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Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases after *Morrison* and *Kiobel*

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Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases after *Morrison* and *Kiobel*

David Keenan and Sabrina P. Shroff*

In two recent decisions, Morrison v. National Australia Bank, 130 S. Ct. 2869 (2010), and Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013), the Supreme Court emphatically reaffirmed the longstanding presumption that federal statutes do not apply outside the territorial United States absent a “clear indication” to the contrary. Although Morrison and Kiobel involved civil suits under section 10(b) of the Securities Exchange Act and the Alien Tort Statute (“ATS”) respectively, this Article contends that the Court’s holdings ought to similarly restrict the extraterritorial application of federal criminal law. That is because Morrison and Kiobel instruct courts on how they should interpret the reach of statutes generally—not just civil ones like section 10(b) and the ATS. Consequently, a host of criminal laws that prosecutors have routinely applied extraterritorially in the past, but whose geographic scope is facially ambiguous, ought to be reinterpreted as reaching domestic conduct only. Such statutes encompass not just securities fraud, but conduct as varied and significant as antitrust violations, racketeering, drug trafficking, mail fraud, and weapons possession.

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INTRODUCTION

In 2010, the Supreme Court decided *Morrison v. National Australia Bank*.¹ Practitioners and academics quickly hailed the decision as a landmark ruling in the Court's securities law,² jurisdictional,³ and statutory interpretation⁴ jurisprudence. *Morrison* applied the

1. 130 S. Ct. 2869 (2010).

2. See, e.g., Joshua L. Boehm, *Private Securities Fraud Litigation After Morrison v. National Australia Bank: Reconsidering a Reliance Based Approach to Extraterritoriality*, 53 HARV. INT'L L.J. 249, 250 (2012) (describing *Morrison* as a "momentous decision" that "upend[ed] decades of federal appeals court precedent in transnational securities law"); Luke Green, *Morrison v. National Australia Bank – The Dawn of a New Age?*, ISS GOVERNANCE: INSIGHT: SECURITIES LITIGATION (June 25, 2010, 5:54 PM), <http://blog.issgovernance.com/slw/2010/06/morrison-v-national-australia-bank-the-dawn-of-a-new-age.html> (calling the decision "ground breaking"); Richard Hans & Anthony D. Gill, *Landmark Morrison Ruling: Supreme Court Rejects Extraterritorial Application of Securities Exchange Act*, DLA PIPER LITIGATION ALERT (June 30, 2010), <http://www.dlapiper.com/landmark-morrison-ruling-supreme-court-rejects-extraterritorial-application-of-securities-exchange-act/> (dubbing *Morrison* a "watershed" in securities litigation).

3. See, e.g., Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1673 (2012) (recognizing *Morrison* as a "landmark" decision); Howard M. Wasserman, *The Demise of Drive-By Jurisdictional Rulings*, 105 NW. U. L. REV. 947, 947 (2011) (describing *Morrison* as one of several "significant constitutional rulings" from the Court's October 2009 term that helped clarify the distinction between jurisdictional and non-jurisdictional rules).

4. See, e.g., William S. Dodge, *Morrison's Effects Test*, 40 SW. U. L. REV. 687, 687 (2011) (characterizing *Morrison* as "the most important decision construing the geographic scope of a statute in almost twenty years").

“longstanding” presumption against extraterritoriality to hold that section 10(b) of the Securities Exchange Act of 1934⁵ does not reach securities transactions that occur outside the territorial United States.⁶ By doing so, the Court—in one fell swoop—overturned decades of lower court precedent that had permitted such suits so long as plaintiffs adequately alleged deceptive conduct that either occurred in, or had substantial effects upon, the United States.⁷ The decision has already had a profound impact on securities-fraud litigation. In several cases, district courts have cited *Morrison* in dismissing civil suits against foreign securities issuers.⁸ As lead counsel for National Australia Bank noted just over a year after *Morrison* was decided, “[plaintiffs] don’t even bother to bring these cases anymore.”⁹

This past term, the Court went one step further. In *Kiobel v. Royal Dutch Petroleum*,¹⁰ it relied on *Morrison* to hold that the Alien Tort Statute (“ATS”)¹¹ does not permit federal courts to recognize a cause of action for torts committed by aliens abroad. *Kiobel* makes clear the

5. 15 U.S.C. § 78j(b) (2012).

6. *Morrison*, 130 S. Ct. at 2877 (“It is a ‘longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))).

7. The so-called “conducts and effects test” was the product of several Second Circuit decisions in the late 1960s and early 70s, the most famous of which is *Leasco Data Processing Equip. Co. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); see also *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 991 (2d Cir. 1975); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206–08 (2d Cir. 1968), *modified on other grounds en banc*, 405 F.2d 215 (2d Cir. 1968). To varying degrees, other circuits embraced the Second Circuit’s approach. See *Morrison*, 130 S. Ct. at 2880 (collecting cases). For blunt criticism of the Court’s departure from this long line of precedent, see Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. U. L. REV. 655, 655 (2011) (“Last term, *Morrison v. National Australia Bank* jettisoned decades of settled law, casting doubt on long-accepted practices of statutory construction and instructing the lower courts to turn a deaf ear to indications of congressional intent any subtler than the proverbial meat axe.”).

8. See, e.g., *In re Infineon Techs. AG Sec. Litig.*, No. 04-cv-04156, 2011 WL 7121006, at *3 (N.D. Cal. Mar. 17, 2011) (rejecting plaintiff’s argument that *Morrison* does not apply to securities that are “dual listed” on foreign and domestic exchanges); *Elliott Assocs. v. Porsche Auto. Holding SE*, 759 F. Supp. 2d 469, 476 (S.D.N.Y. 2010) (holding over-the-counter equity-swap agreements to be “essentially ‘transactions conducted upon foreign exchanges and markets,’ and not ‘domestic transactions’ that merit the protection of § 10(b)” (quoting *Morrison*, 130 S. Ct. at 2882, 2884)); *In re Alstom SA Secs. Litig.*, 741 F. Supp. 2d 469, 471–72 (S.D.N.Y. 2010) (rejecting “dual listed” argument); *Cornwell v. Credit Suisse Grp.*, 729 F. Supp. 2d 620, 622 (S.D.N.Y. 2010) (applying *Morrison* to purchases of foreign securities by American investors).

9. Alison Frankel, *Morrison v. NAB’s 2nd Act: Way Beyond Securities Fraud and RICO*, ON THE CASE: A THOMSON-REUTERS BLOG (Oct. 17, 2011), <http://blogs.reuters.com/alison-frankel/2011/10/17/morrison-v-nabs-2nd-act-way-beyond-securities-fraud-and-rico/>.

10. 133 S. Ct. 1659 (2013).

11. 28 U.S.C. § 1350 (2012).

Court intended *Morrison* to do more than simply define the substantive reach of U.S. securities laws. Although neither party raised the issue below,¹² the Justices ordered post-argument supplemental briefing as to whether the ATS encompasses extraterritorial conduct.¹³ Ultimately, they held that it did not, even though the ATS is merely a jurisdictional statute that “does not directly regulate conduct or afford relief” itself.¹⁴ The Court reasoned that ATS litigation implicated the principles underlying the presumption, particularly the desire to avoid “unwarranted judicial interference in the conduct of foreign policy.”¹⁵

This Article examines an overlooked aspect of the Court’s renewed emphasis on the presumption against extraterritoriality: its potential impact on federal *criminal* law. *Morrison* and *Kiobel* are likely to have far-reaching consequences for how courts interpret the substantive reach of federal criminal statutes. That is because both decisions admonish lower courts on how they should interpret federal statutes generally—not just the ATS and section 10(b). As Justice Scalia succinctly explained in *Morrison*: “When a statute gives no clear indication of an extraterritorial application, it has none.”¹⁶ The *Morrison* Court further instructed, and *Kiobel* reiterated, that judges must “apply the presumption in *all cases*” in order to “preserv[e] a stable background against which Congress can legislate with predictable effects.”¹⁷ Statutes will not be given extraterritorial effect absent a “clear indication” of congressional intent.¹⁸ Consequently, in light of *Morrison* and *Kiobel*, a host of criminal statutes that prosecutors routinely applied extraterritorially in the past, but whose geographic scope is facially ambiguous, ought to be reinterpreted as reaching domestic conduct only. Such statutes encompass not just securities fraud, but conduct as varied and significant as antitrust violations,¹⁹ racketeering,²⁰ drug trafficking,²¹ mail fraud,²² and weapons

12. Brief for Respondents at 53–55, *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 259389, at *53–55.

13. *Kiobel v. Royal Dutch Petrol. Co.*, 132 S. Ct. 1738 (2012) (directing parties to submit supplemental briefing).

14. *Kiobel*, 133 S. Ct. at 1664.

15. *Id.*

16. *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2878 (2010).

17. *Id.* at 2881 (emphasis added).

18. *Kiobel*, 133 S. Ct. at 1665 (quoting *Morrison*, 130 S. Ct. at 2883).

19. See 15 U.S.C. § 1 (2012) (Sherman Antitrust Act).

20. See 18 U.S.C. § 1959 (2012) (RICO). As is true of violations of the Securities Exchange Act of 1934 and the Sherman Antitrust Act, violations of RICO can give rise to criminal and civil liability. Compare *id.* § 1963 (criminal penalties), with *id.* § 1964 (civil penalties).

21. See, e.g., 21 U.S.C. § 841 (2012) (Controlled Substances Act).

22. See, e.g., 18 U.S.C. § 1341 (mail fraud); *id.* § 1343 (wire fraud).

possession.²³

The impact of *Morrison* on criminal cases is already evident. In January 2013, the Ninth Circuit cited *Morrison* in holding that the Racketeer Influenced and Corrupt Organizations Act (“RICO”) does not apply extraterritorially in a criminal proceeding.²⁴ And this past August, the Second Circuit similarly found that a criminal action under section 10(b) must satisfy the same requirements as a civil one under *Morrison*, namely that the underlying securities transaction(s) occur domestically.²⁵ The court explained: “[T]he general rule is that the presumption against extraterritoriality applies to criminal statutes, and section 10(b) is no exception.”²⁶

Notwithstanding these recent decisions, considerable ambiguity remains over whether the presumption ought to apply with equal force to federal criminal statutes writ large. That ambiguity stems from *United States v. Bowman*,²⁷ a 1922 Supreme Court case that seems to support exempting at least some criminal laws from the presumption altogether. Lower courts, both before and after *Morrison*, have routinely cited *Bowman* in rejecting efforts to apply the presumption to federal criminal statutes.²⁸ Indeed, notwithstanding its recent emphatic declaration concerning the presumption’s applicability to section 10(b) criminal prosecutions, the Second Circuit had previously asserted—in two post-*Morrison* cases, no less—that the presumption against extraterritoriality does not apply *at all* to criminal matters.²⁹ Moreover,

23. See, e.g., *id.* § 924(c) (Gun Control Act of 1968).

24. *United States v. Chao Fan Xu*, 706 F.3d 965, 974–75 (9th Cir. 2013).

25. *United States v. Vilar*, Nos. 10-521-cr(L), 10-580-cr(CON), 10-4639-cr(CON), 2013 WL 4608948 (2d Cir. Aug. 30, 2013). Dodd-Frank has since modified the Securities Exchange Act to authorize “extraterritorial jurisdiction” for actions brought by the Securities Exchange Commission (“SEC”) or Department of Justice (“DOJ”). See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). George Conway III, the lawyer who represented the *Morrison* respondents, has argued that Congress’s apparent drafting error (i.e., addressing jurisdiction rather than the substantive reach of the statute) should invalidate efforts to apply the statute extraterritorially. See George T. Conway III, *Extraterritoriality After Dodd-Frank*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 5, 2010, 8:58 AM), <http://blogs.law.harvard.edu/corpgov/2010/08/05/extraterritoriality-after-dodd-frank/>; see also Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195, 207–08 (2011); Andrew Rocks, *Whoops! The Imminent Reconciliation of U.S. Securities Laws with International Comity After Morrison v. National Australia Bank and the Drafting Error in the Dodd-Frank Act*, 56 VILL. L. REV. 163, 188–95 (2011). Regardless of whether one accepts Conway’s argument, it is clear that Dodd-Frank does not apply retroactively to conduct that occurred before its passage. § 4, 124 Stat. at 1390.

26. *Vilar*, 2013 WL 4608948, at *7.

27. 260 U.S. 94 (1922).

28. See *infra* Part I.A.

29. *United States v. Siddiqui*, 699 F.3d 690, 700 (2d Cir. 2012) (“The ordinary presumption

even when courts do apply the presumption, they must confront the further difficulty of identifying a principled basis for differentiating domestic from extraterritorial criminal conduct.

This Article aims to help guide scholars, litigants, and courts as they approach this unsettled area of the law. It proceeds in two Parts. Part I offers both an explanation for lower courts' reluctance to apply the presumption in criminal cases and a critique of their (varied) reasoning for doing so. For instance, Part I.A describes how lower courts have distorted *Bowman*'s holding in approving expansive applications of U.S. law to acts and persons abroad. Part I.B examines the primary justifications for invoking the presumption and explains how they ought to apply with equal force to criminal prosecutions. Part II looks forward to what a more robust application of the presumption in criminal cases would look like in practice. In Parts II.A, II.B, and II.C, we consider three statutes that are likely to receive greater scrutiny in the months ahead. Those statutes include the criminal penalty provisions of section 10(b) and RICO, as well as 18 U.S.C. § 924(c), which penalizes using, carrying, or possessing a firearm during the commission of a drug trafficking offense or crime of violence. As we show, each of these statutes merits reinterpretation in light of the Supreme Court's renewed emphasis on the presumption's role in delimiting the geographic scope of facially ambiguous statutes.

I. AN UNPRINCIPLED DISTINCTION BETWEEN CRIMINAL AND CIVIL LAW

While *Morrison* has provided civil defendants with a powerful tool for dismissing a variety of private lawsuits,³⁰ lower courts have

that laws do not apply extraterritorially has no application to criminal statutes.”); *United States v. Al Kassir*, 660 F.3d 108, 118 (2d Cir. 2011) (“The presumption that ordinary acts of Congress do not apply extraterritorially, does not apply to criminal statutes.” (citation omitted)).

30. See, e.g., *Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 844–46 (9th Cir. 2012) (citing *Morrison* in support of holding that the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 903(a), does not apply extraterritorially); *Cedeno v. Castillo*, 457 Fed. App'x 35, 35 (2d Cir. 2012) (finding, pursuant to *Morrison*, that RICO does not apply extraterritorially in a private civil lawsuit); *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (same, but expressly declining to offer an opinion on whether the statute would reach extraterritorial conduct if enforced by the government); see also *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-cv-345, 2012 WL 2522599, at *4 (S.D. Tex. June 28, 2012), *aff'd*, No. 12-20522, 2013 WL 3742492 (5th Cir. July 17, 2013) (holding that the Dodd-Frank Anti-Retaliation Provision does not apply extraterritorially); *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1347 (S.D. Fla. 2012) (finding that RICO does not apply extraterritorially); *CGC Holding Co., LLC v. Hutchens*, 824 F. Supp. 2d 1193, 1207–10 (D. Colo. 2011) (same); *In re Le-Nature's Inc.*, No. 9-1445, 2011 WL 2112533, at *2 (W.D. Pa. May 26, 2011) (same); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 913 (C.D. Cal. 2011) (same); *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 27–28 (D.D.C. 2011) (same); *European Cmty. v. RJR Nabisco, Inc.*, No. 02-cv-5771, 2011 WL 843957, at *4 (E.D.N.Y. Mar. 8, 2011) (same). But see *Sarei v. Rio Tinto, PLC*, 671 F.3d 736,

generally been reluctant to apply its reasoning to criminal prosecutions.³¹ As we seek to show here, such reluctance is unfaithful to *Morrison*'s holding, unfair to criminal defendants, and unwise as a matter of policy. Nothing in the Court's decision suggests *Morrison*'s logic applies to civil actions only.³² To the contrary, the Court made clear that the presumption applies in "all cases."³³ Moreover, the Court

745 (9th Cir. 2011), *cert. granted, j. vacated*, 133 S. Ct. 1995 (2013) (declining to apply *Morrison* and the presumption against extraterritoriality to the Alien Tort Statute in part because "[t]here is no indication in *Morrison* . . . or elsewhere, that a 'presumption against extraterritoriality' existed and could have been invoked by Congress in 1789").

