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CASE COMMENT

TELECOMMUNICATIONS: THE APPLICABILITY OF THE WIRE FRAUD STATUTE TO PROSECUTIONS OF SCHEMES AIMED AT A FOREIGN SOVEREIGN

Pasquantino v. United States, 125 S. Ct. 1766 (2005)

*Joanna A. Wasiluk**

I. FACTS

The defendants, U.S. citizens, smuggled large quantities of liquor from the United States into Canada¹ without paying the required excise taxes.² The U.S. Government alleged that they committed federal wire fraud by using interstate wires³ to effect a “scheme or artifice to defraud” in violation of the wire fraud statute.⁴ Defendants appealed following their conviction in the district court.⁵ They argued that the common law revenue rule,⁶ which bars the courts of one country from enforcing another

* J.D. expected May 2007, University of Florida Levin College of Law; B.A. 2004, Duke University. This Comment is dedicated to my parents, Andrew and Izabela, and to my fiancé, Mike White, for their continued love and support.

1. *Pasquantino v. United States*, 125 S. Ct. 1766, 1770 (2005).

2. *Id.* At that time, Canada’s taxes on imported liquor amounted to double the liquor’s purchase price. *Id.* The defendants would avoid paying the taxes by hiding the liquor in their cars and driving it over the Canadian border without declaring it to the Canadian customs officials. *Id.*

3. *Id.* The defendants, while in New York, used the telephone to order liquor from discount package stores in Maryland. *Id.*

4. The wire fraud statute provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. . . .

18 U.S.C. § 1343 (2005).

5. *Pasquantino*, 125 S. Ct. at 1770.

6. *Id.* at 1775. The common law revenue rule was based on an analogy between foreign revenue laws and foreign penal laws. *Id.* A general rule exists against the enforcement of foreign penal statutes. *Id.* at 1774. It derives from a principle that crimes can only be prosecuted in the country in which they were committed. *Id.* As Chief Justice Marshall explained, “[t]he Courts of

country's tax laws, prevented prosecution of this case because it would require the court to recognize the revenue laws of Canada.⁷ The Fourth Circuit affirmed their convictions⁸ and the Supreme Court of the United States⁹ HELD, that scheme to defraud a foreign government of tax revenue violates the wire fraud statute as the plain terms of the statute criminalize such a scheme and the revenue rule does not bar this prosecution.¹⁰

II. HISTORY

The U.S. Courts of Appeals have disagreed over whether such a scheme to defraud a foreign government of tax revenue can violate the wire fraud statute.¹¹ The main issues facing the courts have been determining the extent of the statute's reach and the breadth of the revenue rule.

The First Circuit Court of Appeals in *United States v. Boots*¹² held that such foreign tax frauds were beyond the reach of the wire fraud statute.¹³ In *Boots*, three defendants were involved in a scheme in which they utilized the telecommunication wires to import tobacco into Canada without paying the required taxes.¹⁴ The First Circuit reversed their convictions for wire fraud.¹⁵ In so ruling, the court looked beyond the plain language of the statute and considered the international implications that a conviction may have.¹⁶ Consistent with the revenue rule, the court reasoned that foreign governments' revenue laws should not be subjected

no country execute the penal laws of another." *Pasquantino*, 125 S. Ct. at 1774 (quoting *The Antelope*, 10 Wheat. 66, 123, 6 L. Ed. 268 (1825)). Courts have treated the revenue rule as a corollary to this principle. *Id.* at 1775.

7. *Id.* at 1770.

8. *Id.* at 1771. The Fourth Circuit panel first agreed with the defendants and reversed their convictions; however, upon a rehearing en banc, the court vacated the panel's decision and affirmed the convictions. *Id.*

9. *Id.*

10. *Pasquantino*, 125 S. Ct. at 1770.

11. *Compare* *United States v. Boots*, 80 F.3d 580 (1996), *with* *United States v. Trapilo*, 130 F.3d 547 (1997).

