International Criminal Jurisdiction in the Twenty-First Century: Rediscovering *United States v. Bowman*

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Laws Apply at Sea, Supreme Court Rules was the *Washington Post* headline[1] for a story reporting the Supreme Court's November 13, 1922 decision of *United States v. Bowman*.[2] In 1922, America had not yet imagined a globalized world where a local Washington D.C. phone call might be answered in New Delhi and where the notion of Americans making clothes and forging steel was becoming quaint and antiquated.

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1. *Laws Apply at Sea, Supreme Court Rules*, WASH. POST, Nov. 14, 1922, at 5.
2. 260 U.S. 94 (1922).

Yet in the *Bowman* decision, the Court laid the groundwork for a twenty-first century defined by global commerce and crime without borders. Today, the *Bowman* decision receives relatively little attention. When it is cited, it is often misread by lower courts.[3] But as this new century unfolds, *Bowman* is likely to be seen as a central decision in the evolution of international criminal jurisdiction. It is time to shine a new light on *Bowman*—a criminal procedure decision that has long been underrated and misunderstood.

In Part I of this Article, we provide a description of the facts and holding of *United States v. Bowman*. In Part II, we describe the ways in which lower courts have interpreted this decision. We point to various cases citing *Bowman* and show how these courts give exceedingly broad application to the holding—far broader application than the opinion warrants. Finally, in Part III, we discuss the ways in which the courts should read *Bowman* and demonstrate how this more accurate reading of the Court's decision is consistent with the realities of twenty-first century global economies. In doing so, we illustrate how *Bowman* can be a leading case for a sensible international criminal jurisdiction jurisprudence in a global age.

I. THE *BOWMAN* DECISION

Raymond Bowman was the chief engineer of the vessel *Dio*, a ship owned by the United States Shipping Board Emergency Fleet Corporation (the Fleet Corporation) and operated by the National Shipping Corporation.[4] The United States owned all of the stock in the Fleet Corporation.[5] The National Shipping Corporation was to bill the Fleet Corporation for fuel, oil, labor, and material necessary to operate the *Dio*.[6] Bowman was accused of working with three other codefendants to defraud the Fleet Corporation. The indictment stated that these defendants hatched a plan to have the National Shipping Corporation bill the Fleet Corporation for one thousand tons of oil, while only taking delivery of six hundred tons. The four defendants would then divide the excess cash produced by this overbilling.[7]

3. *See infra* notes 55–58 and accompanying text.
4. Brief for the United States at 2, United States v. Bowman, 260 U.S. 94 (1922) (No. 69).
5. *Bowman*, 260 U.S. at 95.
6. Brief for the United States, *supra* note 4, at 2.
7. *Bowman*, 260 U.S. at 95–96.

The United States government charged four defendants, including Raymond H. Bowman, with conspiracy to defraud[8] the "United States Shipping Board Emergency Fleet Corporation, a corporation in which the United States was a stockholder."[9] Three of the defendants, including Bowman, were United States citizens and the fourth was a British subject. The indictment was filed in the Southern District of New York, the district in which the Americans were first brought.[10] The charges in the indictment specified that the acts occurred in several different locations, including on the high seas, at the port of Rio Janeiro, in the city of Rio Janeiro, and in its harbor.[11] One defendant pleaded guilty and was sentenced to one day in custody.[12] Two other defendants were never tried, one having his bail forfeited.[13] The other, a British citizen, was never arrested.[14] Raymond H. Bowman, the remaining defendant, was left to answer the charges levied against him.

Bowman filed a demurrer to the six-count indictment, arguing that the court had no jurisdiction.[15] The lower court sustained the demurrer stating that "[o]rdinarily . . . and prima facie, the criminal laws of the United States are effective only within the territory of the United States."[16] The district court emphasized that congressional language is necessary to extend "the *locus* of the crime to the high seas or beyond the territory of the United States," and Congress did not include such language.[17]

The Supreme Court reversed the lower court's decision and adopted the government's position that extraterritorial jurisdiction was authorized.[18] The Court began its analysis by conceding that, absent explicit language

8. The first three counts of the six count indictment charged conspiracy to defraud. The fourth count was for a fictitious claim, count five for the presentation of that claim, and the final count for "concealment by trick, scheme, and device of a material fact in the presentation of the claim." Brief for the United States, *supra* note 4, at 4.

9. *Id.* at 1.

10. *See Bowman*, 260 U.S. at 96.

11. *Id.*

12. Transcript of Record at 22, *Bowman*, 260 U.S. 94 (No. 69).

13. Brief for the United States, *supra* note 4, at 2.

14. *Bowman*, 260 U.S. at 102.