31. *See, e.g.*, *United States v. Sumeru*, 449 F. App'x 617, 621 (9th Cir. 2011) (rejecting the defendants' *Morrison* claim and distinguishing 15 U.S.C. § 77q(a), which prohibits fraudulent conduct "in the offer and sale of securities," from 15 U.S.C. § 78j(b), which punishes fraud "in connection with the purchase or sale" of securities); *United States v. Belfast*, 611 F.3d 783, 814 (11th Cir. 2010) (rejecting the defendant's claim that *Morrison* prohibited his conviction for weapons possession under 18 U.S.C. § 924(c) during an extraterritorial crime of violence prohibited by the Torture Act); *United States v. Singhal*, 876 F. Supp. 2d 82, 105 (D.D.C. 2012) (rejecting the defendants' argument that, in light of *Morrison*, the mail fraud statute—18 U.S.C. § 1341—cannot be said to reach conduct that occurred in China); *United States v. Campbell*, 798 F. Supp. 2d 293, 303–04 (D.D.C. 2011) (denying an Afghan contractor's *Morrison*-based argument that the bribery statute, 18 U.S.C. § 666(a)(1)(B), does not apply extraterritorially, despite the court's acknowledgement that "[t]he plain language of § 666 contains no direct or explicit grant of extraterritorial application"); *United States v. Carson*, No. SACR 09-00077, 2011 WL 7416975, at *6 (C.D. Cal. Sept. 20, 2011) (concluding that "[e]ven if an extraterritorial analysis [were] implicated" in that case, counts alleging violation of the Travel Act, 18 U.S.C. § 1952(a)(3), were proper because, under *United States v. Bowman*, 260 U.S. 94 (1922), "criminal statutes may apply extraterritorially even without an explicit Congressional statement"); *United States v. Mandell*, No. (S1) 09-cr-0662, 2011 WL 924891, at *5 (S.D.N.Y. Mar. 16, 2011) (rejecting the defendants' motion to dismiss securities fraud charges under 15 U.S.C. § 78j(b) and 78ff, where the alleged fraud involved securities listed on the London Stock Exchange); *see also* *United States v. Weingarten*, 632 F.3d 60, 65–66 (2d Cir. 2011) (applying *Morrison* in finding a "clear and affirmative indication" that Congress intended 18 U.S.C. § 2423(b), which criminalizes travel overseas for the purpose of committing sexual acts with minors, to apply extraterritorially, but further noting that under *Bowman*, "there is reason to doubt that the presumption against extraterritoriality applies to § 2423(b) at all"); *United States v. Ahmed*, No. 10-cr-131, 2012 WL 983545, at *2 (S.D.N.Y. Mar. 22, 2012) (concluding that *Morrison* does not "change th[e] analysis" of whether 18 U.S.C. § 924(c) applies extraterritorially and finding that, because it is an "ancillary statute," it has extraterritorial application whenever the underlying substantive offense does).

32. In a footnote to his nonbinding concurrence, Justice Stevens unconvincingly sought to limit the Court's holding to actions brought by private civil litigants. *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2894 n.12 (2010) (Stevens, J., concurring) ("The Court's opinion does not, however, foreclose the [Securities & Exchange] Commission from bringing enforcement actions in additional circumstances, as no issue concerning the Commission's authority is presented by this case. The Commission's enforcement proceedings not only differ from private § 10(b) actions in numerous potentially relevant respects, but they also pose a lesser threat to international comity."). Justice Scalia's majority opinion did not address Justice Stevens's concurrence directly, but dismissed the comity concern, noting, "[t]he canon . . . or presumption [against extraterritoriality] applies regardless of whether there is a risk of conflict between the American statute and a foreign law." *Id.* at 2877–78 (majority opinion).

33. *Id.* at 2881 (emphasis added).

saw its primary task as rendering a definitive construction of section 10(b)'s text, specifically the words "purchase or sale." This observation is significant because section 10(b) applies with equal force to both civil and criminal securities fraud actions.³⁴ And the Court rejected the Solicitor General's invitation to formulate a test that would exempt criminal actions from the ordinary presumption.³⁵

In fact, there is no compelling justification for a court to give two constructions to a single statute—a domestic one for civil actions, and an extraterritorial one for criminal prosecutions—based solely on the nature of the underlying proceeding. If anything, the rule of lenity suggests criminal defendants ought to receive more generous treatment than their civil counterparts.³⁶ From a policy standpoint, the presumption against extraterritoriality functions as one of the few structural checks against the unbridled exercise of U.S. power. This is so because U.S. courts have repeatedly upheld Congress's constitutional authority to apply its laws extraterritorially,³⁷ while simultaneously limiting the scope of foreign defendants' constitutional rights.³⁸ At a

34. Section 32(a) of the Exchange Act proscribes criminal punishments for anyone who "willfully violates" any provision or rule under the Act, including section 10(b) and Rule 10b-5. 15 U.S.C. § 78ff(a) (2012); 17 C.F.R. § 240.10b-5 (2013). As the Supreme Court has explained in the context of applying the rule of lenity in a civil matter, a statute with civil and criminal applications can only have one authoritative meaning. *See Leocal v. Ashcroft*, 543 U.S. 1, 11–12 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

35. *Morrison*, 130 S. Ct. at 2886; Brief for the United States as Amicus Curiae Supporting Respondents at 14, 16–17, *Morrison*, 130 S. Ct. 2869 (No. 08-1191).

36. *See United States v. Bass*, 404 U.S. 336, 347 (1971) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." (citation omitted)).

37. *See generally* CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 1–7 (2012) (collecting cases); *see also* *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."); *Foley Bros. v. Filardo*, 336 U.S. 281, 284–85 (1949) ("The question before us is not the power of Congress to extend the eight hour law to work performed in foreign countries. Petitioners concede that such power exists. The question is rather whether Congress intended to make the law applicable to such work."); *United States v. Yousef*, 327 F.3d 56, 86 (2d. Cir. 2003) ("It is beyond doubt that, as a general proposition, Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.").

38. *See, e.g.*, *United States v. Balsys*, 524 U.S. 666, 669 (1998) (declining to find a Fifth Amendment right against self-incrimination where the feared prosecution was foreign rather than domestic); *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992) (finding the defendant was not entitled to dismissal or any other constitutional remedy where American law enforcement kidnapped him in Mexico and brought him to the United States to stand trial); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990) (plurality opinion) (holding the Fourth Amendment inapplicable to warrantless searches of foreign nationals outside the territorial United States). In his *United States v. Verdugo-Urquidez* dissent, Justice Brennan underscored the perverse

minimum, Congress should be required to speak clearly when it wishes to criminalize extraterritorial conduct or subject foreign nationals to American laws.

Recent developments suggest lower courts' reluctance to apply *Morrison's* reasoning to criminal statutes may be waning. In August, a Second Circuit panel concluded, in the context of a section 10(b) criminal prosecution, that the presumption against extraterritorially “does apply to criminal statutes, except where the law at issue is aimed at protecting ‘the right of the government to defend itself.’”³⁹ In similar fashion, a Ninth Circuit panel recently applied the presumption to the criminal penalty provisions of RICO.⁴⁰ The court's decision not only recognized *Morrison's* applicability in criminal cases,⁴¹ but also highlighted conflicting interpretations regarding “the ‘focus’ of congressional concern” in enacting RICO.⁴² Prior to the Ninth Circuit's decision, several lower courts had found that Congress's focus in enacting RICO was on criminal enterprises, as opposed to racketeering activities generally.⁴³ Consequently, in order to properly invoke RICO

consequences of exposing foreign nationals to punishment under U.S. laws, on the one hand, while denying them the protections of the U.S. Constitution on the other. 494 U.S. at 282 (Brennan, J., dissenting) (“The Court today creates an antilogy: the Constitution authorizes our Government to enforce our criminal laws abroad, but when Government agents exercise this authority, the Fourth Amendment does not travel with them. This cannot be. At the very least, the Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law.”).

39. *United States v. Vilar*, Nos. 10-521-cr(L), 10-580-cr(CON), 10-4639-cr(CON), 2013 WL 4608948, at *5 (2d Cir. Aug. 30, 2013) (quoting *United States v. Bowman*, 260 U.S. 94, 98 (1922)).

40. *United States v. Chao Fan Xu*, 706 F.3d 965, 978 (9th Cir. 2013).

41. *Id.* at 974–75 (“In the wake of *Morrison*, this circuit has not considered whether RICO applies extraterritorially. . . . Other courts that have addressed the issue have uniformly held that RICO does not apply extraterritorially. . . . Although those cases addressed the civil rather than the criminal RICO statute, they are faithful to *Morrison's* rationale. . . . Therefore, we begin the present analysis with a presumption that RICO does not apply extraterritorially in a civil or criminal context.”); *see also* *United States v. Weingarten*, 632 F.3d 60, 65–66 (2d Cir. 2011) (applying *Morrison* and finding a “clear and affirmative indication” that Congress intended 18 U.S.C. § 2423(b), which criminalizes travel overseas for the purpose of committing sexual acts with minors, to apply extraterritorially, but dismissing one count predicated entirely on defendant's travel *between* foreign states). *But see* *United States v. Siddiqui*, 699 F.3d 690, 700 (2d Cir. 2012) (“The ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes.”); *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (“The presumption that ordinary acts of Congress do not apply extraterritorially, does not apply to criminal statutes.”).

42. *Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869, 2884 (2010). In applying the presumption against extraterritoriality to section 10(b), *Morrison* borrowed this “focus” test from *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 247 (1991) (“Applying the same mode of analysis here, we think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”).

43. *See, e.g., Mitsui O.S.K. Lines, Ltd. v. Seamasster Logistics, Inc.*, 871 F. Supp. 2d 933,

in those courts, prosecutors or civil plaintiffs need to prove the existence of a domestic criminal enterprise. The Ninth Circuit, by contrast, found the statute's focus to be on the pattern of racketeering activity itself.⁴⁴ Under this reading, enforcing RICO against a foreign enterprise is unobjectionable so long as the alleged racketeering activity occurred domestically.⁴⁵

These conflicting interpretations illustrate the difficulty courts sometimes face when applying *Morrison*. But as this Article argues, that difficulty is not a reason to avoid the presumption's application altogether, but rather a reminder of the useful role it plays in incentivizing Congress to speak with greater clarity in drafting federal statutes. The presumption offers an interpretive aid that allows courts to "determine Congress' intent where Congress likely did not consider the matter and where other indicia of intent are in approximate balance."⁴⁶

Before turning to an evaluation of *Morrison*'s and *Kiobel*'s potential impact on a variety of criminal statutes in Part II, this Part first examines why lower courts have heretofore resisted applying the presumption in criminal cases. As we explain, such resistance is both inconsistent with *Morrison*'s and *Kiobel*'s teachings as well as misguided as a matter of logic and policy.

A. *Confronting a Misunderstood Precedent: United States v. Bowman*

If the presumption against extraterritoriality really is the "longstanding" rule of statutory interpretation that *Morrison* and *Kiobel* suggest it is, why have lower courts typically avoided applying it when

938–40 (N.D. Cal. 2012); *Farm Credit Leasing Servs. Corp. v. Krones, Inc.* (*In re Le–Nature's, Inc.*), No. 9-1445, 2011 WL 2112533, at *3 n. 7 (W.D. Pa. May 26, 2011); *In re Toyota*, 785 F. Supp. 2d 883, 914 (C.D. Cal. 2011); *European Cmty. v. RJR Nabisco, Inc.*, No. 02-cv-5771, 2011 WL 84395, at *5 (E.D.N.Y. Mar. 8, 2011); *Cedeno v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010), *aff'd sub nom. Cedeno v. Castillo*, 457 F. App'x 35 (2d Cir. 2012).

44. *Chao Fan Xu*, 706 F.3d at 977 ("[A]n inquiry into the application of RICO to Defendants' conduct is best conducted by focusing on the pattern of Defendants' racketeering activity as opposed to the geographic location of Defendants' enterprise.").

45. *Id.* at 979 ("Defendants' pattern of racketeering activity may have been conceived and planned overseas, but it was executed and perpetuated in the United States. . . . Having determined that RICO's focus is on the pattern of racketeering activity, we conclude that Defendants' criminal plan, which included violation of United States immigration laws while the Defendants were in the United States, falls within the ambit of the statute."). To complicate matters even further, the Second Circuit, while likewise holding that Congress did not intend for RICO to apply extraterritorially, has avoided the focus question altogether by simply declaring that "slim contacts with the United States" are "insufficient to support extraterritorial application." *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010).

46. *Small v. United States*, 544 U.S. 385, 390 (2005).

determining the scope of federal criminal laws?

The answer lies, in part, in an oft-quoted, but frequently mischaracterized, passage of a 1922 Supreme Court case, *United States v. Bowman*.⁴⁷ The defendants in *Bowman* stood accused of attempting to defraud a U.S.-owned corporation on a shipment of oil destined for Rio de Janeiro.⁴⁸ None of the alleged criminal activity took place within the territorial boundaries of the United States and the statute itself was silent as to its extraterritorial effect.⁴⁹ Still, the Court found the defendants' conduct fell within the statute's reach. In so holding, the Court began by acknowledging the general principle that Congress ordinarily legislates with domestic concerns in mind:

Crimes against private individuals or their property . . . must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended outside 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.⁵⁰

This statement was consistent with more than one hundred years of precedent; as early as 1818, the Court had invoked the presumption in holding that the 1790 Crimes Act did not reach a robbery committed by foreign nationals aboard a foreign ship while on the high seas.⁵¹

Where *Bowman* broke new ground, was in holding that certain statutes, like those making it a crime to defraud a U.S.-owned entity, ought to be given extraterritorial effect to avoid undermining Congress's "purpose" in enacting the statute.⁵² The Court held that the ordinary presumption

should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction,

47. 260 U.S. 94 (1922).

48. Significantly, the Court declined to reach the thorny issue of whether foreign national defendants fell within the statute's ambit. *Id.* at 101.

49. The provision at issue, section 35 of the U.S. Criminal Code, read in relevant part:

Whoever shall . . . cause to be presented, for payment or approval, to or by any . . . corporation in which the United States of America is a stockholder, any claim upon or against the government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent . . . shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

Act of Oct. 13, 1918, ch. 194, 40 Stat. 1015; *Bowman*, 260 U.S. at 100 n.1.

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

51. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) ("[Although] 'any person or persons,' are broad enough to comprehend every human being," such "general words must . . . be limited to cases within the jurisdiction of the state.").

52. *Bowman*, 260 U.S. at 97.

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. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others 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.⁵³

The Court did not make clear whether it intended to create a broad exception to the ordinary presumption for certain types of statutes or, alternatively, indicate a narrow set of circumstances under which the presumption could be overcome. That oversight, unfortunately, has caused great confusion for lower courts trying to interpret the decision's meaning.

By its terms, *Bowman* appears to cover only a narrow subset of cases, namely those where the “nature of the offense” implicates the government's right “to defend itself against obstruction, or fraud wherever perpetrated.”⁵⁴ In fact, the *Bowman* Court was quite specific about the kinds of statutes that would permit a court to infer extraterritorial intent. Among those it listed as examples were laws that punished “knowingly certify[ing] a false invoice [while acting as a U.S. consul],” “forging or altering a ship's papers,” “enticing desertions from the naval service,” “bribing a United States officer of the civil, military or naval service,” and “steal[ing] . . . property of the United States . . . to be used for military or naval service.”⁵⁵

All of the aforementioned crimes share two common features. First, they are all directed at the federal government itself. Second, each is likely to occur outside the territorial jurisdiction of the United States.⁵⁶ Accordingly, *Bowman* is properly read as fashioning a statutory interpretation test consisting of two operative conditions, both of which must be satisfied before a court can infer extraterritoriality from “the

53. *Id.* at 98 (emphasis added).

54. *Id.*

55. *Id.* at 99.