12. 80 F.3d 580 (1996).

13. *Id.* at 589.

14. *Id.* at 583. The government presented evidence that telephone communications were made to further the scheme. *Id.* at 585.

15. *Id.* at 589.

16. *Id.* at 587.

to intrusive scrutiny by U.S. courts.¹⁷ Rather, because of their potential for stirring up foreign relations issues,¹⁸ the court concluded that matters arousing such international implications are better handled by the executive and legislative branches of government.¹⁹

However, in *United States v. Trapilo*,²⁰ the Second Circuit Court of Appeals expressly rejected the First Circuit's decision in *Boots*.²¹ In *Trapilo*, the defendants plotted to smuggle liquor²² into Canada without paying the required excise taxes.²³ In accordance with *Boots*, the district court granted their motion to dismiss the indictment for wire fraud.²⁴ The government, on appeal, argued that contrary to the reasoning in *Boots*, the statute condemned "any scheme" to defraud that utilized U.S. telecommunications systems, and did not require an inquiry into the validity of the foreign government's tax laws.²⁵ The Second Circuit agreed.²⁶

The *Trapilo* court noted that the plain language of the statute clearly punished "any scheme" to defraud²⁷ and that the statute's language neither expressly nor impliedly precluded a prosecution to defraud a foreign government of tax revenue.²⁸ Relying on the premise that "[w]here there

17. *Boots*, 80 F.3d at 587. The court reasoned that upholding this wire fraud conviction would amount to passing on the validity of Canadian revenue laws. *Id.* Because the object of the scheme was a violation of Canadian tax laws, in order to prove that a scheme to defraud existed, the court would have to examine Canadian law to determine whether a violation was intended and in fact occurred. *Id.* In making such a determination, the court would have to judge the validity of defendants' challenges to these laws or allegations of not having violated them. *Id.*

18. *Id.* at 587. The court reasoned that enforcement of foreign tax frauds is inevitably intertwined with the enforcement of the foreign sovereign's own laws and policies, ones that this country may not necessarily be sympathetic to but ones over which this country has no authority. *Id.*

19. *Id.* at 588. The court explained that although it does not question Canadian laws in particular, the courts are not empowered to make such country-by-country assessments of potential for foreign relations conflicts. *Id.* The criminality of conduct should not be left to prosecutorial discretion, with the expectation that prosecutions based on schemes aimed at hostile countries will not be pursued. *Id.* Rather, the judiciary should abstain from such determinations and leave them to the executive and legislative branches. *Id.*

20. 130 F.3d 547 (1997).

21. *Id.* at 551.

22. *Id.* at 549. The defendants allegedly ordered large amounts of liquor through telephone calls, facsimiles and wire transmissions. *Id.*

23. *Id.*

24. *Id.* at 550.

25. *Trapilo*, 130 F.3d at 551.

26. *Id.*

27. *Id.*

28. *Id.*

is no ambiguity in the words, there is no room for construction,”²⁹ the court declined to engage in discussions of the statute’s potential international implications.³⁰ Further, the Court noted that all the prosecution was required to show was a scheme, an intent to defraud, and the use of wire communications in its furtherance.³¹ It was immaterial what form the scheme would take, what its ultimate purpose or who its victim was, and what law it intended to violate.³² Thus, because the statute’s focus was the misuse of wires rather than the validity of foreign revenue laws, the *Trapilo* court found that an assessment of the validity of Canadian laws was at no point necessary and the revenue rule not implicated.³³

III. INSTANT CASE

In *Pasquantino v. United States*,³⁴ the Supreme Court resolved the conflict between the courts of appeals by holding that a scheme to defraud a foreign government of tax revenue violates the wire fraud statute.³⁵ The Court agreed with the Second Circuit’s reasoning in *Trapilo* that the plain terms of the statute criminalized such conduct,³⁶ and that the common law revenue rule did not bar the prosecution.³⁷ However, over the dissent’s

29. *Id.* “The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words. . . in search of an intention which the words themselves did not suggest.” *Id.* (quoting *United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820)).