15. Brief for the United States, *supra* note 4, at 5.

16. United States v. Bowman, 287 F. 588, 592 (S.D.N.Y. 1921), *rev'd*, 260 U.S. 94 (1922).

17. *Id.* at 593 (emphasis added). The lower court stated that "the court and not Congress would be writing the statute, if it gave to it the construction urged by the Government." *Id.*

18. *Bowman*, 260 U.S. at 102–03.

to the contrary, "[c]rimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it."[19] But the Court permitted extraterritorial jurisdiction in *Bowman* because:

> [T]he same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents.[20]

And individuals who commit "fraud upon the government" should be prosecuted irrespective of whether it is "in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States."[21] The Court limited its holding to some degree, emphasizing the importance of Bowman's status as a United States citizen.[22]

The Court thus staked out a position rejecting broad extraterritorial application of criminal law in the absence of express congressional mandate.[23] The distinction, which is apparent from a close reading of this case, is between acts that affect private citizens and those acts targeted directly against the government.[24] Although society may typically view criminal law as a means to regulate conduct that damages public welfare, the facts of *Bowman*—and the Court's narrow analysis of the case—clearly address criminal behavior for which the government is the prime victim.[25] The Court also clearly showed its respect for the rule of comity,[26] which dictates that the United States should not interfere with

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19. *Id.* at 98.
20. *Id.*
21. *Id.* at 102.
22. *See id.* The Court stated that "the three defendants . . . were citizens of the United States, and were certainly subject to such laws as it might pass . . . . The other defendant is a subject of Great Britain . . . . and it will be time enough to consider what, if any, jurisdiction the District Court below has to punish him when he is brought to trial." *Id.* at 102–03.
23. *Id.* at 98–99, 102.
24. *Id.* at 98.
25. *Id.*
26. *See id.* at 102. The Court stated that "[c]learly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance." *Id.*

another country's desire to prosecute alleged criminal conduct occurring within that country's jurisdiction.[27]

This interpretation of *Bowman* fits with later Supreme Court decisions that invoke a presumption against extraterritorial application of criminal statutes unless Congress expresses a contrary intent.[28] Although *Bowman* was not mentioned in the recent Supreme Court decision of *Small v. United States*,[29] which held that the meaning of "convicted in *any* court" did not include foreign courts,[30] the *Small* Court clearly stated that "Congress ordinarily intends its statutes to have domestic, not extraterritorial, application."[31]

In later years, however, the legacy of *Bowman* has not been so clear cut. *Bowman* has been an underappreciated decision—it has been cited fewer than two hundred times in the case law. Where the decision has been cited, courts often used it to support findings that are inconsistent with the analysis of the *Bowman* Court.[32]

II. THE *BOWMAN* LEGACY

In the years since *Bowman*, and particularly in the past forty years, the federal government has vastly expanded its criminal enforcement powers.[33] Congress has adopted a surfeit of new statutes.[34] And prosecutorial offices, including various Department of Justice divisions, United States Attorney's offices, and criminal enforcement divisions in

27. ELLEN S. PODGOR, UNDERSTANDING INTERNATIONAL CRIMINAL LAW 7–8 (2004). For a discussion of the meanings and origins of comity in international law, see generally Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

28. *See, e.g.*, Smith v. United States, 507 U.S. 197 (1993); Blackmer v. United States, 284 U.S. 421 (1932); *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e(f)), *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

29. 544 U.S. 385 (2005).

30. *Id.* at 394 (emphasis added).

31. *Id.* at 388–89.

32. *See, e.g.*, Brulay v. United States, 383 F.2d 345, 350 (9th Cir. 1967) (using *Bowman* to support a finding of extraterritoriality); United States v. Baker, 609 F.2d 134, 136–37 (5th Cir. 1980) (applying the *Bowman* Court's discussion of congressional intent to support a holding of extraterritoriality).

33. TASK FORCE ON THE FEDERALIZATION OF CRIM. LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998) (noting that "[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970").

34. *Id.* at 7–9.

other agencies, have expanded to enforce these laws.[35] One of the most important and wide-ranging aspects of this expansion has been in the area of drug enforcement.[36] Because a large portion of the legal drug traffic starts in, and passes through, other countries, federal drug enforcement agencies have begun to look outside the country in their efforts to prosecute drug crimes.[37] In more recent years, with the rise of the Internet and, more generally, a global economy, enforcement of other economic crimes has pushed beyond the national borders.[38]

Given this dramatic expansion in both the scope and geographic reach of federal prosecutions, it was hardly surprising that federal agencies sought the power to reach defendants outside the country—even in the absence of explicit congressional authorization for such conduct.