56. See Brief for Amicus Curiae the Association of the Bar of the City of New York in Support of Defendants-Appellants at 11, *United States v. Mandell*, No. 12-cr-1967 (2d Cir. 2012), 2012 WL 4336737 (“Consuls, ships, naval service, prizes—all clearly connote the high seas or foreign lands.”).

nature of the offense.”⁵⁷

This is precisely how the Supreme Court characterized *Bowman* in a subsequent decision, *Skiriotes v. Florida*, where it cited the case for the proposition that “a criminal statute dealing with acts that are *directly injurious to the government, and are capable of perpetration without regard to particular locality* is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect.”⁵⁸ Otherwise, as the Court recognized in another case postdating *Bowman*, “criminal statutes of the United States are not by implication given an extraterritorial effect.”⁵⁹ What is more, as the Second Circuit has recognized, the Court’s frequent pronouncements on the presumption in recent years, “none of which mention[] *Bowman*, seem to require that *all* statutes, without exception, be construed to apply within the United States only, unless a contrary intent appears.”⁶⁰

Notwithstanding these precedents, the government has put forward an alternative reading of *Bowman* in several post-*Morrison* criminal cases. It has argued that *Bowman* exempts *all* statutes from the ordinary presumption against extraterritoriality when they are applied to a criminal defendant.⁶¹ Hence, the government would give section 10(b) two distinct meanings—one for civil cases and another for criminal prosecutions. In making a similar argument regarding RICO, government attorneys went so far as to suggest that, under *Bowman*, statutes actually enjoy a presumption *in favor* of extraterritoriality in criminal cases.⁶²

The government’s argument would be remarkable for its audacity were it not for the fact that lower courts routinely misinterpret *Bowman* in a similar fashion.⁶³ In their zeal to affirm the extraterritorial reach of

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

58. 313 U.S. 69, 73–74 (1941) (emphasis added).

59. *United States v. Flores*, 289 U.S. 137, 155 (1933) (citing *Bowman*, 260 U.S. at 98).

60. *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 71 (2d Cir. 1994) (concluding that “*Bowman* should be read narrowly” and that “[r]eading *Bowman* as limited to its facts, only criminal statutes, and perhaps only those relating to the government’s power to prosecute wrongs committed against it, are exempt from the presumption”).

61. Sur-Reply Brief for the United States at 8, *United States v. Vilar*, Nos. 10-521-cr(L), 10-580-cr(CON), 10-4639-cr(CON), 2013 WL 4608948 (2d Cir. 2012), 2012 WL 1799150.

62. Brief of the United States as Amicus Curiae in Support of Limited Rehearing En Banc at 3, *Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010) (No. 07-4553-cv) [hereinafter *United States as Amicus Norex Brief*].

63. See Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Law After Morrison v. National Australia Bank*, 67 N.Y.U. ANN. SURV. AM. L. 137, 165 (2011) (“[C]ourts [of appeals] have repeatedly stretched the substantive reasoning of *Bowman* to apply more and more criminal statutes extraterritorially.”).

criminal prosecutions, lower courts have occasionally cited *Bowman* as reason to exempt criminal statutes from the presumption altogether.⁶⁴ More commonly, courts have invoked *Bowman* to support the extraterritorial application of any law whose “nature” suggests transborder conduct or whose effectiveness could be hindered if confined to the territorial United States.⁶⁵ Thus, even crimes that do not directly victimize U.S. interests or persons have been given extraterritorial effect. Instances where courts have declined to apply a criminal statute extraterritorially, by comparison, have become the exception rather than the rule.⁶⁶ Among the disparate statutes courts have exempted from the territorial presumption are those directed at price-fixing by foreign corporations,⁶⁷ the dissemination of child pornography,⁶⁸ drug trafficking,⁶⁹ firearms possession,⁷⁰ and murder or

64. *United States v. Siddiqui*, 699 F.3d 690, 700–01 (2d Cir. 2012); *United States v. Kassab*, 660 F.3d 108, 118 (2d Cir. 2011).

65. Zachary Clopton argues that *Morrison*’s emphasis on congressional “focus” might actually enable courts to affirm this prior case law expansively interpreting *Bowman*. See Clopton, *supra* note 63, at 139 (2011) (“[T]he Supreme Court’s decision in *Morrison*, which seemingly narrowed the situations to which U.S. law applies, actually permits a new approach that the Supreme Court could follow in affirming much of the criminal law trend.”).

66. We have only been able to locate five cases where the presumption served to defeat the government’s attempted extraterritorial application of a federal criminal statute. See, e.g., *United States v. Lopez-Vanegas*, 493 F.3d 1305, 1313 (11th Cir. 2007) (holding that 21 U.S.C. §§ 841(a)(1) and 846, which make it unlawful for any person to conspire to possess a controlled substance with the intent to distribute, do not apply extraterritorially); *United States v. Gatlin*, 216 F.3d 207, 210–11 (2d Cir. 2000) (determining defendant could not be prosecuted for sexual assault on a German military base because courts must presume jurisdictional statutes have no extraterritorial effect); *United States v. Mitchell*, 553 F.2d 996, 1005 (5th Cir. 1977) (finding against the extraterritorial application of the Marine Mammal Protection Act of 1972); *United States v. Reeves*, 62 M.J. 88, 92 (C.A.A.F. 2005) (concluding that the Child Pornography Prevention Act of 1996 does not apply extraterritorially); *United States v. Martinelli*, 62 M.J. 52, 59 (C.A.A.F. 2005) (same).

67. *United States v. Nippon Paper Indus.*, 109 F.3d 1, 9 (1st Cir. 1997) (holding that the criminal provisions of the Sherman Antitrust Act, like their civil counterparts, apply to wholly extraterritorial conduct).

68. See, e.g., *United States v. Frank*, 599 F.3d 1221, 1231 (11th Cir. 2010) (“[E]xtraterritorial application is supported by the nature of § 2251A and Congress’s other efforts to combat child pornography.”); *United States v. Harvey*, 2 F.3d 1318, 1327 (3d Cir. 1993) (“[T]o deny [extraterritorial application of the Act] would be greatly to curtail the scope and usefulness of the statute[s].” We can think of few more important efforts than eradicating sexual exploitation of children.” (quoting *United States v. Bowman*, 260 U.S. 94, 98 (1922))); *United States v. Thomas*, 893 F.2d 1066, 1068–69 (9th Cir. 1990) (“Congress has created a comprehensive statutory scheme to eradicate sexual exploitation of children. . . . Punishing the creation of child pornography outside the United States that is actually, is intended to be, or may reasonably be expected to be transported in interstate or foreign commerce is an important enforcement tool.”).

69. For instance, every circuit agrees that 21 U.S.C. § 841(a)(1), which makes it a crime to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance,” reaches at least some extraterritorial conduct. Interestingly, courts have offered different justifications for *why* § 841(a)(1) applies extraterritorially. See,

other violent acts committed to further a racketeering enterprise.⁷¹ The Eleventh Circuit has aptly summarized the prevailing attitude of most courts: “On authority of *Bowman*, courts in this Circuit and elsewhere have *routinely inferred* congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm.”⁷² Thus, in the criminal context, the presumption against extraterritorially has been flipped on its head.

e.g., *United States v. Larsen*, 952 F.2d 1099, 1100–01 (9th Cir. 1991) (finding extraterritorial application appropriate because the statute “comports with the reasoning behind the Supreme Court’s *Bowman* decision . . . [and] “[i]t would be going too far to say that because Congress does not fix any *locus* it intended to exclude the high seas in respect of this crime” (second alteration in original) (internal quotation marks omitted)); *United States v. Wright-Barker*, 784 F.2d 161, 167 (3d Cir. 1986) (reasoning that “Congress undoubtedly intended to prohibit conspiracies to import controlled substances . . . as part of its continuing effort to contain the evils caused on American soil by foreign as well as domestic suppliers of illegal narcotics” and concluding that “[t]o deny such use of the criminal provisions ‘would be greatly to curtail the scope and usefulness of the statute[s]’” (quoting *Bowman*, 260 U.S. at 98)); *United States v. Orozco-Prada*, 732 F.2d 1076, 1088 (2d Cir. 1984) (“The intent to cause effects within the United States also makes it reasonable to apply to persons outside United States territory a statute which is not expressly extraterritorial in scope.” (citation omitted)); *United States v. Baker*, 609 F.2d 134, 137 (5th Cir. 1980) (upholding the extraterritorial application of the statute to defendants accused of possessing marijuana bound for the United States because “[t]he 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”); *United States v. Arra*, 630 F.2d 836, 840 (1st Cir. 1980) (omitting mention of the presumption but affirming the conviction because “[a] sovereign may exercise jurisdiction over acts done outside its geographical jurisdiction which are intended to produce detrimental effects within it”). *But see* *United States v. Lopez-Vanegas*, 493 F.3d 1305, 1313 (11th Cir. 2007) (“[W]here, as here, the object of the conspiracy was to possess controlled substances outside the United States with the intent to distribute outside the United States, there is no violation of § 841(a)(1)”); *accord* *United States v. Hayes*, 653 F.2d 8, 15 (1st Cir. 1981); *United States v. Gould*, 13 M.J. 734, 738 (A.C.M.R. 1982).

70. *See, e.g.*, *United States v. Belfast*, 611 F.3d 783, 814–15 (11th Cir. 2010) (applying *Bowman* to illegal firearm possession); *United States v. Ahmed*, 10-Cr-131 (PKC), 2012 WL 983545, at *1–2 (S.D.N.Y. Mar. 22, 2012) (allowing § 924(c), which prohibits illegal firearm possession, to have extraterritorial application); *United States v. Mardirossian*, 818 F. Supp. 2d 775, 777 (S.D.N.Y. 2011) (same).

71. *United States v. Leija-Sanchez*, 602 F.3d 797, 802 (7th Cir. 2010); *United States v. Vasquez-Velasco*, 15 F.3d 833, 841 (9th Cir. 1994).

72. *United States v. Plummer*, 221 F.3d 1298, 1304–05 (11th Cir. 2000) (emphasis added). *Plummer* reversed a district court’s holding that 18 U.S.C. § 545, which makes smuggling a crime punishable by up to twenty years in prison, did not apply to a defendant captured with thousands of Cuban cigars outside the territorial waters of the United States. *Id.* at 1305 (“Although the completed crime of smuggling does require some conduct within U.S. territory, smuggling is quintessentially an international crime, and the acts constituting an attempt to smuggle are not ‘logically dependent on their locality.’” (citing *Bowman*, 260 U.S. at 98)); *see also* *Brulay v. United States*, 383 F.2d 345, 350 (9th Cir. 1967) (“Since smuggling by its very nature involves foreign countries, and since the accomplishment of the crime always requires some action in a foreign country, we have no difficulty inferring that Congress did intend that the provisions of 18 U.S.C. § 545 should extend to foreign countries at least as to citizens of the United States”).

The tendency of courts to discern the extraterritorial reach of criminal statutes by asking whether the underlying conduct they seek to prohibit causes domestic harm is remarkably similar to the “conduct-and-effects test” that the Supreme Court recently repudiated in *Morrison*. In *Morrison*, foreign plaintiffs attempted to sue predominantly foreign defendants under section 10(b) of the Securities Exchange Act for making false and misleading statements in connection with foreign securities transactions involving an Australian bank.⁷³ Applying long-settled precedent, the Second Circuit held that it lacked jurisdiction over the case because plaintiffs failed to demonstrate either that the wrongful conduct had occurred in the United States or that it had substantial effects on the United States or its citizens.⁷⁴

While reaching the same outcome, the Supreme Court faulted the Second Circuit’s reasoning on two grounds. First, the question of extraterritoriality should be properly conceived of as a merits question rather than a jurisdictional one. In other words, “to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits,”⁷⁵ not whether Congress has empowered U.S. courts to hear the underlying claim. Second, the Court chided the Second Circuit for having “excised the presumption against extraterritoriality from the jurisprudence of § 10(b)” by replacing it with a test that asked “whether it would be reasonable . . . to apply the statute to a given situation.”⁷⁶ Such a test, the Court commented, was a judicial invention that lacked a “textual or even extratextual basis.”⁷⁷ Instead, courts should “apply the presumption in all cases” in order to “preserv[e] a stable background against which Congress can legislate with predictable effects.”⁷⁸

To be sure, *Morrison* involved the interpretation of a civil statute. But there is little reason to think its logic does not apply with equal force to criminal ones. Indeed, as this Article shows, there is no compelling reason for applying the presumption against extraterritorially differently based on whether a statute (or its application) is criminal or civil in nature. Whatever one thinks of its validity, the presumption represents a general impression of how Congress ordinarily enacts laws as well as a prudential preference that it make its intentions explicit when it wishes to apply those laws abroad.

73. *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2876 (2010).

74. *Morrison v. Nat’l Austl. Bank*, 547 F.3d 167, 176 (2d Cir. 2008), *aff’d on other grounds*, 130 S. Ct. 2869 (2010).

75. *Morrison*, 130 S. Ct. at 2877.

76. *Id.* at 2878–79.

77. *Id.* at 2879.

78. *Id.* at 2881.

In both the criminal and civil contexts, Congress is well aware of how to give extraterritorial effect to its statutes. When it fails to do so, courts ought to assume that the law applies to domestic conduct only.⁷⁹ The question then becomes one of degree, namely whether a defendant's domestic conduct, if any, rises to a level sufficient to trigger liability under the charged offense.

B. Understanding the Purposes of the Presumption in Civil and Criminal Cases

This Section will demonstrate that the four values commonly cited in support of the presumption apply with equal force to criminal statutes.⁸⁰ The weight given to these values by the Court has varied over time, leading some commentators to question the presumption's utility as a tool of statutory interpretation. While we acknowledge the legitimacy of some of these criticisms, our primary concern is to show that, so long as the presumption exists, there can be no valid reason for restricting its application to civil statutes alone.

For starters, the *Morrison* Court noted that the presumption rests on the general observation that "Congress ordinarily legislates with respect to domestic, not foreign matters."⁸¹ Although one can question the accuracy of that observation given our increasingly globalized world,⁸² there is little reason (empirical or otherwise) to think Congress is more likely to believe it is legislating globally when addressing criminal, as opposed to civil, concerns. Moreover, as the U.S. Code amply demonstrates, Congress knows how to give extraterritorial effect to its statutes when it wants to.⁸³

79. Here, we take issue with an idea put forward by Clopton, *supra* note 63, at 187 (proposing that courts, in interpreting criminal statutes, could "apply[] *Chevron*-type deference to the executive branch in foreign affairs").

80. For a general discussion of the history behind this "long-standing" presumption, see William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 115–20 (1998).

81. *Morrison*, 130 S. Ct. at 2877 (citing *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

82. See, e.g., Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 660 (1990) (arguing the presumption "is no longer valid; Congress has expanded its regulatory interests to meet growing transnational markets and problems. To enforce a strict territorial result in extraterritorial cases is to ignore the more likely contemporary intent of Congress"); James E. Ward, "Is That Your Final Answer?" *The Patchwork Jurisprudence Surrounding the Presumption Against Extraterritoriality*, 70 U. CIN. L. REV. 715, 717 (2002) (arguing "that the premises supporting the existence of the presumption are no longer valid, and the doctrine should therefore be reversed to support a presumption in favor of extraterritoriality").

83. There are dozens, if not hundreds, of examples in the U.S. Code. See, e.g., 18 U.S.C. § 2339B(d) (2012) (material support for terrorism) (entitled "Extraterritorial Jurisdiction" and describing conditions where its exercise is authorized); *id.* § 3271(a) (sex trafficking) ("Whoever,

The *Morrison* Court's second rationale for the presumption—"preserving a stable background against which Congress can legislate with predictable effects"—likewise draws no distinction between a law's civil and criminal application.⁸⁴ Professor William Eskridge has analogized this justification to "driving a car on the right-hand side of the road," explaining that "[i]t is not so important to choose the best convention as it is to choose one convention and stick to it."⁸⁵ If the value of the presumption lies in ensuring predictability, surely courts ought to apply the rule uniformly to all statutes rather than "guess anew in each case" by engaging in what *Morrison* derisively termed "judicial-speculation-made-law."⁸⁶

A third consideration, largely dismissed as irrelevant by the *Morrison* majority⁸⁷ but featured prominently in Justice Roberts's *Kiobel* opinion,⁸⁸ justifies the presumption as a prudential doctrine that helps prevent embarrassing or dangerous conflicts with foreign laws and foreign sovereigns. In this vein, as Justice Rehnquist noted in *EEOC v.*

while employed by or accompanying the Federal Government outside the United States, engages in conduct outside the United States that would constitute an offense under chapter 77 or 117 of this title if the conduct had been engaged in within the United States or within the special maritime and territorial jurisdiction of the United States shall be punished as provided for that offense."); 21 U.S.C. § 960a(b)(5) (2012) (illicit drug import and export) ("There is jurisdiction over an offense under this section if . . . (5) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States.").