30. *Trapilo*, 130 F.3d at 551.

31. *Id.* at 552. *See Durland v. United States*, 161 U.S. 306, 313 (explaining that the wire fraud statute punishes the scheme, not its success). *See also Gregory v. United States*, 253 F.2d 104, 109 (stating that the wire fraud statute only condemns the forming of the scheme to defraud, whatever form it may take, and the use of wire communications in its furtherance). These cases illustrate that both the success of the scheme and the identity of the victim are irrelevant; all that is proscribed is the use of U.S. telecommunications systems to promote a scheme through which one intends to defraud another of property. *Trapilo*, 130 F.3d at 552.

32. *Trapilo*, 130 F.3d at 551.

33. *Id.* at 552.

34. 125 S. Ct. 1766 (2005).

35. *Id.* at 1770.

36. *Id.* at 1771. The Court reasoned that the scheme in question satisfied both of the elements of the wire fraud statute that the defendants disputed in this case: that they engaged in a “scheme to defraud” and that the object of the scheme was “property”. *Id.* First, their plot was a “scheme to defraud” Canada because the defendants routinely brought liquor into Canada while failing to disclose it on customs forms. *Id.* at 1772. Second, the right of Canada to collect taxes constituted “property” within the meaning of the statute because depriving Canada of such a valuable possession resulted in economic injury. *Id.* Thus, the broad language of the statute authorized this prosecution. *Id.* at 1771.

37. *Id.* at 1779.

objection, the Supreme Court stressed that such an application of the wire fraud statute did not give it extraterritorial effect.³⁸

The Court concluded that the revenue rule did not bar this prosecution.³⁹ By examining the early revenue rule cases, the Supreme Court found that the original purpose of the rule was to prohibit the collection of tax obligations of foreign countries.⁴⁰ However, the Court noted that the instant action was just a criminal prosecution designed to punish domestic conduct.⁴¹ The enforcement of foreign revenue laws was simply an incidental by-product and indirect effect,⁴² and the Court found no cases that barred such an action.⁴³ Because the extent to which the revenue rule barred indirect recognition of foreign revenue laws was unsettled at the time the wire fraud statute was enacted,⁴⁴ the Court concluded that Congress could have reasonably thought that the courts would enforce the statute even if doing so would result in incidental recognition of foreign revenue laws.⁴⁵

Additionally, the Supreme Court reasoned that this prosecution did not contravene the purposes behind the revenue rule⁴⁶ as it posed little risk of the main evil that the rule was created to guard against: judicial evaluation of foreign governments' revenue policies.⁴⁷ This action had been brought

38. *Id.* at 1780.

39. *Pasquantino*, 125 S. Ct. at 1774.

40. *Id.* at 1775. The Court found that the first cases implementing the revenue rule prohibited the enforcement of one country's tax liabilities in the courts of another country. *Id.*

41. *Id.*

42. *Id.* at 1776. "An action by a domestic sovereign enforces the sovereign's own penal law. A prohibition on the enforcement of *foreign* penal law does not plainly prevent the Government from enforcing a *domestic* criminal law. Such an extension, to our knowledge, is unprecedented. . . ." *Id.*

43. *Id.* at 1777. The main object in cases defendants cited was to collect money to pay foreign tax claims. *Id.*

44. *Pasquantino*, 125 S. Ct. at 1778. The wire fraud statute was enacted in 1952. *Id.*

45. *Id.*

46. *Id.* at 1779.

47. *Id.* As Judge Hand stated:

[W]hen it concerns the relations between the foreign state and its own citizens. . . To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities.