In 1967, in *Brulay v. United States,*[39] the Ninth Circuit considered the extraterritorial reach of a conspiracy statute where prosecutors charged the defendant with conspiring to smuggle drugs into the United States. In *Brulay*, the American defendant was arrested in Mexico for conduct that occurred in Mexico.[40] The government introduced no evidence that the conspiracy was formed in the United States and provided no evidence of an overt act in the United States.[41] Summarily dismissing the defendant's challenge, the court rejected the argument that there was any need for express congressional authorization for extraterritorial reach.[42] Instead, the court quoted *Bowman*'s critical language and argued that conspiracy to smuggle drugs into the country was the sort of crime "not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents."[43] The court provided no additional

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35. *Id.* at 14.

36. *See* U.S. Drug Enforcement Administration, DEA Staffing & Budget, http://www.usdoj.gov/dea/agency/staffing.htm (last visited Aug. 24, 2007) (illustrating the staffing increases in the Drug Enforcement Administration over the past thirty-four years).

37. *See* United States v. Larsen, 952 F.2d 1099, 1100 (9th Cir. 1991) (surveying the different circuits that gave extraterritorial effect to a particular drug statute). *See also* EDWARD M. WISE, ELLEN S. PODGOR & ROGER S. CLARK, INTERNATIONAL CRIMINAL LAW 191–94 (2d ed. 2004).

38. *See* EDWARD M. WISE & ELLEN S. PODGOR, INTERNATIONAL CRIMINAL LAW 142–43 (2000).

39. 383 F.2d 345 (9th Cir. 1967).

40. *Id.* at 347.

41. *See id.* at 349–51. Although 18 U.S.C. § 371, the generic conspiracy statute, requires proof of an overt act, drug conspiracy statutes omit this element in the offense, allowing prosecutors to prove a conspiracy without presenting any evidence of an overt act coming from the agreement. *See* United States v. Shabani, 513 U.S. 10, 11 (1994).

42. *Brulay*, 383 F.2d at 350.

43. *Id.* (quoting United States v. Bowman, 260 U.S. 94, 98 (1922)).

analysis and did not explain how a conspiracy to smuggle drugs fit into the category of crimes involving fraud against the United States.

In *United States v. Baker,*[44] the Fifth Circuit followed the Ninth Circuit's logic but offered a more explicit and expansive reading of *Bowman.* In *Baker*, Abraham Baker and James Osborne were convicted of possession with intent to distribute marijuana.[45] The two men had been operating an American flag vessel nine miles off the coast of Florida, which was outside the three-mile territorial jurisdiction of the United States.[46] The question before the Fifth Circuit was whether the federal criminal statutes had extraterritorial application, and the court conceded that the statutes involved in *Baker* were silent on this point.[47] The court turned to *Bowman* to determine whether to infer such extraterritorial reach.[48] The *Bowman* Court started its analysis with a clear awareness that extraterritorial application without express authorization would not be the norm.[49] Remarkably, the *Baker* court began its analysis with the claim that "[a]bsent an express intention on the face of the statutes to do so, the exercise of [extraterritorial] power may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved."[50] The court then quoted extensively from the *Bowman* Court's carefully worded holding.[51] Writing for the Fifth Circuit, Judge Roney explained that the drug laws at issue were part of a comprehensive effort to halt drug abuse in the United States and "the power to control efforts to introduce illicit drugs into the United States from the high seas and foreign nations is a necessary incident to Congress' efforts to eradicate all illegal drug trafficking."[52] Although the court had to concede that the statute was silent as to the extraterritorial application

44. 609 F.2d 134 (5th Cir. 1980).
45. *Id.* at 136. Baker was also convicted of conspiracy. *Id.*
46. *Id.* at 135. The boat was stopped nine miles from the coast, within what are sometimes known as "customs waters" or the "marginal sea." The United States conceded that this area was regarded as outside of the United States—and part of the high seas—for the purpose of criminal jurisdiction. *Id.* at 136.
47. *Id.* at 136.
48. *Id.* at 136–37.
49. The *Bowman* Court stated, "If punishment . . . is to be extended to include those committed outside of the strict territorial jurisdiction, 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." United States v. Bowman, 260 U.S. 94, 98 (1922).
50. *Baker*, 609 F.2d at 136.
51. *Id.* at 136–37.
52. *Id.* at 137.

