CRIMINAL LAW; EXTRATERRITORIALITY; SECTION 10(b); RELIANCE


Federal Court of Appeals Holds that Morrison v. National Australia Bank and the Presumption Against Extraterritoriality Apply in Criminal Cases

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In an important decision issued late last week, the United States Court of Appeals for the Second Circuit held that Morrison v. National Australia Bank and the powerful rule of statutory construction that Morrison embodies—the presumption against extraterritoriality—apply in criminal prosecutions. United States v. Vilar, No. 10-521-cr (2d Cir. Aug. 30, 2013).

The defendants in Vilar “were prominent investment managers and advisers” who had been criminally convicted of securities fraud under Section 10(b) and Rule 10b-5. They argued on appeal that their clients’ securities transactions were foreign, and that, as a result, Morrison required reversal. In response, relying principally upon the 1922 decision of the Supreme Court in United States v. Bowman, the government sweepingly argued that the

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extraterritoriality canon, and *Morrison*’s domestic-transaction requirement, applied only in civil cases.

The Second Circuit forcefully rejected the government’s position. The court found “no problem concluding”—and, indeed, considered it “clear” and “obvious”—“that *Morrison*’s holding applies equally to criminal actions brought under Section 10(b),” and that “no plausible construction of *Bowman* support[ed]” the government’s view. “To the contrary,” held the court, “*Bowman* stands for quite the opposite” of what the government argued, as the Supreme Court in *Bowman* had stated that Congress’s “‘failure’” “‘to say’” that “[c]rimes against private individuals or their property … include those committed outside of the strict territorial jurisdiction … will negative the purpose of Congress in this regard.’” Only when a criminal prohibition is “‘enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated,’” will the presumption not apply under *Bowman*.

Because Section 10(b) protects private persons and property, the *Vilar* court held it to be “exactly the sort of statutory prohibition [to] which the presumption against extraterritoriality does apply.” The court of appeals also noted that the government’s claim that Section 10(b) applied abroad in criminal but not civil cases “would establish [a] dangerous principle”—“that judges can give the same statutory text different meanings in different cases.” And so the court applied *Morrison*. In doing so, it found sufficient evidence of domestic transactions to sustain the convictions, but remanded the case so that the district court could consider whether, in light of *Morrison*, the foreign transactions could be considered under the sentencing guidelines.

*Vilar*’s application of the extraterritoriality canon in a criminal securities-fraud prosecution carries particular significance in light of the prospect, as we have discussed here and here, that the Dodd-Frank Act fails to overturn *Morrison* in criminal securities cases. But as it also confirms that the extraterritoriality canon applies to most criminal laws, *Vilar* undoubtedly portends more frequent invocation of that canon in future transnationally-focused criminal cases.

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