Id. (quoting *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929)).

by the Executive⁴⁸ to enforce a statute passed by the legislature; thus, although it would require a recognition of foreign laws to determine whether domestic laws had been violated, the Supreme Court decided that these branches must have concluded that the dangers of causing international friction in this instance were low.⁴⁹ In a deferential stance, the Court noted that it did not have the authority to evaluate such foreign policy concerns.⁵⁰

Despite this broad reading of the wire fraud statute, the Supreme Court stressed that such an application did not give it extraterritorial effect; rather, it insisted that only domestic conduct was at issue.⁵¹ The Court reasoned that because “[t]he wire fraud statute punishes [only] the scheme and not its success,”⁵² the offense was completed at the moment the scheme was executed inside the United States.⁵³ Thus, the application of this statute was entirely domestic.⁵⁴

The dissent,⁵⁵ however, characterized the majority’s opinion as applying an “exorbitant scope to the wire fraud statute”⁵⁶ and giving it extraterritorial effect.⁵⁷ The dissent admonished the majority for disregarding the presumption against extraterritoriality in determining the

48. *Id.* at 1779. The Executive is “the sole organ of the federal government in the field of international relations” and has ample authority and competence to manage ‘the relations between the foreign state and its own citizens’ and to avoid ‘embarrass[ing] its neighbor[s].’ *Id.* (citation omitted) (quoting *Moore*, 30 F.2d at 604).

49. *Id.* at 1779. The Court assumed that by choosing to prosecute, the Executive had assessed the impact that such a prosecution would have on U.S.-Canadian relations. *Id.*

50. *Pasquantino*, 125 F.3d at 1779.

51. *Id.* at 1780.

52. *Id.* (quoting *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000)).

53. *Id.*

54. *Id.* at 1781. The Court noted that in any event, this was not a statute in which Congress was concerned with only domestic issues because the language of the statute punishes frauds executed in “interstate or foreign commerce.” See 18 U.S.C. § 1343 (2005).

55. Justice Ginsburg, with whom Justice Breyer joins, and Justice Scalia and Justice Souter join as to Parts II and III. *Pasquantino*, 125 F.3d at 1781.

56. *Id.* at 1782. The dissent noted that the Court has previously recognized that an “incautious reading of the statute could dramatically expand the reach of federal criminal law, [and has] refused to apply the proscription exorbitantly.” *Id.* at 1784. See *McNally v. United States*, 483 U.S. 350, 360 (refusing the extension of the counterpart mail fraud statute to reach corruption in local government); see also *Cleveland v. United States*, 531 U.S. 12, 24-25 (holding that the wire fraud statute does not reach plots to falsify information on state license applications).

57. *Pasquantino*, 125 S. Ct. at 1784 (“Construing § 1343 to encompass violations of foreign revenue laws, the [majority] ignores the absence of anything signaling Congress’s intent to give the statute such an extraordinary extraterritorial effect.”).

scope and interpretation of a statute,⁵⁸ absent anything to signal Congress's contrary intent.⁵⁹ The dissent further noted that this prosecution implicated the revenue rule directly: it reasoned that the only aspect of the defendants' conduct that was criminal in the United States was the purpose to evade Canadian tax laws.⁶⁰ Thus, the effect of the prosecution's charge was that another country's revenue laws had been violated and that the wire fraud statute would be used to enforce such foreign laws.⁶¹ Accordingly, convictions could not have been obtained without proof of the defendants' intent to violate Canadian revenue laws.⁶² The dissent found such a reliance on Canadian laws illustrative of the impropriety of this prosecution.

IV. ANALYSIS

The U.S. Courts of Appeals have struggled over the question of whether the wire fraud statute applies to schemes aimed at defrauding a foreign government of tax revenue.⁶³ At issue has been the significance of the foreign entity and whether its introduction requires a modified reading of the wire fraud statute in order to avoid violating the well-established common law revenue rule.⁶⁴ However, the Supreme Court, rather than addressing this issue, dispelled of it by finding the revenue rule inapplicable to this prosecution and thus the foreign entity of little significance.⁶⁵ Two broad principles shaped the Court's holding.