of the provisions at issue in *Baker*, it pointed to other sections of the law where Congress had affirmatively authorized extraterritorial reach. For instance, the Court referenced 21 U.S.C. § 959, which criminalizes the manufacturing and distribution of a controlled substance outside the United States with the intent of importing it to the United States, to support its position that the exclusion of language providing for express extraterritorial authorization signified Congress's intent to include such broad authorization of power.[53]

Thus, the *Baker* court transformed *Bowman* in three key ways: first, the court inverted the assumption that extraterritorial application of criminal law normally required express authorization; second, the court found such implicit authorization in a situation where Congress clearly demonstrated its ability to explicitly authorize such power (but equally clearly failed to do so with respect to the particular statute at issue); and third, the court joined other courts, such as the *Brulay* court, in extending the number of circumstances in which such authorization could implicitly be found beyond situations where the government itself was a victim to situations where the statute was designed to protect the public at large. This expansion of *Bowman* dramatically changed the meaning of the opinion and was subsequently the basis for other decisions authorizing a broader reach of statutes, even in the absence of express congressional authorization.[54]

The problem with these interpretations of *Bowman*, however, is twofold. First, these interpretations are not faithful to the Supreme Court's explicit holding. Second, they are deeply problematic on a policy level, particularly in an era of globalization where many countries may seek to enforce their respective interests both at home and abroad.

III. *BOWMAN* AND THE "NEW WORLD ORDER"

The Supreme Court handed down the *Bowman* decision in an era very different from today. Still, the Court's carefully crafted decision reflects the same concerns that should animate a modern understanding of the issue of extraterritorial reach. The primary difference between the 1920s and today is that the world has become far more interconnected than ever before. We are living, in the words of President George H.W. Bush, in a "new world order."[55]

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53. *Id.*

54. *See* United States v. Plummer, 221 F.3d 1298, 1305 (11th Cir. 2000) (listing cases that have allowed an extraterritorial application).

55. Address Before a Joint Session of Congress on the Persian Gulf War Crisis and the Federal Budget Deficit, 2 PUB. PAPERS 1218, 1219 (Sept. 11, 1990).

In the past forty years, many courts have inferred broad reach to criminal laws even in the absence of Congressional mandate.[56] There is little doubt that Congress maintains the capacity to create such potent laws. But because the consequences of these provisions are increasingly far reaching—with many countries potentially seeking to extend the reach of their criminal laws and possibly willing to punish America for an extended reach—Congress *should* make these judgments.

The issues are not simple and two policy rationales conflict here. On one hand there is a need to make certain that individuals do not cross borders merely to avoid criminal prosecution in the United States. For example, a *Washington Post* article reporting on the *Bowman* decision stated that the Court upheld the government's position "that unless the ruling of the lower court was set aside the criminal statutes of the United States could be violated with impunity by persons going outside the 3-mile limit."[57] Allowing perpetrators to intentionally exit the borders of this country to commit crimes against individuals here would defeat the prohibitions outlined in the statute.

On the other hand, another policy rationale argues for limits to extraterritorial applications. If the United States begins prosecuting individuals outside its borders because the crime merely "affects" this country,[58] it will be advertising to other countries that they can prosecute United States citizens when the conduct has an effect on their respective country.[59] Taking into account that the crimes in these other countries may not be crimes in the United States or may be subject to our constitutional protections, it becomes apparent that there are severe repercussions in allowing blanket extraterritoriality. Finally, in this globalized and computerized world, the United States citizen who commits the alleged criminal act in violation of the laws of another country may never have left home.[60] The perpetrator's keystroke in the United States,

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56. *See Plummer*, 221 F.3d at 1305 (listing cases that have allowed an extraterritorial application).

57. *Laws Apply at Sea*, *supra* note 1, at 5.

58. This principle is called "objective territoriality." *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911); *see also* Aldens, Inc. v. La Follette, 552 F.2d 745, 751 (7th Cir. 1977).

59. *See generally* Ellen S. Podgor, *Extraterritorial Criminal Jurisdiction: Replacing "Objective Territoriality" With "Defensive Territoriality," in* 28 STUDIES IN LAW, POLITICS & SOCIETY 117 (Austin Sarat & Patricia Ewick eds., 2003) (discussing the repercussions of expansive extraterritorial jurisdiction).

60. Former Attorney General Janet Reno stated that "[a] hacker needs no passport and passes no checkpoints." Janet Reno, U.S. Attorney Gen., Keynote Address at the

expressing speech that the First Amendment protects, may nevertheless be the subject of a prosecution in a country with laws prohibiting such speech.[61] Jurisdiction would be basically limitless if it could be met merely because the World Wide Web allows someone in another country to access via their computer materials that have been placed on the web in this country.

