the U.S. citizen-defendant was convicted in Florida for using diving equipment to remove sponges from the Gulf of Mexico.[151] In *Skiriotes*, the Supreme Court reiterated the key facts of *Bowman* and surmised that *Bowman* only applies to "*citizens* of the United States upon the high seas or in a foreign country."[152] Even though the Supreme Court explicitly limited the holding of *Bowman* to *U.S. citizens* and their activities abroad, lower federal courts have ignored *Skiriotes* and continued to apply *Bowman* to the criminal activities of *non-U.S citizens* abroad. Now, a century after *Bowman* was decided, the Supreme Court needs to overrule *Bowman* and demand that federal courts actively apply the presumption against extraterritoriality.

The Supreme Court has iterated time and again that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."[153] The swift actions of Congress in amending § 1114 is a clear example of the democratic process in action and of Congress's exercise of power that is solely within its domain. Congress's reaction to *Garcia Sota* further demonstrates how the presumption against extraterritoriality respects the separation of power among the government branches. Moreover, the presumption against extraterritoriality respects the "seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not

States v. Frank, 599 F.3d 1221, 1230 (11th Cir. 2010)) (internal citation omitted)); United States v. Liang, 224 F.3d 1057, 1060 (9th Cir. 2000) (relying on *Bowman* for the proposition that "the nature of the offense of alien smuggling may dictate extraterritorial application"); United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994) ("Where '[t]he *locus* of the conduct is not relevant to the end sought by the enactment' of the statute, and the statute prohibits conduct that obstructs the functioning of the United States government, it is reasonable to infer congressional intent to reach crimes committed abroad." (quoting United States v. Cotten, 471 F.2d 744, 751 (9th Cir. 1973)); United States v. Harvey, 2 F.3d 1318, 1327 (3d Cir. 1993) (reasoning that although there is no explicit extraterritoriality provision in the Protection of Children Against Sexual Exploitation Act, the act's scope and usefulness would be significantly limited if it did not apply extraterritorially); United States v. Castillo-Felix, 539 F.2d 9, 13 (9th Cir. 1976) ("[T]his court applied the rule of *Bowman* to a conspiracy to smuggle, even though the conspiracy had been formed in Mexico and all the overt acts had taken place in Mexico. The rule announced in *Bowman* is particularly applicable here.").

151 313 U.S. 69, 69–70 (1941). Crucially, the area of water the defendant was diving in and took the aquatic sponges from was under Mexico's jurisdiction. *Id.*

152 *Id.* at 73–74 (emphasis added).

153 Dixon v. United States, 548 U.S. 1, 7 (2006) (quoting Liparota v. United States, 471 U.S. 419, 424 (1985)).

courts should define criminal activity."[154] The D.C. Circuit, by applying the presumption against extraterritoriality to a criminal statute that was silent on the issue, demonstrated respect for the severity of criminal punishments.

Moreover, Congress was emboldened to act swiftly and clarify its position on whether § 1114 applied abroad. In passing the Jaime Zapata and Victor Avila Act, Congress decided that a federal criminal statute had an extraterritorial application. Importantly, it was not the courts, acting through *Bowman*, speculating on Congress's intentions that a statute applies abroad. Although the D.C. Circuit's decision in *Garcia Sota* was met with backlash, it raised an important question—does the judiciary have the necessary competence to decide whether a federal criminal statute applies to non-domestic crimes? There is a strong argument that it does not. As such *Bowman*'s continued relevance needs to be reevaluated.

On statutory matters, Congress has the power to negate a court's decision by enacting new legislation.[155] The presumption against extraterritoriality helps courts avoid passing "judicial-speculation-made-law" and "divining what Congress would have wanted."[156] The presumption avoids the inconsistent, often unclear judicially developed tests for extraterritoriality that have developed in the lower courts.[157] The heavy reliance by lower federal courts on *Bowman* rather than the presumption against extraterritoriality adds to this confusion. The circuit courts often ignore the presumption and simply reiterate the Supreme Court's holding in *Bowman* to reason that a federal criminal statute applies abroad. Such a simple analysis requires little to no consideration of whether Congress *actually* intended for the criminal statute to apply abroad.[158]

As the Supreme Court surmised in *Morrison*, "[r]ather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects."[159] Moreover, the presumption against extraterritoriality acknowledges the limitations of a judiciary that "does not have access to information relating, for example, to the views of foreign governments and

---

154 United States v. Bass, 404 U.S. 336, 348 (1971).

155 Neal Devins, *Congressional Responses to Judicial Decisions*, *in* ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 400, 400 (David. S. Tanenhaus ed., 2008).

156 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 259–61 (2010).

157 *See* United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011).

158 *See* S. 921, 117th Cong. § 2 (2021).

159 *Morrison*, 561 U.S. at 261.

the U.S. strategic and economic interests around the world."[160] Although Congress acted quickly to clarify its position in opposition to the holding in *Garcia Sota*, Congress could have reasonably condemned the other circuits for their overreliance on a single, century-old Supreme Court case to "divine" its intentions.

The problem with *Bowman* and all the judicially enacted federal criminal statutory tests the circuit courts have developed is that all they do is make an educated guess on Congress's position. Guesses that could have just as easily proved to be an erroneous application of Congress's will. The D.C. Circuit applied a nuanced extraterritorial analysis that can easily be replicated across various federal criminal statutes. By applying the presumption against extraterritoriality to § 1114, the D.C. Circuit avoided "divining" what Congress *would have* wished and instead encouraged Congress to unambiguously state what it, in fact, *does* wish.

CONCLUSION

The recent decision by the D.C. Circuit that vigorously applies the presumption against extraterritoriality to a federal criminal statute demonstrates that presumption has a place in the field of criminal statutory interpretation. While the Supreme Court has repeatedly emphasized the importance of strict adherence to the presumption against extraterritoriality, thus far, federal courts have exhibited a distinct reluctance to apply the presumption to federal criminal statutes. The D.C. Circuit's decision recognizes the Supreme Court's adherence to the presumption against extraterritoriality and shows how federal courts can apply the presumption to federal criminal laws in the future. The D.C. Circuit's struggle to reconcile Bowman in its extraterritorial analysis shows that Bowman will continue to pose a major obstacle to coherently applying the presumption when non-U.S. citizen-defendants raise extraterritoriality concerns in federal courts. The aftermath of the D.C. Circuit's decision shows that Congress can and will intervene when it chooses to do so but that, generally, federal courts are ill-equipped to prophesy Congress's intentions abroad.

160 Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 550–51 (1997).