58. *Id.* at 1785. Unless otherwise indicated, Congress intends its statutes to have domestic, not extraterritorial, application. *Id.*

59. *Id.* The Court explained that Congress has not given any indication of its intent to give this statute extraterritorial application. *Id.* It reasoned that when Congress intends its statutes to have extraterritorial reach, it is capable of conveying such a choice. *Id.*; see 16 U.S.C. § 3372(a)(2)(A) (2005) (prohibiting transportation of wildlife that has been "taken, possessed, transported, or sold in violation of any . . . foreign law"). Thus, congressional silence does not equal Executive or Judicial discretion; rather a presumption against extraterritoriality applies. *Pasquantino*, 125 S. Ct. at 1785.

60. *Pasquantino*, 125 S. Ct. at 1786.

61. *Id.*

62. *Id.* at 1783 (Ginsburg, J. & Breyer, J., dissenting). See *United States v. Pierce*, 244 F.3d 158, 166-168 (2d Cir. 2000) (explaining that if no Canadian duty tax existed, defendants would not have been guilty of wire fraud).

63. See *United States v. Boots*, 80 F.3d 580, 588 (1996); cf. *United States v. Trapilo*, 130 F.3d 547, 551 (1997).

64. *Boots*, 80 F.3d at 588.

65. *Pasquantino*, 125 S.Ct. at 1779.

A. *Protecting U.S.'s Right of Domestic Enforcement*

The holding in the instant case hinges on the Court's determination that this prosecution regulates primarily domestic conduct.⁶⁶ The Supreme Court agreed with *Trapilo* that the heart of the prosecution concerns the misuse of U.S. wires, rather than the validity of Canadian revenue laws.⁶⁷ The Court reasoned that the purpose of the statute was to punish the misuse of U.S. telecommunications systems and that any enforcement of Canadian revenue laws was purely incidental.⁶⁸

The Supreme Court agreed with the dissent and the First Circuit Court of Appeals in *Boots* that the basis for this prosecution was the defendants' "scheme to defraud" Canadian tax law;⁶⁹ however, the Court disagreed with what it perceived to be the implications of this finding. Both the dissent and the First Circuit focused on the fact that proof of the intent to defraud would require judicial interpretations and evaluations of Canadian tax law⁷⁰ and because such an inquiry would violate the revenue rule, they concluded that this prosecution should be barred.⁷¹ However, the Supreme Court sided with the Second Circuit in *Trapilo* and found that although this prosecution would require an incidental recognition of Canadian law, the sole conduct being punished was the intent and the scheme itself, regardless of the likelihood of its success or the identity of the victim.⁷² Thus, since the scheme was concocted wholly within the United States, the application of the statute was entirely domestic rather than extraterritorial, and the revenue rule was never directly implicated.⁷³

66. *Id.* at 1776, 1777, 1780.

67. *Trapilo*, 130 F.3d at 552; *Pasquantino*, 125 S. Ct. at 1777. The Court considered this to be an action that "had as its primary object the deterrence and punishment of fraudulent conduct—a substantial domestic regulatory interest entirely independent of foreign tax enforcement." *Id.*

68. *Pasquantino*, 125 S. Ct. at 1777 ("[T]he link between this prosecution and foreign tax collection is incidental and attenuated at best. . .").

69. *Id.* at 1780.

70. *Id.* at 1783 ("The defendants' convictions for wire fraud therefore resulted from, and could not have been obtained without proof of, their intent to violate Canadian revenue laws."); *United States v. Boots*, 80 F.3d 580, 587 (1996) ("The scheme to defraud at issue—proof of which is essential to conviction—had as its sole object the violation of Canadian revenue laws. To convict, therefore, the district court and this court must determine whether a violation of Canadian tax laws was intended and, to the extent implemented, occurred. In so ruling, our courts would have to pass on defendants' challenges to such laws and any claims not to have violated or intended to violate them.").