84. *Morrison*, 130 S. Ct. at 2881.

85. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 277 (1994). Eskridge is critical of the Court's decision in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), which applied the presumption to invalidate an American-born plaintiff's Title VII suit alleging discrimination by Aramco in Saudi Arabia. For the presumption to be valid, Eskridge explains, the interpretive regime must remain both transparent and fixed. But, he argues that a congressional observer at the time of Title VII's passage would not have realized that the presumption was good law, much less that it required something close to a clear statement by Congress to overcome. *Id.* at 281–85.

86. *Morrison*, 130 S. Ct. at 2881.

87. *Id.* at 2877–78 ("The canon or presumption [against extraterritoriality] applies regardless of whether there is a risk of conflict between the American statute and a foreign law.").

88. *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1664 (2013) ("The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."); *see also* *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (noting that the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord"); *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 19 (1963) (refusing to construe the National Labor Relations Act as including foreign flagged vessels within its coverage because doing so "would inevitably lead to embarrassment in foreign affairs"); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) ("For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.").

Arabian American Oil Co., the presumption serves to “protect against unintended clashes between our laws and those of other nations which could result in international discord.”⁸⁹ Of course, few issues are more politically sensitive than a nation’s claimed authority to criminally punish the citizens of a foreign sovereign for acts committed abroad.

The recent prosecution of Viktor Bout offers a colorful illustration. Bout, a Russian arms dealer nicknamed the “merchant of death,” was arrested in Thailand pursuant to an American sting operation in which Drug Enforcement Administration (“DEA”) agents portrayed themselves as members of the Colombian terrorist group Fuerzas Armadas Revolucionarias de Colombia (“FARC”).⁹⁰ Bout’s contested extradition and subsequent conviction prompted a stern rebuke from the Russian foreign ministry, which accused the American justice system of fulfilling a “political order” and warned of possible harm to U.S.-Russian relations.⁹¹ Russia’s reaction to Bout’s prosecution reveals the complexity of applying the presumption in a criminal context. Matters of foreign policy and decisions concerning whom to prosecute are ordinarily entrusted to the Executive’s exclusive discretion. Such deference, however, is constitutionally appropriate only where the Executive’s power is exclusive or its power to prosecute is clear. Courts, by invoking the presumption only where Congress has not spoken clearly concerning a statute’s geographic scope, can restrain executive action in a manner that is consistent with their limited role in our democratic system of government.

Relatedly, the presumption is sometimes envisioned as serving broader structural concerns that affirm Congress’s role in the lawmaking process and limit activist judicial interpretations. As Professor Curtis Bradley has explained in evaluating the basis for the presumption in patent cases, “[T]he determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary.”⁹² In

89. *Arabian Am. Oil Co.*, 499 U.S. at 248.

90. U.S. officials brought a tremendous degree of political pressure to bear on their Thai counterparts in order to secure Bout’s extradition. Indeed, the battle over his extradition constituted a sort of proxy war between the United States and Russia. See Johnny Dwyer, *Wikileaks: How the U.S. Helped Bring in a ‘Merchant of Death,’* TIME, Dec. 3, 2010, available at <http://www.time.com/time/world/article/0,8599,2034760,00.html>.

91. Michael Schwartz, *Russia Denounces U.S. Sentencing of Arms Dealer*, N.Y. TIMES, Apr. 6, 2012, http://www.nytimes.com/2012/04/07/world/europe/russia-denounces-us-sentencing-of-arms-dealer.html?_r=0.

92. Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 516 (1997).

addition, the executive branch may seek to apply certain statutes in a manner that Congress never intended to authorize.⁹³ Such concerns are amplified in the criminal setting because prosecutors, as opposed to private litigants, purport to speak on behalf of the U.S. government.

One significant counterargument for refraining from applying the presumption in criminal and/or regulatory matters merits consideration.⁹⁴ That argument embodies a functionalist concern with the different incentives that motivate civil litigants and government officials. In its most basic form, the argument would proceed as follows: absent *Morrison's* and *Kiobel's* holdings, U.S. courts would face an avalanche of nuisance suits directed at foreign corporations.⁹⁵ As a consequence, those corporations would spend substantial sums to settle or otherwise avoid liability by circumventing personal jurisdiction or conduct-and-effects hooks to the United States.⁹⁶ Actions initiated by the Securities and Exchange Commission ("SEC") or the Department of Justice ("DOJ") are inherently different, according to the argument's logic. Unlike civil plaintiffs, U.S. Attorneys and government regulators can be counted on to exercise discretion before initiating a prosecution.⁹⁷ Moreover, courts may reasonably rely on the expectation

93. One example, though perhaps an imperfect one, is the EEOC's effort to apply the provisions of Title VII of the Civil Rights Act abroad. In *EEOC v. Arabian Am. Oil Co.*, the agency argued that Congress, in passing Title VII, intended for its provisions to cover Americans employed by American corporations outside the United States. 499 U.S. at 248. But the Court was unable to find any "affirmative evidence" that Congress intended for the statute to apply in such a manner and further noted that "Congress' awareness of the need to make [such a showing] is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute." *Id.* at 258. Some scholars have criticized the Court's interpretation on the grounds that "there was ample legislative and implied textual evidence of congressional extraterritorial intent." Jonathan Turley, *Dualistic Values in the Age of International Legispudence*, 44 HASTINGS L.J. 185, 221 (1993). But even if such criticisms are true, the underlying rationale of the opinion survives. In the face of perceived ambiguity, there is a salutary value to having Congress make its intentions explicit, as it did with respect to Title VII's extraterritorial application the year after *Arabian Am. Oil Co.* was decided. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a)-(b)(1), 105 Stat. 1071, 1077 (codified at 42 U.S.C. §§ 2000e(f), 2000e-1 (2012)).

94. We are indebted to Daniel Hemel for alerting us to this counterargument.

95. Kara Baquizal, *The Extraterritorial Reach of Section 10(B): Revisiting Morrison in Light of Dodd-Frank*, 34 FORDHAM INT'L L.J. 1544, 1580 ("The United States should not open itself up to plaintiffs hoping to take advantage of the United States' entrepreneurial legal system with the aid of attorneys willing to search every securities transaction with a fine-toothed comb to find some tenuous connection to the United States.").

96. *Id.* at 1555 ("Making the private right of action under §10(b) available to investors involved in predominantly international transactions, such as 'f-cubed' transactions, would be the type of legal cost that a non-US issuer might find too great, to the detriment of the US markets.").

97. The appellants in *Kiobel v. Royal Dutch Petroleum* embraced an analogous argument regarding universal jurisdiction. See Supplemental Brief for Appellant at 42, *Kiobel v. Royal Dutch Petrol.*, 133 S. Ct. 1659 (2012) (No. 10-1491) ("The distinction between universal criminal

that there will be some coordination between executive agencies and the State Department over issues of international comity.⁹⁸ Finally, resource constraints on prosecutors will serve to defeat any potential litigation flood.⁹⁹

Admittedly, these arguments may be persuasive from a policy standpoint. At least in the securities law context Congress seems to have thought so, as evidenced by its insertion of a provision into the Dodd-Frank Act that purportedly permits extraterritorial actions by the SEC and DOJ, but not by civil litigants.¹⁰⁰ And one can imagine other contexts where distinguishing between civil matters, on the one hand, and regulatory or criminal matters, on the other, would make sense.¹⁰¹

But that is precisely the point of the presumption: it is the courts' "function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve."¹⁰² That is because a statute's potential extraterritorial application is the type of sensitive policy determination the Constitution has appropriately delegated to Congress. If Congress, in turn, wishes to delegate that responsibility to executive agencies, that is fine. But one should expect, at a minimum, for it to say so explicitly.¹⁰³ Whether or

and civil jurisdiction makes sense because a private civil cause of action lacks "the check imposed by prosecutorial discretion." (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

98. Curtis Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 347 (2001) ("Whereas the government is responsible in the criminal context for considering the foreign policy costs of exercising universal jurisdiction, private plaintiffs in civil cases have no such responsibility and, in any event, are unlikely to have the incentive or expertise to do so."); see also *United States v. Delgado-Garcia*, 374 F.3d 1337, 1351 (D.C. Cir. 2004) ("The executive's expert exercise of prosecutorial discretion and foreign diplomacy should be more than sufficient to avoid the conflicts the dissent thinks our holding risks creating."); Clopton, *supra* note 63, at 187 ("Even if courts worry only about conflicts with foreign laws, the executive branch is likely to be more cognizant of these potential conflicts than the average civil plaintiff.").

99. See, e.g., Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 519 (2003) ("Resource constraints, a potent brake on overprosecution in domestic systems, will limit the ICC Prosecutor's ability to pursue all meritorious cases.").

100. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

101. Arguably, the Alien Tort Statute is one context where Congress might wish to distinguish between civil and regulatory enforcement based on the locus of the alleged acts. As the Court explained in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), private causes of action like the ATS lack the "check imposed by prosecutorial discretion." *Id.* at 727. Consequently, they arguably pose a greater threat to U.S. foreign relations than do the limited number of prosecutions for international human rights violations that Congress has seen fit to authorize. See, e.g., 18 U.S.C. §§ 1091, 2340A, 2441 (2012) (genocide, torture, and war crimes, respectively).

102. *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2886 (2010).

103. See *Pasquantino v. United States*, 544 U.S. 349, 377-80 (2005) (Ginsburg, J., dissenting) ("Congress, which has the sole authority to determine the extraterritorial reach of domestic laws, is fully capable of conveying its policy choice to the Executive and the courts. I would not

not it is wise policy for Congress or the Executive to apply a statute extraterritorially is, after all, a different question than whether *courts* should interpret that statute as encompassing extraterritorial acts.¹⁰⁴ Based on the principles guiding the presumption as outlined in *Morrison* and *Kiobel*, we think the answer to the latter question is clearly “no.”

II. APPLYING THE PRESUMPTION AFTER *MORRISON* AND *KIOBEL*: SECTION 10(B) AND BEYOND

This Part offers a nuanced explanation of how various criminal statutes will fare after *Morrison* and *Kiobel*. The question is more complex than it initially appears because determining whether a statute applies extraterritorially is not simply a matter of reading its text. For one, *Morrison* and *Kiobel* did not endorse a clear statement rule and therefore, context still matters. Does this mean courts can infer extraterritorial application from the “nature” of the offense à la *Bowman*? Is it enough to characterize the offense in question as one that often occurs internationally, such as drug smuggling?

Second, as the *Morrison* court explained, “it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.”¹⁰⁵ Courts must therefore identify a statute’s “focus” before determining whether a defendant’s domestic conduct is sufficient for criminal liability to attach. In *Morrison*, for instance, the Court determined that “the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”¹⁰⁶ Consequently, the locus of the *Morrison* defendants’ alleged deception was irrelevant since the securities transactions at issue occurred in Australia. According to Justice Stevens, this focus test, rather than the presumption, was the “real motor” of the Court’s decision.¹⁰⁷ Sometimes determining a statute’s focus is straightforward, but in other cases Congress may have

assume from legislative silence that Congress left the matter to executive discretion.”).

104. *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1664 (2013) (“[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do.”); *see also* *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) (“The point of the policy concerns ‘behind’ the presumption against applying statutes to have extraterritorial effect is that they mean that a court should ordinarily understand Congress’s commands to apply only within U.S. borders, not that a court should itself apply those policy concerns to the case at bar and read the statute based on the result of its own policy analysis.”).

105. *Morrison*, 130 S. Ct. at 2884.

106. *Id.*

107. *Id.* at 2894 (Stevens, J., concurring).

had many goals or its intent might not be otherwise apparent.

What is more, determining a statute's focus is only half the battle. Courts must also decide when a defendant's domestic conduct is sufficient to bring it within a statute's reach. In *Kiobel*, for instance, the Court emphasized that "even where [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."¹⁰⁸ But as Justice Alito noted in his concurrence, "[t]his formulation obviously leaves much unanswered."¹⁰⁹ The goal of this Part is to begin to fill in the blanks.

In addition to analyzing section 10(b), this Part reviews two other statutes whose extraterritorial scope is similarly ambiguous: RICO and 18 U.S.C. § 924(c). While these are certainly not the only statutes whose interpretation *Morrison* is likely to affect, they are among the most important. Both statutes impose lengthy mandatory minimum sentences on criminal defendants. RICO, which criminalizes racketeering activity by criminal enterprises, appears to be *Morrison*'s next victim because, like section 10(b), it is silent regarding its extraterritoriality and subjects defendants to both civil and criminal penalties.¹¹⁰ Some courts, including the Second and Ninth circuits, have already relied on *Morrison* to bar RICO's extraterritorial application.¹¹¹ Because the same substantive statute governs civil and criminal RICO actions, the statutory construction issue is identical to that of section 10(b). On the other hand, 18 U.S.C. § 924(c), which makes it a crime to possess a weapon in connection with certain enumerated felonies, has no civil component. It is nevertheless a shining example of a statute whose reach should be restricted if the presumption is to be meaningfully applied in criminal cases going forward.

A. Section 10(b)

Because *Morrison* involved a private civil lawsuit, the Supreme Court did not have occasion to consider whether or how the presumption would apply in criminal prosecutions. Two Second Circuit cases, one recently decided and the other still pending, help illustrate how courts have begun to resolve these unanswered questions.¹¹² Both

108. *Kiobel*, 133 S. Ct. at 1669.

109. *Id.* (Alito, J., concurring).

110. For a detailed discussion of civil RICO in light of *Morrison*, see R. Davis Mello, *Life After Morrison: Extraterritoriality and RICO*, 44 VAND. J. TRANSNAT'L L. 1385 (2011).

111. See *supra* notes 39, 40 and accompanying text.

112. *United States v. Vilar*, Nos. 10-521-cr(L), 10-580-cr(CON), 10-4639-cr(CON), 2013 WL

Alberto Vilar and Ross Mandell, the primary defendants in the two cases, are larger-than-life figures convicted of violating section 10(b) by engineering Ponzi-like schemes that defrauded both foreign and American investors. On appeal, they each argued that *Morrison* clarified the reach of section 10(b) in such a way that their securities fraud convictions ought to be reversed.¹¹³ In August, the panel hearing Vilar's appeal rejected the government's broad argument that the presumption against extraterritoriality has no effect on criminal statutes. Instead, the court affirmed the presumption's general applicability to all actions, while concluding Vilar and his co-defendant had nonetheless engaged in substantial domestic conduct to bring their criminal scheme within the statute's ambit.

Prior to his conviction, Vilar, who at one point was among the top benefactors of New York's Metropolitan Opera, had a long track record of successful investments in technology companies.¹¹⁴ But the crash of the Internet bubble, together with his penchant for underwriting expensive opera productions, proved to be his undoing.¹¹⁵ In November 2008, prior to the Supreme Court's *Morrison* decision, a jury convicted Vilar and his business partner Gary Tanaka of using their SEC-registered advisory firm to entice American investors into purchasing fraudulent investment products.¹¹⁶ According to the evidence presented at trial, Vilar and Tanaka used the proceeds of those investments for their own personal use, principally to cover Vilar's spiraling debts.¹¹⁷ Of central importance to their appeal was that the primary investment vehicle underlying the section 10(b) charge was registered under foreign, rather than domestic, law.¹¹⁸ Moreover, nearly all of the purchases and sales occurred outside the United States so investors could avoid paying federal taxes.¹¹⁹

4608948 (2d Cir. Aug. 30, 2013); *United States v. Mandell*, No. 12-cr-1967 (2d Cir. 2012).