In 2005, the United States Court of Appeals for the Armed Forces—perhaps not surprisingly a tribunal likely to express grave concern regarding the international implications of its decisions—confronted this problematic legacy of *Bowman*. In *United States v. Martinelli*,[62] the court considered the extraterritorial reach of the Child Pornography Prevention Act of 1996. Christopher Martinelli, a member of the United States military, had been charged with violations of the Act that occurred in Darmstadt, Germany.[63] He was accused of possessing, downloading, and emailing pornographic images of children on his computer.[64] The court acknowledged that several courts had read *Bowman* to extend beyond cases where the American government was a victim.[65] The court rejected this interpretation, however, concluding that while the Act was designed to protect children, this community protection was not the sort that the *Bowman* Court considered as a basis for inferring the extraterritorial reach of a criminal statute.[66]

Meeting of the P8 Senior Experts' Group on Transnational Organized Crime (Jan. 21, 1997), *available at* http://www.usdoj.gov/criminal/cybercrime/agfranc.htm. One of the President's working groups repeated this metaphor in its report on cybercrime. PRESIDENT'S WORKING GROUP ON UNLAWFUL CONDUCT ON THE INTERNET, THE ELECTRONIC FRONTIER: THE CHALLENGE OF UNLAWFUL CONDUCT INVOLVING THE USE OF THE INTERNET 21 (2000), *available at* http://www/usdoj.gov/criminal/cybercrime/unlawful.htm.

61. *See German and U.S. Clash Over Efforts to Crack Down on Neo-Nazi Web Sites in the U.S.*, 17 INT'L ENFORCEMENT L. REP. 63, 64 (2001) (discussing controversy between United States and Germany in that Germany wishes to "crack down extraterritorially on Neo-Nazi hate crimes," and United States wishes to maintain individuals' First Amendment rights within United States); *see also* Yahoo!, Inc., v. La Ligue Contre Le Racisme Et L'Antisenitisme, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001) (ruling that Yahoo! was not subject to French laws criminalizing the auctioning of Nazi memorabilia when the conduct was protected by the First Amendment), *cited in* Ellen S. Podgor, *International Computer Fraud: A Paradigm for Limiting National Jurisdiction*, 35 U.C. DAVIS L. REV. 267, 310 n.179 (2002).

62. 62 M.J. 52 (C.A.A.F. 2005).

63. *Id.* at 53.

64. *Id.* at 55.

65. *Id.* at 58.

66. *Id.*

IV. CONCLUSION

Bowman provides a key distinction that few courts recognize today.[67] If the government is the target or the victim of a criminal act, extraterritorial jurisdiction should be permitted. Conversely, if the target or the victim of the crime is beyond the government, then courts should refuse to permit the government to prosecute absent clear congressional language authorizing an extraterritorial application. The government's brief in the *Bowman* case clearly limits its request for relief to this scenario, as the authors of the brief use italics as emphasis in describing crimes as "not against persons and property *but against the sovereignty of the United States and the operations of its Government*."[68]

So why should this case be deemed the most underrated criminal procedure case? Jurisdiction is the most fundamental principle for proceeding with a criminal action. Without the power to investigate, prosecute, and punish activities, there is no criminal matter before the court. There will be no forum to resolve *Miranda*,[69] *Escobedo*,[70] or *Leon*[71] issues if the court never assumes jurisdiction of the case.

The *Bowman* case provides an important paradigm for determining the appropriate geographic boundaries for criminal matters. It also stands at the entry way, the place where the criminal justice process begins. Although many statutes will specify the constitutional basis for jurisdiction, many will omit whether extraterritorial actions are legally permissible, leaving the courts with the task of wrestling with this question. Historically, answering this question may not have been crucial. But when criminal activities move from the seas to the internet highway, jurisdiction may prove to be the most crucial issue that courts will need to resolve.

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67. The misreading of the statute can be traced back to a Fifth Circuit decision, *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980). *See Martinelli*, 62 M.J. at 58 (discussing how the roots of the misreading of the *Bowman* decision emanate from this drug-related case).

68. Brief for the United States, *supra* note 4, at 17.

69. Miranda v. Arizona, 384 U.S. 436 (1966) (creating procedure by which police must apprise criminal suspects of their rights and thereby mitigate interrogation's inherent element of coercion).

70. Escobedo v. Illinois, 378 U.S. 478 (1964) (defining circumstances where a criminal suspect can be in police custody without being under formal arrest).

71. United States v. Leon, 468 U.S. 897 (1984) (creating exception to evidentiary exclusionary rule where police make good-faith attempt to follow constitutionally required procedures).