71. *Pasquantino*, 125 S. Ct. at 1788; *Boots*, 80 F.3d at 588 (Ginsburg, J., Breyer, J., Scalia, J., & Souter, J., dissenting).

72. *Pasquantino*, 125 S. Ct. at 1780. ("Their offense was complete the moment they executed the scheme inside the United States. . .").

73. *Id.*

B. *Judicial Deference in Foreign Policy Matters*

One of the few issues that the First and Second Circuits agreed on was the principle of judicial non-interference in foreign policy matters.⁷⁴ However, in arguing deference to the legislative and executive branches, the courts came up with opposite conclusions regarding the propriety of this wire fraud prosecution. The *Boots* court found that because this prosecution would require an examination of foreign revenue laws, the executive and legislative foreign policy power would be impaired by the courts' involvement.⁷⁵ In contrast, the *Trapilo* court found that because no ambiguity existed in the legislative language, the court should not search for an intent that the words did not suggest.⁷⁶ Thus, the prosecution should proceed since it simply involved the application of the language as the legislature unambiguously drafted it.⁷⁷

The Supreme Court elevated the contest over the deferentiality to an even higher level. It followed *Trapilo's* reasoning because it refused to apply its own interpretation to what it perceived as seemingly unambiguous language of the legislature.⁷⁸ However, the Supreme Court went a step further. It reasoned that the court's *refusal* to allow such a prosecution would actually frustrate both the legislature and the executive: since the action was based on a statute passed by the legislature and the prosecution was pursued by the executive branch, these branches had

74. *Boots*, 80 F.3d at 587-88 ("Of particular concern is the principle of noninterference by the federal courts in the legislative and executive branches' exercise of their foreign policymaking powers."); *United States v. Trapilo*, 130 F.3d 547, 553 (1997) ("The simple fact that the scheme to defraud involves a foreign sovereign's revenue laws does not draw our inquiry into forbidden waters reserved exclusively to the legislative and the executive branches of our government.").

75. *Boots*, 80 F.3d at 588 ("National policy judgments made pursuant to [the legislative and executive branches' foreign policymaking power] could be undermined if federal courts were to give general effect to wire fraud prosecutions for schemes of this type aimed at violating the revenue laws of any country.").

76. *Trapilo*, 130 F.3d at 551. The court stated:

The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.

Id. (quoting *United States v. Wiltberger*, 18 U.S. 76, 95-96, 5 L. Ed. 37 (1820)).

77. *Id.* at 553 ("Our goal is simply to vindicate the intended purpose of the statute. . .").

78. *Pasquantino*, 125 S. Ct. at 1170 ("[T]he plain terms of § 1343 criminalize such a scheme. . .").

already made their determinations of foreign policy and must have concluded that such a prosecution would not create international friction.⁷⁹ The Supreme Court found that courts have “neither aptitude, facilities nor responsibility” to evaluate foreign policy concerns stemming from the revenue rule and that judicial intervention would simply contravene the legislative and executive purpose.⁸⁰ Thus, following the principle of judicial non-interference in matters of foreign policy, the Supreme Court permitted this wire fraud prosecution.

V. CONCLUSION

The courts’ contradictory reactions to the wire fraud statute in response to the foreign entity element show the uncertainty that exists in the law with regards to the potential extraterritorial application of U.S. statutes. The courts are justifiably reluctant in giving our laws extraterritorial effect; however, as the Supreme Court suggested, these courts are sometimes too willing to attribute such an effect to any action that implicates a foreign sovereign.⁸¹ As the Court demonstrated, a careful scrutiny of the statutory language may reveal that a prosecution that initially appears to have extraterritorial application is actually entirely domestic in character.⁸²

79. *Id.* at 1779.

80. *Id.* (“The greater danger, in fact, would lie in our judging this prosecution barred based on the foreign policy concerns animating the revenue rule, concerns that we have ‘neither aptitude, facilities nor responsibility’ to evaluate.”).

81. *Id.* at 1780.

82. *Id.*