113. Brief for Appellant Alberto Vilar at 63, *Vilar*, 2013 WL 4608948 (Nos. 10-521-cr(L), 10-580-cr(CON), 10-4639-cr(CON)), 2011 WL 4735336; Brief for Appellant Ross H. Mandell at 19, *Mandell*, No. 12-cr-1967, 2012 WL 4336737.

114. James B. Stewart, *Onward and Upward with the Arts: The Opera Lover*, THE NEW YORKER, Feb. 13, 2006, available at http://www.newyorker.com/archive/2006/02/13/060213fa_fact_stewart.

115. *Id.*

116. Daniel J. Wakin, *Music Patron is Convicted of Fraud*, N.Y. TIMES, Nov. 19, 2008, http://www.nytimes.com/2008/11/20/arts/music/20vila.html?_r=0&at=/music/20vila.html.

117. Trial Transcript at 4609, *United States v. Vilar*, No. 05-cr-621 (S.D.N.Y. 2010) [hereinafter *Vilar Trial Transcript*].

118. Brief for Appellant Alberto Vilar, *supra* note 113, at 65.

119. *Id.* ("The lion's share of investors about whom proof was offered at trial did their purchasing through entities that were specifically designed and organized offshore as part of a deliberate tax management strategy by the investors." (citing *Vilar Trial Transcript*, *supra* note

Ross Mandell led a similarly adventurous, albeit less financially remunerative, existence. In the 1990s, Mandell was the subject of a front page *Wall Street Journal* article that noted numerous SEC complaints against him as well as a six-week suspension by the New York Stock Exchange (“NYSE”).¹²⁰ While Mandell “seem[ed] to be thriving” less than a decade later while running a brokerage firm in the United Kingdom called Sky Capital Holdings,¹²¹ his supposed success turned out to be illusory. In 2009, Mandell was arrested by FBI agents and charged with several counts of securities fraud related to activities that occurred between 1998 and 2006.¹²² The indictment accused him of engineering a \$140 million fraud whose object was the inflation of Sky Capital Holdings’ stock price.¹²³ Significantly, Sky Capital Holdings was registered on the London Alternative Investment Index rather than the NYSE and the majority of Mandell’s victims were British.¹²⁴ While charges against Mandell were pending, the Supreme Court decided *Morrison*. The government, perhaps fearing a potential dismissal, amended its indictment to include mail and wire fraud charges.¹²⁵ In turn, Mandell made a motion requesting that all of the charges be dismissed. The lower court rejected that motion, in part relying on *Bowman* for the proposition that “the United States is free to protect its citizens from fraud.”¹²⁶

The government has gone one step further in both the Vilar and Mandell appeals by arguing that *Morrison* ought not apply at all in criminal prosecutions.¹²⁷ The Second Circuit unequivocally rejected

117)).

120. Jeffrey Taylor, *Art of Survival: How One Stockbroker Keeps on Selling, Despite Complaints*, WALL ST. J., March 14, 1996, at A1.

121. David Serchuk, *Wall Street’s “Bad-boy” Broker Ross Mandell is Back with a Flair—Pushing Stock and Courting Politicians*, FORBES, Oct. 19, 2005, available at <http://www.forbes.com/forbes/2005/1003/062.html>.

122. *Six Employees of Sky Capital Are Accused in a \$140 Million Fraud Scheme*, N.Y. TIMES, July 8, 2009, <http://www.nytimes.com/2009/07/09/business/09fraud.html>.

123. Indictment, United States v. Mandell, No. 09-cr-662 (S.D.N.Y. July 8, 2009).

124. United States v. Mandell, No. 09-cr-0662, 2011 WL 924891, at *1 (S.D.N.Y. Mar. 16, 2011); Brief for Appellant Ross H. Mandell, *supra* note 113, at *2.

125. *Mandell*, 2011 WL 924891, at *3. In adding the mail and wire fraud counts, it appears the U.S. Attorney’s Office took a hint from Justice Breyer’s *Morrison* concurrence. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2888 (2010) (Breyer, J., concurring in the judgment) (“[W]hile state law or other federal fraud statutes, see, e.g., 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), may apply to the fraudulent activity alleged here to have occurred in the United States, I believe that § 10(b) does not.”).

126. *Mandell*, 2011 WL 924891, at *5 (citing United States v. Bowman, 260 U.S. 94 (1922)).

127. A primary point of contention in Vilar and Mandell’s appeals is whether the transactions at issue were foreign or domestic. Compare Brief for Appellant Ross H. Mandell, *supra* note 113, at *2, with Brief for the United States of America at 31, United States v. Mandell, No. 09-cr-

that position in its recently issued opinion in *United States v. Vilar*, noting that to do otherwise “would establish the dangerous principle that judges can give the same statutory text different meanings in different cases.”¹²⁸ The court particularly faulted the government’s reliance on *Bowman* for the proposition that criminal statutes as a class ought to be exempted from the presumption. “To the contrary,” the court explained, “no plausible interpretation of *Bowman* supports this broad proposition; fairly read, *Bowman* stands for quite the opposite.”¹²⁹

Vilar’s impact on future securities fraud litigation is uncertain because shortly after *Morrison* was decided Congress amended section 10(b), ostensibly to permit extraterritorial civil enforcement actions and criminal prosecutions.¹³⁰ Yet section 929P of the Dodd-Frank Act speaks in terms of providing federal courts with “extraterritorial jurisdiction” over such matters,¹³¹ whereas *Morrison* made clear that the issue was not one of jurisdiction, but instead concerned the statute’s substantive scope.¹³² Since the provision was enacted after *Vilar* and Tanaka’s convictions, and thus not implicated in their ensuing appeals, it remains to be seen whether the Second Circuit’s holding in *Vilar* will have continued resonance in the securities fraud context.

Where *Vilar*’s greater significance lies is in its potential to profoundly alter how courts interpret the extraterritorial reach of criminal statutes generally, much as *Morrison* transformed how lower courts analyze civil statutes. That is because in rejecting the government’s expansive argument regarding *Bowman*, the *Vilar* court articulated a general rule that encompasses both civil and criminal statutes alike. As such, the decision offers substantial support to criminal defendants seeking to challenge their indictments or convictions.

To grasp *Vilar*’s significance, it is necessary to review the government’s three principle arguments in support of its position that

0662 (2d Cir. Dec. 20, 2010), 2012 WL 6811426 [hereinafter *United States of America Mandell Brief*]. If the latter, each case would be treated as a traditional securities fraud prosecution and *Morrison* would not apply. The resolution of this question, which depends to great extent on the factual subtleties of each case and the legal definition of a “domestic transaction,” is not our primary concern here.

128. *United States v. Vilar*, Nos. 10-521-cr(L), 10-580-cr(CON), 10-4639-cr(CON), 2013 WL 4608948, at *8 (2d Cir. Aug. 30, 2013) (quoting *Clark v. Martinez*, 543 U.S. 371, 386 (2005)).

129. *Vilar*, 2013 WL 4608948, at *5.

130. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

131. *Id.*

132. *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2877 (2010).

section 10(b) authorizes extraterritorial prosecutions. First, it cites the mistaken, but oft-repeated, notion that “[t]he presumption that ordinary acts of Congress do not apply extraterritorially does not apply to criminal statutes.”¹³³ In fairness to the government, in two decisions postdating *Morrison*, the Second Circuit had itself cited *Bowman* as reason to ignore the presumption altogether in criminal cases.¹³⁴ As demonstrated elsewhere, such an interpretation represents a fundamental misunderstanding of the presumption’s function.¹³⁵ For its part, the *Vilar* court tempered the “broadly worded” language of prior Second Circuit opinions by recognizing that *Bowman* must be understood in context as creating only a narrow exception in instances where “the right of the government to defend itself” is directly implicated.¹³⁶

The government further argues that applying the presumption in criminal cases would necessitate a finding that *Morrison* implicitly overruled *Bowman*.¹³⁷ Since repeals by implication are frowned upon, the government reasons the presumption should carry no weight in criminal cases.¹³⁸ The problem with this analysis is that it creates a false conflict between the two precedents. *Bowman* itself explicitly recognized the presumption’s continuing validity in ordinary criminal cases.¹³⁹ As *Vilar* underscores, *Bowman* is most faithfully read as embodying a narrow carve out for instances where the object of a statute’s text is the protection of U.S. sovereign interests.¹⁴⁰

133. United States of America Mandell Brief, *supra* note 127, at 34 (quoting United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011)).

134. United States v. Siddiqui, 699 F.3d 690, 700 (2d Cir. 2012) (“The ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes.”); *Al Kassar*, 660 F.3d at 118 (“The presumption that ordinary acts of Congress do not apply extraterritorially does not apply to criminal statutes.”).

135. See discussion *supra* Part I.A.

136. United States v. Vilar, Nos. 10-521-cr(L), 10-580-cr(CON), 10-4639-cr(CON), 2013 WL 4608948, at *6 (2d Cir. Aug. 30, 2013) (explaining that *Siddiqui* and *Al Kassar* are best understood “in context” as “simply applications of *Bowman*’s holding”).

137. Brief for the United States of America, *Vilar*, 2013 WL 4608948 (Nos. 10-521-cr(L), 10-580-cr(CON), 10-4639-cr(CON)) (2d Cir. Mar. 26, 2012), 2012 WL 1076169, at *97–98 [hereinafter United States of America Vilar Brief]; United States of America Mandell Brief, *supra* note 127, at 35–36.

138. United States of America Vilar Brief, *supra* note 137, at *98 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)); see also *Rodriguez de Quijas v. Shaeerson/Am. Express, Inc.* 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case that directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

139. United States v. *Bowman*, 260 U.S. 94, 98 (1922).

140. 18 U.S.C. § 1114 provides such an example. The statute makes it a crime to kill or attempt to kill “any officer or employee of the United States . . . while such officer or employee is engaged in or on account of the performance of official duties.” One could argue that *Bowman*

The government's final argument is a familiarly functionalist one. Limiting section 10(b)'s scope, it argues, "would create a broad immunity for criminal conduct simply because the fraudulent scheme culminates in a purchase or sale abroad."¹⁴¹ Such a concern echoes that raised by Justice Stevens in his *Morrison* concurrence.¹⁴² While the *Morrison* majority brushed off the idea that the United States might become a "Barbary coast" for fraud,¹⁴³ Justice Stevens identified certain harms that could accrue to U.S. citizens as a consequence of the majority's holding. His critique seems prescient in light of the pending litigation:

Imagine . . . an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price—and which will, upon its disclosure, cause the price to plummet. Or, imagine that those same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company's doomed securities. Both of these investors would, under the Court's new test, be barred from seeking relief under § 10(b).¹⁴⁴

Admittedly, Justice Stevens's concerns are troubling, particularly in light of the fact that *Morrison*'s reliance on the presumption against extraterritoriality does not end the inquiry into a statute's "focus." Because statutes like RICO and section 10(b) "do[] not speak with geographic precision,"¹⁴⁵ courts cannot avoid making difficult line-

applies only to statutes whose "focus" is U.S. personnel or interests *and* whose commission is likely to occur overseas, in which case 18 U.S.C. § 1114 probably would not overcome the presumption. Zachary Clopton suggests courts could adopt an even narrower reading of the case, one limited to "statutes that protect government contracts from fraud and obstruction." Clopton, *supra* note 63, at 167. This argument, however, may be foreclosed by *Bowman* itself, specifically the Court's reference to other statutes that should similarly be read as having extraterritorial effect. For instance, the Court cited 4 U.S.C. § 39, which penalized "bribing a United States officer of the civil, military, or naval service to violate his duty or to aid in committing a fraud on the United States." *Bowman*, 260 U.S. at 99.

141. United States of America Vilar Brief, *supra* note 137, at *98-99; *see also* United States of America Mandell Brief, *supra* note 127, at 40 ("[A]ccepting the defendants' argument would render the criminal securities fraud laws ineffectual against U.S. citizens who commit certain securities fraud crimes from entirely within this country, creating a veritable safe harbor for fraudsters who are clever enough to draft securities offerings that would make transactions in the securities 'foreign' under *Morrison*.").

142. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2887 (2010) (Stevens, J., concurring.)

143. *Id.* at 2886 (majority opinion).

144. *Id.* at 2895 (Stevens, J., concurring).

145. *Id.* at 2894.

drawing determinations, like whether a securities transaction or criminal enterprise is domestic or foreign in nature.

Where this Article parts company with Justice Stevens, however, is his assessment that courts are properly empowered to determine the substantive scope of federal criminal law. The fact that *Morrison*'s interpretive inquiry may result in outcomes that courts find odious is not a valid justification for fashioning congressional intent where none exists. And courts are not powerless to alert Congress to errors in legislative draftsmanship. That is exactly what Judge Jose Cabranes, the author of the *Vilar* decision, did in *United States v. Gatlin*.¹⁴⁶ After deciding that a jurisdictional statute, when read against the presumption, did not permit the U.S. government to prosecute a defendant accused of raping a minor on a U.S. military installation overseas, Cabranes directed his clerk to forward a copy of the opinion to the chairmen of the House and Senate Armed Services Committees.¹⁴⁷ Congress, in turn, responded by quickly closing the loophole.¹⁴⁸ The proper question for a court to ask, therefore, is one of institutional competency, not what Congress might have wished had it thought of a particular problem beforehand.

In any event, there is a vast literature detailing many persuasive reasons to resist the expansion of federal criminal law.¹⁴⁹ The point is simply that Congress is the proper body to decide the issue. For even if a court could accurately predict what Congress would want, there are still good reasons to apply the presumption; forcing Congress to

146. 216 F.3d 207 (2d Cir. 2000).

147. *Id.* at 209.

148. Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. §§ 3261–3267 (2012).

149. See, e.g., John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 552–53 (2004) (“No matter how many crimes Congress enacts, it remains for federal prosecutors to decide which statutes to invoke when proceeding to an indictment. Many of the new crimes serve no other purpose than to make Congress look good with particular groups and/or on popular issues. . . . The availability of more crimes also affords the prosecutor more discretion, and, therefore, greater leverage against defendants.”); Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1642 (2001) (arguing that the pressure to enhance gun penalties has raised constitutional and prudential concerns, and that “enhancing the penalties under federal law and expanding the range of cases to which those penalties apply . . . has enhanced the prosecution’s bargaining power and its unchecked discretion in a wide range of cases”); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 645 (1997) (arguing that the federalization of criminal law has led to the “dramatically disparate treatment of similarly situated offenders”); Robert L. Stern, *The Commerce Clause Revisited—the Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 274 (1973) (arguing that the federalization of intrastate crime “extend[s] the commerce power beyond previous limits”).

verbalize its intentions both familiarizes congressional representatives with the consequences of their votes and increases the legitimacy of enacted legislation.

The outcome of the *Vilar* litigation should further temper fears concerning the likelihood of a parade of horrors. While the defendants achieved victory on the threshold issue of *Morrison*'s applicability to section 10(b) criminal prosecutions, the court nonetheless upheld their convictions after finding that they had engaged in sufficient domestic conduct to bring their actions within the statute's prohibitions.¹⁵⁰ Specifically, the court invoked a test it had previously articulated for determining whether a securities transaction was domestic or extraterritorial in nature. According to that test, a transaction is domestic if title passes or a purchaser or seller incurs "irrevocable liability" to transfer title to a security within the territorial United States.¹⁵¹ Because some of the transactions at issue in *Vilar* and Tanaka's alleged scheme satisfied this test,¹⁵² the court elected to uphold their convictions. It did so notwithstanding the possibility that "in responding to a carefully drawn special verdict form, the jury would have found Vilar and Tanaka guilty only of defrauding victims outside of the United States."¹⁵³ The court also indicated, however, that the scheme's collateral connections to the United States, including the mailing of marketing materials to U.S. customers, domestic wire transactions, and the use of a U.S. firm as the firm's custodian, would not have sufficed to bring it within section 10(b)'s reach.¹⁵⁴

Vilar represents an important affirmation of the presumption's applicability to criminal statutes. Yet it leaves many questions unanswered. While the decision establishes the burden the government must overcome to establish a domestic securities transaction for the purpose of securing a criminal conviction, it offers no general method of determining the predominant locus of criminal conduct outside the section 10(b) context. Nor does it offer any indication as to the kinds of contextual evidence that may be sufficient to overcome the presumption when applied to other criminal statutes. Instead, in a fashion consistent with *Morrison* and *Kiobel*'s teachings, *Vilar* suggests lower courts must analyze statutes on a case-by-case basis to determine whether particular

150. *United States v. Vilar*, Nos. 10-521-cr(L), 10-580-cr(CON), 10-4639-cr(CON), 2013 WL 4608948, at *10–*11 (2d Cir. Aug. 30, 2013).

