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United States v. Vilar, No. 10-521-cr (2d Cir. Aug. 30, 2013)

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,² 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

² This memo was originally released September 3, 2013.

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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