151. *Id.* at *9 (citing *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 69 (2d Cir. 2012)).

152. *Id.* at *10–*11.

153. *Id.* at *10.

154. *Id.* at *9 n.10.

extraterritorial applications “are the objects of [a] statute’s solicitude.”¹⁵⁵ To that end, in the following Sections we examine two areas of law—criminal RICO and 18 U.S.C. §924(c)—where courts have already begun to engage in that process.

B. RICO

This Section confronts the difficulties that lower courts have encountered when asked to apply RICO in a post-*Morrison* world. Congress passed RICO in 1970 after lengthy public hearings.¹⁵⁶ The statute’s purpose was to eradicate “organized crime,” the activities of which Congress found to “weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare.”¹⁵⁷ Although originally directed at the mafia’s infiltration of legitimate businesses, RICO has since been applied to a variety of organizations and activities, both foreign and domestic.¹⁵⁸

Prior to *Morrison*, courts routinely upheld extraterritorial “jurisdiction” over RICO offenses using the same conducts-and-effects test employed in section 10(b) cases.¹⁵⁹ That is, courts asked whether the alleged racketeering activity occurred in, or had substantial effects upon, the United States sufficient to warrant a court’s exercise of subject matter jurisdiction. Under this framework, courts had no occasion to ask whether the alleged criminal enterprise was domestic or foreign. So long as the activities complained of occurred in or had effects on the United States, extraterritorial application of RICO seemed consistent with both Due Process and legislative intent.¹⁶⁰

155. *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2884 (2010).

156. 18 U.S.C. §§1961–1964 (2012).

157. Organized Crime Control Act of 1970, Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922, 922–23 (1970).

158. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 661 (1987) (noting RICO’s “broad draftsmanship, which has left it open to a wide range of applications, not all of which were foreseen or intended by the Congress that enacted it”); *id.* at 662 (“Congress viewed RICO principally as a tool for attacking the specific problem of infiltration of legitimate business by organized criminal syndicates. As such, RICO has hardly been a dramatic success.”).

159. R. Davis Mello, Note, *Life After Morrison: Extraterritoriality and RICO*, 44 VAND. J. TRANSNAT’L L. 1385, 1387 n.12 (2011) (adopting the “widely accepted view . . . that RICO may apply extraterritorially if conduct material to the completion of the racketeering occurs in the United States, or if significant effects of the racketeering are felt here” (quoting Liquidation Comm’n of Banco Intercont’l, S.A. v. Alvarez Renta, 530 F.3d 1339, 1351–52 (11th Cir. 2008))).

160. Some courts reached this decision almost reflexively, whereas other courts engaged in a

Morrison upended this analysis. Although Justice Scalia's opinion did not mention RICO by name, every court that has considered the statute's application since *Morrison* has found that it lacks extraterritorial effect.¹⁶¹ Indeed, these decisions follow logically from pre-*Morrison* holdings that RICO's text is silent as to its extraterritorial reach.¹⁶² Constrained by these prior holdings and *Morrison*'s logic, both the Second and Ninth Circuits have held that RICO does not apply extraterritorially, though they have differed on precisely what this means in practice.¹⁶³

Two interpretive questions guide the analysis that follows. First, recognizing that the majority of post-*Morrison* RICO decisions involve civil claims, this Article asks whether courts should interpret RICO's scope congruently when applied in a criminal prosecution. Second, it asks what Congress's "focus" was in enacting RICO—the criminal enterprise or the pattern of racketeering activity.

The first question ought to be easily resolved. Since RICO's criminal and civil penalty provisions are premised on the same substantive conduct, they ought to be interpreted consistently.¹⁶⁴ Put slightly differently, to ask what conduct RICO reaches is to ask what conduct it prohibits, not what penalties may be imposed in a civil or criminal action. In this sense, the analysis is no different than that which applies in the section 10(b) context. Nor is a *Bowman* argument more persuasive here—both section 10(b) and RICO are concerned with conduct that harms private actors or society generally rather than U.S.

searching discussion of what Congress intended. *Compare Renta*, 530 F.3d at 1351–52 (quoted above), *with Butte Min. PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996) (“We do not suppose that Congress in enacting RICO had the purpose of punishing frauds by aliens abroad even if peripheral preparations were undertaken by them here.”), *and N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1053 (2d Cir. 1996) (quoting same).

161. *United States v. Chao Fan Xu*, 706 F.3d 965, 974–75 (9th Cir. 2013); *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 243–46 (S.D.N.Y. 2012); *Mitsui O.S.K. Lines, Ltd. v. Seamount Logistics, Inc.*, 871 F. Supp. 2d 933, 938–40 (N.D. Cal. 2012); *CGC Holding Co. v. Hutchens*, 824 F. Supp. 2d 1193, 1209–10 (D. Colo. 2011); *Farm Credit Leasing Servs. Corp. v. Krones, Inc. (In re Le–Nature’s, Inc.)*, No. 9-1445, 2011 WL 2112533, at *3 n.7 (W.D. Pa. May 26, 2011); *In re Toyota*, 785 F. Supp. 2d, 883, 914 (C.D. Cal. 2011); *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 29 (D.D.C. 2011); *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771, 2011 WL 84395, at *5 (E.D.N.Y. Mar. 8, 2011); *Cedeno v. Intech Group, Inc.*, 733 F. Supp. 2d 471, 472–73 (S.D.N.Y. 2010).

162. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004) (“RICO itself is silent as to its extraterritorial application.”); *Al-Turki*, 100 F.3d at 1051 (“The RICO statute is silent as to any extraterritorial application.”).

163. *Compare Chao Fan Xu*, 706 F.3d at 976 (finding the pattern of racketeering activity to be RICO's focus), *with Norex Petrol. Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (limiting *Morrison* to domestic conduct but declining to specify RICO's focus).

164. *Compare* 18 U.S.C. § 1963 (2012) (criminal penalties), *with id.* § 1964 (civil remedies).

sovereign interests.

Nevertheless, the U.S. government has taken a contrary position. In *Norex Petroleum Ltd. v. Access Industries, Inc.*, a civil RICO case, a Second Circuit panel held that RICO has no extraterritorial application.¹⁶⁵ The U.S. Attorney's Office, concerned by the effect this decision would have on criminal prosecutions, took the somewhat unusual step of requesting a limited rehearing en banc so the panel could clarify that its decision did not apply to criminal RICO prosecutions.¹⁶⁶ Specifically, it argued for an expansive reading of the *Bowman* exception and warned that:

An overbroad reading of *Morrison* would potentially undercut government enforcement not only of RICO, but also of other provisions. For example, applying a rigid “presumption against extraterritoriality,” without consideration of the specific statute and context at issue, could impair non-RICO criminal conspiracy prosecutions in cases related to international terrorism, narco-trafficking, arms-trafficking, and organized crime, where much of the underlying conduct may have occurred abroad. It could also impair government enforcement under statutes arising in other areas, including taxation and protection of the environment.¹⁶⁷

The *Norex* plaintiffs themselves never requested a rehearing en banc. Moreover, because the case involved a civil matter, neither the plaintiffs nor the defendants had reason to oppose the government's request.¹⁶⁸

The Second Circuit panel obliged the government by amending its opinion without even scheduling a hearing. The revised opinion included the following disclaimer: “Because *Norex* brought a private lawsuit pursuant to 18 U.S.C. § 1964(c), we have no occasion to address—and express no opinion on—the extraterritorial application of RICO when enforced by the government pursuant to §§ 1962, 1963, 1964(a) and (b).”¹⁶⁹ Hence, by modifying its decision in this way, the Second Circuit panel implicitly deferred to the government's continued reliance on RICO in extraterritorial prosecutions.

The only court since *Morrison* to squarely address whether criminal RICO applies extraterritorially found that it did not, consistent with the

165. *Norex*, 631 F.3d at 33.

166. United States as Amicus *Norex* Brief, *supra* note 62.

167. *Id.* at 7 n.8.

168. Even the government's motion for rehearing acknowledged as much, though the panel opinion strikingly did not. *See id.* at 2 (“[A]lthough *Norex* has not sought panel rehearing, that would not preclude the panel from simply amending its opinion *sua sponte* to account for these concerns set forth in this brief.”).

169. *Norex Petrol. Ltd. v. Access Indus., Inc.*, 622 F.3d 148 (2d Cir. 2010), *amended and superseded*, 631 F.3d 29, 33 (2d Cir. 2010).

foregoing analysis. In that case, *United States v. Chao Fan Xu*, the Ninth Circuit did not even go to the trouble of addressing the government's *Bowman* argument.¹⁷⁰ Instead, it simply began "with a presumption that RICO does not apply extraterritorially in a civil or criminal context."¹⁷¹ Doing so, it reasoned, was "faithful to *Morrison*'s rationale," which it understood as a desire to construct a stable background of interpretative rules against which Congress can legislate.¹⁷²

The Ninth Circuit's decision is also instructive, however, in illustrating the difficulty courts have sometimes encountered in determining a statute's "focus" as *Morrison* directs them to do. In the RICO context, there are two possible objects of congressional focus: the criminal enterprise or the pattern of racketeering activity. To see why this matters, consider the facts of *Chao Fan Xu*. The defendants in that case were four Chinese nationals convicted under RICO for engaging in a scheme to defraud the Bank of China by diverting bank funds to a holding company in Hong Kong.¹⁷³ The defendants subsequently used those funds "to speculate in foreign currency, to make fraudulent loans, to purchase real estate in Asia and North America, and to finance gambling trips to Las Vegas and other casino venues."¹⁷⁴ Though the fraud's primary victim was a foreign bank and nearly all the fraudulent activity occurred overseas, the scheme's success depended on each defendant's decision to enter into a sham marriage with a U.S. citizen or Green Card holder.¹⁷⁵ Doing so ultimately enabled them to evade Chinese law enforcement by fleeing to the United States.¹⁷⁶

In assessing whether the defendants' conduct constituted a crime punishable under RICO, the Ninth Circuit noted post-*Morrison* disagreement among lower courts over whether RICO's principal focus is on the criminal enterprise or the pattern of racketeering activity.¹⁷⁷ Ultimately, the court concluded that RICO's focus was on the racketeering activity and not the criminal enterprise, and it accordingly upheld the convictions of the defendants.¹⁷⁸ The court purported to

170. Brief of the United States at 45–48, *United States v. Chao Fan Xu*, 706 F.3d 965 (9th Cir. 2013) (09-10189).

171. *Chao Fan Xu*, 706 F.3d at 974–75.

172. *Id.* at 974 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010)).

173. *Id.* at 972.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 975–76.

178. *Id.* at 979.

premise its decision on RICO's text and Congress' intent as expressed through the statute's legislative history. It noted for instance, that RICO's statement of purpose indicated that the statute was intended to promote "the eradication of organized crime . . . by providing enhanced sanctions and new remedies *to deal with the unlawful activities* of those engaged in crime."¹⁷⁹ Consequently, the Court concluded, "it is highly unlikely that Congress was unconcerned with the actions of foreign enterprises where those actions violated the laws of this country while the defendants were in this country."¹⁸⁰

While the Ninth Circuit asked the right question, its ultimate conclusion was erroneous. The more compelling argument, as expressed by several district courts, is that RICO's focus concerns criminal enterprises.¹⁸¹ That is because the reasoning of those courts mirrors that of *Morrison*, which noted that "§ 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'"¹⁸² Similarly, RICO does not punish racketeering activity, "but only racketeering activity in connection with an 'enterprise.'"¹⁸³ It seems clear, then, that the criminal enterprise is "the object[] of the statute's solicitude."¹⁸⁴ Or, as one district court has explained, "RICO . . . seeks to regulate 'enterprises' by protecting them from being victimized by or conducted through racketeering activity."¹⁸⁵

Ironically, the Ninth Circuit declined to define RICO's focus as the criminal enterprise for largely functionalist reasons. The irony lies in the court's doing so while also claiming fidelity to *Morrison*, a decision that eschewed functionalist concerns for an approach grounded in textualist premises. The Ninth Circuit's primary objection to adopting the enterprise as the statute's focus was its perception that "[d]etermining the geographic location of an enterprise—whether

179. *Id.* at 978 (quoting Organized Crime Control Act of 1970, Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970), *reprinted in* 1970 U.S.C.C.A.N. 1073 (emphasis added)).

180. *Id.* at 978.

181. *See, e.g.,* Mitsui O.S.K. Lines, Ltd. v. Seamasster Logistics, Inc., 871 F. Supp. 2d 933, 938–40 (N.D. Cal. 2012); *European Cmty. v. RJR Nabisco, Inc.*, No. 02-cv-5771, 2011 WL 843957, at *5 (E.D.N.Y. Mar. 8, 2011); *Cedeno v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473–74 (S.D.N.Y. 2010).

182. *European Cmty.*, 2011 WL 843957, at *5 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010)).

183. *Id.*

184. *Morrison*, 130 S. Ct. at 2884.

185. *European Cmty.*, 2011 WL 843957, at *5.

foreign or domestic—is a difficult inquiry.”¹⁸⁶ Specifically, the court objected to the “nerve center” test employed by many lower courts.¹⁸⁷ This test, which asks where the enterprise’s decisions are conceived rather than carried out, “could lead to ‘artificially simplified results.’”¹⁸⁸ For instance, if followed, the nerve center test would result in a domestic corporation being held liable under RICO whereas “[a] foreign corporation would be immune from prosecution simply because its ringleaders had the forethought to incorporate overseas.”¹⁸⁹

The court’s decision, of course, neglects the many reasons why Congress might have declined to give prosecutors the power to bring charges against those accused of hatching conspiracies abroad. But it also bears repeating that under *Morrison* and *Kiobel* such functionalist concerns carry little weight. As the *Morrison* Court made clear, “The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritorially.”¹⁹⁰ There is no evidence that Congress ever considered, let alone embraced, RICO’s potential application to foreign defendants whose criminal enterprise was concocted overseas in an effort to defraud a foreign bank, and whose illegal domestic conduct was largely incidental to that scheme’s success. Rather than guess at what Congress would have preferred, “[a] more natural inquiry might be what . . . Congress in fact thought about and conferred.”¹⁹¹

C. 18 U.S.C. § 924(c)

RICO and section 10(b) are both statutes that have criminal and civil components. Such statutes must be read consistently regardless of their application. But *Morrison* also embodies a general admonition to courts about how they should interpret all federal statutes. Here, we consider *Morrison*’s application to a statute that has no civil corollary: 18 U.S.C. § 924(c).

Title 18 U.S.C. § 924(c) makes the possession or use of a gun during a “crime of violence” or drug trafficking crime a distinct offense.¹⁹²

186. United States v. Chao Fan Xu, 706 F.3d 965, 976 (9th Cir. 2013).

187. See, e.g., Mitsui O.S.K. Lines, Ltd. v. Seamasster Logistics, Inc., 871 F. Supp. 2d 933, 940–43 (N.D. Cal. 2012); *European Cmty.*, 2011 WL 843957, at *5–6.

188. *Chao Fan Xu*, 706 F.3d at 977 (quoting *Mitsui O.S.K. Lines, Ltd.*, 871 F. Supp. 2d at 940).

189. *Id.* (citing *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 241–42 (S.D.N.Y. 2012)).

190. *Morrison v. Nat’l Australia Bank*, 130 S. Ct. 2869, 2881 (2010).

191. *Id.* at 2880 (quoting *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987)).

192. 18 U.S.C. § 924(c) (2012).

The statute provides prosecutors with a powerful tool because § 924(c) includes lengthy mandatory minimum sentences.¹⁹³ For instance, a defendant convicted of possessing an assault rifle such as an AK-47 faces a minimum prison sentence of thirty years upon conviction.¹⁹⁴ Consequently, prosecutors gain tremendous leverage in plea negotiations and the government is rarely put to its proof. Instead, defendants typically choose to plead guilty to lesser charges or offer to cooperate in exchange for dismissal of the § 924(c) counts.¹⁹⁵ And because the U.S. Attorney's standard form plea agreement requires that defendants waive their right to appeal, the application of § 924(c) to foreign defendants is largely immunized from appellate review.¹⁹⁶

In a series of recent cases, foreign nationals arrested overseas have argued that 18 U.S.C. § 924(c) does not reach extraterritorial weapons possession. So far, that argument has failed to gain traction.¹⁹⁷ A clearer articulation of the presumption's applicability to criminal statutes by the Second Circuit in *Vilar* and *Mandell*, however, could change how district courts look at § 924(c). The stakes for foreign nationals charged with violating U.S. laws could not be higher. Put simply, in many instances it could mean the difference between pleading guilty or going to trial. Under the law as it is currently interpreted, defendants simply cannot take the risk of incurring lengthy mandatory prison sentences.

This Section begins with an analysis of § 924(c)'s text, history, and structure. Congress enacted the statute as a response to the problem of increasing domestic gun violence in the 1960s, prompted in part by the assassination of Senator Robert F. Kennedy. Regardless of the significance one is inclined to attach to that history, the presumption against extraterritoriality ought to bar § 924(c)'s application abroad. Nowhere does the statute's ambiguous text evince a "clear indication" that Congress intended for it to punish the use or possession of a firearm

193. *Id.* §924(c)(1)(A)–(C) (authorizing mandatory minimums of five to thirty years).

194. *Id.*

195. The DOJ is explicit about its policy. *See* 9 UNITED STATES ATTORNEYS' MANUAL 112 (1997) ("Firearms violations should be aggressively used in prosecuting violent crime. They are generally simple and quick to prove. The mandatory and enhanced punishments for many firearms violations can be used as leverage to gain plea bargaining and cooperation from offenders.").

196. On the issue of appeal waivers, see generally Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209 (2005) (analyzing the details, benefits, costs, and ethics behind many forms of appeal waivers).

197. *See, e.g.*, *United States v. Siddiqui*, 699 F.3d 690, 700 (2d Cir. 2012) (explicitly rejecting this argument); *United States v. Belfast*, 611 F.3d 783, 814 (11th Cir. 2010) (same); *United States v. Ahmed*, No. 10-cr-131, 2012 WL 983545, at *2 (S.D.N.Y. Mar. 22, 2012) (same); *United States v. Mardirossian*, 818 F. Supp. 2d 775, 777 (S.D.N.Y. 2011) (same).

overseas.

Next, this Section considers the various rationales lower courts have fashioned for extending § 924(c)'s reach. None of these rationales is persuasive. For instance, several courts have adopted a plain meaning approach towards the statute by misinterpreting *Bowman* to exempt *all* criminal laws from the presumption. More plausibly, some courts have analogized § 924(c) to crimes like conspiracy, reasoning that the statute is merely an ancillary one whose scope Congress intended courts to derive from underlying predicate crimes. As this Section explains, that analogy is unpersuasive for several reasons, not the least of which is that § 924(c) is not merely a penalty enhancement that punishes the manner of committing a crime, but a substantive offense in its own right that prohibits a specific kind of conduct.

1. Applying the Presumption to § 924(c)

It is easy to see why a court, when presented with § 924(c)'s seemingly straightforward text, would fail to discern a problem with applying the statute abroad. 18 U.S.C. § 924(c) provides in relevant part:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall . . . [listing penalties].¹⁹⁸

The statute consists of two basic elements: (i) using, carrying, or possessing a firearm; (ii) during, in relation, or in furtherance of certain enumerated drug and violent crimes that “may be prosecuted in a court of the United States.” As one court has noted, “[o]n its face, there is simply no limitation in the language of the statute concerning its application to crimes committed outside of the United States.”¹⁹⁹ And because U.S. law prohibits certain drug trafficking offenses and crimes of violence that occur abroad,²⁰⁰ a fact of which Congress was presumably aware at the time it enacted (or amended) the statute, § 924(c) would seem to penalize the extraterritorial possession or use of firearms in certain specified instances. Or so the argument goes.

That argument, however, entirely disregards the presumption against extraterritoriality. Upon applying that canon, the import of the text

198. 18 U.S.C. § 924(c).

199. *Belfast*, 611 F.3d at 814.

200. *See, e.g.*, 18 U.S.C. § 81 (arson); *id.* § 1111 (murder); *id.* § 1201 (kidnapping); 21 U.S.C. § 959 (2012) (illicit drug importation); *id.* § 960a (narco-terrorism); 46 U.S.C. §§ 70501–70507 (2012) (drugs aboard vessels).

becomes much less clear. To begin, consider the statute's first term, "any person." As the Supreme Court has noted, it is not always proper to give the term "any" its literal meaning. For instance, "In ordinary life, a speaker who says, 'I'll see any film,' may or may not mean to include films shown in another city."²⁰¹ Likewise, "In law, a legislature that uses the statutory phrase 'any person' may or may not mean to include 'persons' outside the jurisdiction of the state."²⁰² And while "[t]he words 'any person or persons,' are broad enough to comprehend every human being" those words "must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them."²⁰³ That is how the Supreme Court has in fact interpreted federal criminal laws since at least 1818 when it declined to find statutory authority for the prosecution of a foreign national for robbery on the high seas.²⁰⁴ As *Morrison* and *Kiobel* underscore, absent a "clear indication" by Congress otherwise, federal statutes do not have extraterritorial effect.²⁰⁵

While it is true that the Supreme Court has interpreted the word "any" broadly when considering the domestic application of a separate § 924(c) provision,²⁰⁶ it has repeatedly cautioned lower courts against doing the same when determining the extraterritorial scope of federal statutes. In *Foley Brothers v. Filardo*, for example, the Court rejected the plaintiff's attempt to sue for labor violations abroad under an act providing that "[e]very contract made to which the United States . . . is a party . . . shall contain a provision that no laborer . . . shall be required or permitted to work more than eight hours in any one calendar day."²⁰⁷ The Court did so based on the "normal" assumption that Congress is

201. *Small v. United States*, 544 U.S. 385, 388 (2005).

202. *Id.*

203. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818).

204. *Id.*

205. *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1665 (2013) (quoting *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2883 (2010)).

206. *United States v. Gonzales*, 520 U.S. 1, 4–5 (1997). In *Gonzales*, the Court was tasked with interpreting the following § 924(c) language: "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with *any other term of imprisonment . . .*" Defendant plausibly claimed that Congress intended the phrase "any other term of imprisonment" to refer only to *federal* sentences. Justice O'Connor, writing on behalf of the majority, disagreed. She noted that "[r]ead naturally, the word 'any' has an expansive meaning," and because "Congress did not add any language limiting the breadth of that word," the Court "must read § 924(c) as referring to all 'term[s]' of imprisonment," including those imposed by state courts." *Id.* at 5.

207. *Foley Bros. v. Filardo*, 336 U.S. 281, 282 (1949) (quoting 40 U.S.C. § 324 (repealed 1962)).

“primarily concerned with domestic conditions.”²⁰⁸ Reviewing the legislative history, the Court found that the “insertion of the word ‘every’ was designed to remedy a misinterpretation according to which the Act did not apply to work performed on private property by government contractors.”²⁰⁹ In contrast, “[n]othing . . . support[ed] the conclusion . . . that ‘every contract’ must of necessity, by virtue of the broadness of the language, include contracts for work to be performed in foreign countries.”²¹⁰

The table below demonstrates the Court’s longstanding practice of invoking the presumption to considerably narrow similarly broad language. The examples cited therein, while not exhaustive, suffice to show that general terms predictably lose their expansive meaning when the presumption is properly applied.

Case	Statutory Language	Interpretation
<i>United States v. Palmer</i> , 16 U.S. 610 (1818)	[I]f <i>any person or persons</i> shall commit, upon the high seas . . . murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death . . . every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death	Held not to apply to foreign nationals committing robbery on the high seas aboard foreign vessels
<i>Sandberg v. McDonald</i> , 248 U.S. 185 (1918)	That it shall be . . . unlawful in any case to pay <i>any seaman</i> wages in advance of the time when he has actually earned the same.	Held not to apply to foreign seamen
<i>Foley Bros. v. Filardo</i> , 336 U.S. 281 (1949)	<i>Every contract</i> made to which the United States . . . is a party . . . shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor . . . shall be required or permitted to work more than eight hours in any one calendar day upon such work	Held not to apply to contracts between federal government and private contractors abroad

208. *Id.* at 285.

209. *Id.* at 287.

210. *Id.*

<i>EEOC v. Arabian Am. Oil Co.</i> , 499 U.S. 244 (1991)	The term “industry affecting commerce” means <i>any activity, business, or industry</i> in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce	Held not to apply to foreign corporations operating abroad
<i>Sale v. Haitian Ctrs. Council, Inc.</i> , 509 U.S. 155 (1993)	The Attorney General shall not deport or return <i>any alien</i> . . . to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular group, or political opinion.	Held not to apply to aliens detained in international waters while attempting to enter U.S. territory
<i>Small v. United States</i> , 544 U.S. 385 (2005)	It shall be unlawful for any person . . . who has been convicted <i>in any court</i> of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm.	Held not to apply to convictions in foreign courts
<i>Morrison v. Nat’l Austl. Bank</i> , 130 S. Ct. 2869 (2010)	It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of <i>any national securities exchange</i> . . . [t]o use or employ, in connection with the purchase or sale of any security registered on <i>a national securities exchange</i> or <i>any security</i> not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe	Held not to apply to securities issued on foreign exchanges
<i>Kiobel v. Royal Dutch Petroleum Co.</i> , 133 S. Ct. 1659 (2013)	The district courts shall have original jurisdiction of <i>any civil action</i> by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.	Held not to allow civil actions for torts committed abroad

The Supreme Court has not had occasion to specifically consider whether § 924(c) encompasses extraterritorial conduct. But its interpretation of the substantive reach of a parallel provision is highly

instructive. In *Small v. United States*, the petitioner, Gary Small, appealed his conviction for violation of 18 U.S.C. § 922(g)(1), the so-called felon-in-possession statute.²¹¹ Section 922(g), which, like § 924(c), was passed as part of the Gun Control Act of 1968, makes it a crime for “any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm.”²¹² Small, whose predicate conviction was for attempting to illegally smuggle several firearms into Japan, had been sentenced by a Japanese court to five years’ imprisonment.²¹³ When he returned to the United States, he purchased a gun from a Pennsylvania firearms dealer, which was recovered during a routine parole search.²¹⁴ Small eventually entered a conditional guilty plea while preserving his right to challenge the conviction.²¹⁵

Strictly speaking, *Small* did not involve a question of extraterritorial application of federal law at all. As the dissent protested, “In prosecuting Small, the Government [was] enforcing a domestic criminal statute to punish domestic criminal conduct.”²¹⁶ The government had similarly argued in its brief that the “presumption . . . has no application here” since “922(g)(1) does not regulate conduct on foreign territory.”²¹⁷ But the majority believed the principles behind the presumption were nonetheless relevant, particularly the notion that “Congress generally legislates with domestic concerns in mind.”²¹⁸ In light of this “commonsense notion,” the Court declined to read the phrase “convicted in any court” to encompass foreign convictions.²¹⁹

Although *Small* produced a five-three split, of particular significance is the majority’s uncontroverted assertion that although the presumption did not apply “directly” to Small’s case, it “would apply . . . were [the Court] to consider whether this statute prohibits unlawful gun possession abroad as well as domestically.”²²⁰ That language is more than mere dicta. It is a conclusion both consistent with the text of the dissent, which acknowledged that the presumption operates to “restrict federal statutes from applying outside the territorial jurisdiction of the

211. *Small v. United States*, 544 U.S. 385, 387 (2005).

212. 18 U.S.C. § 922(g)(1) (2012).

213. *Small*, 544 U.S. at 387.

214. *Id.*

215. *Id.*

216. *Id.* at 399 (Thomas, J., dissenting).

217. Brief for Respondent at 44 n.31, *Small*, 544 U.S. 385 (No. 03-750).

218. *Small*, 544 U.S. at 388 (majority opinion) (quoting *Smith v. United States*, 507 U.S. 197, 203 (1993)).

219. *Id.*

220. *Id.* at 389.

United States,”²²¹ and consistent with the identities of the dissent’s signatories, a group that included Justices Scalia, Thomas, and Kennedy, all three of whom subscribed to the *Morrison* and *Kiobel* majority opinions.

It seems likely, then, that a majority of the Court, and quite possibly a unanimous majority, would view the felon-in-possession statute as applying to domestic possession only. That is significant because it, like § 924(c), depends on the commission of a predicate crime. But assumptions as to how the Court would rule if faced with determining the extraterritorial application of the felon-in-possession statute, while instructive, cannot resolve whether § 924(c) applies to a person who uses or possesses a gun overseas. That is because § 924(c)’s reference to “any person” is qualified by the language that follows, i.e. “for which the person may be prosecuted in a court of the United States.” In other words, Congress appears to have been quite specific in identifying the class of individuals whom it sought to punish.

That Congress intended to punish those who carry or use a weapon during the commission of a federal (as opposed to state) crime, however, says nothing about whether Congress meant for the law to apply outside the United States. To put it in *Morrison*’s and *Kiobel*’s terms, there is no “affirmative indication” that the statute applies extraterritorially.²²² It is at this point that *Morrison* and *Kiobel* provide an opening to consider “context,” by which the Court presumably means a statute’s history, structure, and purpose.²²³

Congress enacted 18 U.S.C. § 924(c) as part of the Gun Control Act of 1968 in the wake of the Martin Luther King, Jr. and Robert F. Kennedy assassinations.²²⁴ According to the report of the House conference committee, Congress’s primary purpose in passing the Act was to “respond[] to widespread national concern that existing Federal control over the sale and shipment of firearms [across] State lines [was] grossly inadequate.”²²⁵ To this end, the title of the Act was “An act to amend title 18, United States Code, to provide for better control of the interstate traffic in firearms” and section 1 specifically provided for

221. *Id.* at 399 (Thomas, J., dissenting).

222. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (“For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.” (quoting *Benz v. Compania Naviera Hidalgo*, S. A., 353 U. S. 138, 147 (1957) (internal quotation marks omitted)); *Morrison v. Nat’l Australia Bank*, 130 S. Ct. 2869, 2883 (2010).

223. *Morrison*, 130 S. Ct. at 2883.

224. Pub. L. No. 90-618, 82 Stat. 1213 (codified as 18 U.S.C. § 942(c) (2012)).

225. H.R. REP. NO. 90-1577, at 1047 (1968) (Conf. Rep.) (brackets in original), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4413.

“State Firearms Control Assistance.”²²⁶

The Senate Report offers further confirmation of domestic gun violence as the “object[] of the statute’s solicitude.”²²⁷ The report noted that, “[i]n 1967, 7,700 citizens were murdered by gunmen in the United States, and 71,000 Americans were victims of armed robberies and 55,000 persons were assaulted by means of firearms. Thus, in 1967, 134,000 *American citizens* were victimized by gun violence *in the United States*.”²²⁸ The Senate report did not include any mention of Americans harmed overseas. Even the sponsor of the most recent amendment to § 924(c), enacted in 1998, boasted that the amendment’s passage represented “an important step in the battle against firearm violence *in America*.”²²⁹

The language of § 924(c) as originally enacted applied to an even broader category of criminal activity than it does today. Rather than prohibiting the use of weapons in connection with certain kinds of felonies, i.e. enumerated drug offenses and crimes of violence, the statute simply punished whoever “use[d] a firearm to commit *any felony which may be prosecuted in a court of the United States*.”²³⁰

To understand why Congress adopted this particular statutory formulation, some historical context is necessary. Section 924(c) was not included in the original Gun Control bill, but was instead introduced as an amendment on the House floor by Representative Robert Casey of Texas. Casey’s original amendment would have punished “whoever during the commission of any robbery, assault, murder, rape, burglary, kidnapping, or homicide (other than involuntary manslaughter), uses or carries any firearm which has been transported in interstate or foreign commerce”²³¹ Had it passed, Casey’s amendment would have dramatically expanded the federal government’s intrusion into matters traditionally entrusted to states as part of their general police power. That concern is what prompted Representative Richard Poff of Virginia to suggest a much narrower alternative amendment, which applied to “whoever uses a firearm to commit any felony which may be prosecuted in a court of the United States.”²³² As Poff explained when introducing

226. Pub. L. No. 90-618, 82 Stat. 1213 (1968).

227. *Morrison*, 130 S. Ct. at 2884.

228. S. REP. NO. 90-1501, at 22 (1968) (emphasis added), available at <https://bulk.resource.org/gao/90-618/000051AF.pdf>.

229. 144 CONG. REC. 1715 (1998) (statement of Rep. Bill McCollum) (emphasis added).

230. Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1224 (1968) (emphasis added).

231. H.R. 18298, 90th Cong. (1968).

232. This became the eventual language of the statute. Pub. L. No. 90-618, § 102, 82 Stat.

his revised language:

[A]s a matter of policy, I do not think I would be wise to convert State crimes into Federal crimes on such a massive scale. The Constitution reserves the police powers to the several States. What is at issue is the proper function of the federal system. What is at stake is the concept of dual sovereignties. What is involved is the danger of centralized police powers.²³³

Consequently, the phrase “may be prosecuted in a court of the United States” was inserted in order to differentiate federal from state crimes. The ensuing debate makes clear that other members shared Poff’s concern.²³⁴ In contrast, there is absolutely no hint in the legislative record that Congress even considered § 924(c)’s potential extraterritorial application, nor would they have thought to since the number of federal crimes that had been applied extraterritorially at the time was miniscule.

The point can be put slightly differently: suppose Representative Casey’s original amendment had passed, making it a crime to use a firearm during one of the enumerated felonies so long as that firearm had been transported in interstate or foreign commerce. Such a statute clearly would not apply to the use of a firearm extraterritorially. That is because the Supreme Court has “repeatedly held that even statutes that contain broad language in their definitions of ‘commerce’ that expressly refer to ‘foreign commerce’ do not apply abroad.”²³⁵ If this is correct, it would require a leap of logic to infer that Representative Hoff’s substitute amendment, introduced for the sole purpose of cabining the statute’s scope by differentiating federal from state crimes, in fact expanded the substantive reach of the statute to encompass acts committed abroad.

One final point concerning the phrase “may be prosecuted in a court of the United States” bears mentioning. The same language appears in other sections of the U.S. Criminal Code. For instance, the phrase appears in 18 U.S.C. § 3561(b), which concerns sentences of probation for domestic violence offenders. The relevant provision reads: “A defendant who has been convicted for the first time of a domestic violence crime shall be sentenced to a term or probation if not sentenced to a term of imprisonment. The term ‘domestic violence crime’ means a

1213, 1224 (Oct. 22, 1968).

233. 114 CONG. REC. 22, 231–32 (1968) (statement of Rep. Richard Poff).

234. *Id.* at 22, 231.

235. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991) (emphasis in original) (citing *N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29 (1925)); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

crime for which the defendant may be prosecuted in a court of the United States”²³⁶ There is some support for the idea, then, that the phrase is mere “boilerplate language” that should not be read to expand the substantive reach of the statute.²³⁷

The existence of these other statutes and the legislative history of § 924(c) suggest that the operative language is jurisdictional in nature. That is to say, it defines federal courts’ subject-matter jurisdiction. Wherever the predicate offenses are enumerated felonies, a federal court necessarily enjoys jurisdiction over the “case,” including the authority to decide whether the conduct at issue is punishable under § 924(c). But acknowledging this truth says nothing of the extraterritorial scope of § 924(c) itself. As *Morrison* recognized, “to ask what conduct [a statute] reaches is to ask what conduct [it] prohibits. Subject-matter jurisdiction, by contrast, refers to a tribunal’s power to hear a case.”²³⁸ Seen in this light, the “for which a person may be prosecuted” language merely recognizes federal courts’ jurisdiction over the “case.” It does not speak to conduct that the statute prohibits.

Finally, the conclusion that Congress did not intend § 924(c) to apply extraterritorially is buttressed by a general review of the statute’s overall structure. As the Court found in *EEOC v. Arabian American Oil* with respect to Title VII, “[t]he statute as a whole indicates a concern that it not unduly interfere with the sovereignty and laws of the States.”²³⁹ Other provisions make clear that Congress was primarily concerned with firearms transportation to and between States.

For example, while the Gun Control Act reflects congressional concern over potential conflicts between federal and state law, the statute is silent as to the relationship between federal and foreign law. Section 924(i) penalizes violations of § 922(u), which prohibits thefts from the inventory of gun dealers, manufacturers, and importers. Section 924(i)(2) notes that

[n]othing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.²⁴⁰

236. 18 U.S.C. § 3561(b) (2012) (emphasis added).

237. *Arabian Am. Oil Co.*, 499 U.S. at 251.

238. *Morrison v. Nat’l Australia Bank*, 130 S. Ct. 2869, 2877 (2010).

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

240. 18 U.S.C. § 924(i)(2).

Congress presumably would have at least mentioned potential conflicts with the laws of foreign countries had it considered § 924(c)'s potential extraterritorial application. In fact, there is an entire section of the Act, 18 U.S.C. § 927, devoted to its “Effect on State Law.”²⁴¹ The *Arabian American Oil* Court made a similar point, noting that “[i]t is . . . reasonable to conclude that had Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures.”²⁴²

Many of the penalty provisions of § 924 were drafted in such a way as to foreclose the possibility of extraterritorial application. Section 924(g), for instance, prohibits the act of acquiring a weapon for use in a crime of violence. Significantly, however, the statute's literal terms do not authorize conviction for someone who travels for the purpose of acquiring a weapon outside of the United States. It reads:

Whoever, with the intent to engage in conduct which . . . (4) constitutes a crime of violence . . . travels from any State or foreign country *into any other State* and acquires . . . a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.²⁴³

If Congress had intended § 924 to apply extraterritorially, presumably it would have eliminated the locus language altogether or substituted “into any other foreign country” for “into any other State.” Instead, Congress was sensibly focused on violence *in the United States*. Section 924(k) similarly penalizes the act of smuggling a weapon into the United States for the purpose of committing a crime of violence; it does not criminalize smuggling a weapon *out* of the U.S. for the purpose of committing a crime of violence abroad.²⁴⁴ Finally, § 922 describes several “unlawful acts” under the Gun Control Act—importation, exportation, unlicensed disposal, and possession—with no mention of extraterritorial application.²⁴⁵

Before moving on to an analysis of how courts have addressed § 924(c)'s extraterritorial reach, a final point bears mentioning. One might be tempted to suppose that the subject matter of § 924(c) offers the requisite “context” to overcome the presumption against extraterritoriality. After all, drug trafficking offenses frequently involve extraterritorial conduct. It is not implausible therefore that Congress was thinking extraterritorially when it added “drug trafficking” to the

241. *Id.* § 927.

242. *Arabian Am. Oil Co.*, 499 U.S. at 256.

243. 18 U.S.C. § 924(g) (emphasis added).

244. *Id.* § 924(k).

245. *See generally id.* § 922.

statute in 1986.²⁴⁶ But this argument proves too much. It is not enough to say that the crime at issue often involves extraterritorial conduct. There must be some “affirmative indication” that such conduct was the object of Congress’s concern. The legislative history of the 1986 amendment provides no such indication.

2. The Unwarranted Expansion of § 924(c)

To date, only two appeals courts have addressed § 924(c)’s extraterritorial application.²⁴⁷ Both have determined that the statute prohibits firearms offenses committed abroad. The justifications for these holdings, however, are seriously flawed.

In 2010, the Eleventh Circuit reviewed the convictions of Roy Belfast. Belfast, the American son of former Liberian president Charles Taylor, was the first person to be indicted and convicted under the Torture Act.²⁴⁸ At trial, the government proved that Belfast had participated in and directed a number of atrocities during his father’s presidency, including multiple murders. In addition to being convicted of acts of torture, Belfast was found guilty of violating § 924(c). All of the charged conduct, including Belfast’s use of a weapon, occurred entirely in Liberia.

In addressing Belfast’s argument that § 924(c) does not proscribe extraterritorial conduct, the Eleventh Circuit postulated that “extraterritorial application can be inferred in certain cases even absent an express intention on the face of the statute.”²⁴⁹ For this proposition the court cited *Bowman*. The court further explained its interpretation of *Bowman*’s meaning:

Crimes fall under the *Bowman* exception when limiting 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 in foreign countries as at home. Thus, we have upheld extraterritorial application of statutes where the nature of the activities warranted a broad sweep of power.²⁵⁰

As is true with section 10(b) and RICO, the court of appeals’ reading of *Bowman* would effectively extraterritorialize the entire U.S. Criminal Code. That is not what *Bowman* says, of course, nor does it reflect

246. Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 449, 456–57 (1986) (codified as 18 U.S.C. § 921 (2012)).

247. *United States v. Siddiqui*, 699 F.3d 690, 701 (2d Cir. 2012); *United States v. Belfast*, 611 F.3d 783, 814 (11th Cir. 2010).

248. 18 U.S.C. § 2340–2340A.

249. *Belfast*, 611 F.3d at 813 (quoting *United States v. Frank*, 599 F.3d 1221, 1230 (11th Cir. 2010)).

250. *Id.* at 814 (quoting *Frank*, 599 F.3d at 1230).

Congress's clearly expressed intent. As one district court correctly noted in rejecting a similarly expansive interpretation offered by the government, "§ 924(c) criminalizes conduct that does not directly victimize the United States. All crime can harm the United States indirectly, but it does not follow that all federal criminal statutes apply extraterritorially based on the Government's need to 'defend itself.'"²⁵¹

The Eleventh Circuit went on to note that "the plain language of § 924(c) demonstrates that Congress intended the provision to apply to *any* acts that, under other legislation, may be prosecuted in federal courts."²⁵² Of course, this "plain language" approach ignores both the presumption and the legislative history that demonstrates Congress's overriding concern was to differentiate federal from state crimes.

The Eleventh Circuit's interpretation of § 924(c) is particularly perplexing given the court's acknowledgement of *Morrison* with respect to the Torture Act, a statute whose extraterritorial application is, as the court itself recognized, "unmistakable." After all, the Torture Act applies to "[w]hoever *outside the United States* . . . commits torture."²⁵³ But while playing lip service to the idea that the presumption applied to § 924(c), the court in fact bypassed *Morrison*'s teaching in favor of an unjustifiably broad reading of *Bowman*.

Recently, the Second Circuit became the second court of appeals to consider § 924(c)'s extraterritorial reach.²⁵⁴ "Consider," however, may be too generous a characterization of the court's treatment of the issue. Defendant-Appellant Aafia Siddiqui was convicted of attempted murder of U.S. nationals for firing an American serviceman's M-4 at military personnel while detained at a local police facility in Afghanistan.²⁵⁵ In reviewing her appeal, the court gave short shrift to the argument that § 924(c) does not apply abroad:

As for § 924, which criminalizes the use of a firearm during commission of a crime of violence, every federal court that has considered the issue has given the statute extraterritorial application where, as here, the underlying substantive criminal statutes apply extraterritorially. We see no reason to quarrel with their conclusions.²⁵⁶

Significantly, the court's reasoning was premised on its misguided

251. *United States v. Mardirossian*, 818 F. Supp. 2d 775, 776 (S.D.N.Y. 2011) (citation omitted).

252. *Belfast*, 611 F.3d at 814.

253. 18 U.S.C. § 2340A (emphasis added).

254. *United States v. Siddiqui*, 699 F.3d 690, 701 (2d Cir. 2012).

255. *Id.* at 696–97.

256. *Id.* at 701.

belief that “[t]he ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes.”²⁵⁷

Every district court that has considered the issue has similarly found that § 924(c) applies extraterritorially. But they have not generally followed the Second Circuit’s implausible contention that the presumption simply does not apply to criminal statutes as a class. Instead, they have relied on an alternative theory, namely that § 924(c) is an “ancillary” statute whose reach is determined by the scope of its underlying predicates. In this regard, Judge Rakoff’s opinion in *United States v. Mardirossian*, a case that we litigated, is instructive.

Judge Rakoff’s determination that § 924(c) is an ancillary statute whose reach is coterminous with the underlying drug trafficking offenses or crimes of violence enumerated therein is erroneous for at least three reasons. First, there is no controlling precedent supporting the use of an “ancillary statute” theory as a separate basis for defeating the ordinary presumption against extraterritorial application of statutes. In this way, the district court placed undue emphasis on *United States v. Yousef*,²⁵⁸ a Second Circuit case that upheld the application of a conspiracy statute to defendants accused of plotting to blow up commercial aircraft. In *Yousef*, the court noted that “if Congress intended United States courts to have jurisdiction over the substantive crime of placing bombs on board the aircraft at issue, it is reasonable to conclude that Congress also intended to vest in United States courts the requisite jurisdiction over an extraterritorial conspiracy to commit that crime.”²⁵⁹ The *Morrison* court made clear, however, that the extraterritorial inquiry is a “merits” issue rather than a jurisdictional one.²⁶⁰ Hence, while commission of an enumerated drug trafficking offense or crime of violence empowers a court to hear a “case,” it says nothing of whether Congress intended § 924(c) to reach extraterritorial weapons possession. Moreover, both the conspiracy statute, which speaks of “persons [who] conspire either to commit any offense against the United States, or to defraud the United States,”²⁶¹ and the substantive offenses charged in *Yousef* are, unlike § 924(c), subject to the *Bowman* exception.

Second, the court’s analogy to conspiracy law is inapt. Section 924(c) is not functionally equivalent to solicitation, conspiracy, attempt,

257. *Id.* at 700.

258. 327 F.3d 56 (2d Cir. 2003).

259. *Id.* at 87–88.

260. *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2877 (2010).

261. 18 U.S.C. § 3 (2012).

or any other inchoate offense that derives its substantive scope from an underlying offense. As the Supreme Court has noted, § 924(c) is not merely a penalty or a manner of committing a crime, but rather a crime in its own right that punishes certain conduct, namely carrying or using a weapon during a violent crime or drug trafficking offense.²⁶²

Third, the court's analysis illustrates a broader point about how lower courts view civil and criminal statutes differently when determining a statute's extraterritorial application. In *Mardirossian*, the court accepted the government's argument that, because the predicate crimes of violence and drug trafficking had explicit extraterritorial application, § 924(c) must likewise apply to extraterritorial conduct. But just a year earlier, Judge Rakoff had rejected a similar argument when offered by civil plaintiffs. In that case, the court explained:

Plaintiffs' superficial argument—that since the federal statutes prohibiting money laundering are (they say) extraterritorial in nature, a RICO action predicated on violations of those statutes should be given extraterritorial application—entirely misapprehends both the teachings of *Morrison* and the nature of RICO. . . . [T]he focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity. If, as noted above, RICO evidences no concern with foreign enterprises, RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign.²⁶³

Judge Rakoff's analysis of RICO is undoubtedly correct. But his reasoning is likewise applicable to § 924(c), a statute whose "focus" is to penalize the possession and use of guns, presumably because in Congress's estimation such possession and use makes the commission of the underlying criminal offenses more dangerous. It makes sense for Congress to be primarily concerned with protecting inhabitants of the territorial United States from domestic gun violence. Indeed, to the extent that it is relevant, the legislative history suggests this was precisely Congress's focus when it enacted the law.²⁶⁴ Nevertheless, courts appear reluctant to confine prosecutors' power to bring such charges in international cases.

262. *Simpson v. United States*, 435 U.S. 6, 10 (1978) (holding that § 924(c) "creates an offense distinct from the underlying federal felony"); *see also* *Castillo v. United States*, 530 U.S. 120, 125 (2000) ("Congress already has determined that at least some portion of § 924, including § 924(c) itself, creates, not penalty enhancements, but entirely new crimes. *See* S. REP. NO. 98-225, at 312-314 (1984) ("Section 924(c) sets out an offense distinct from the underlying felony and is not simply a penalty provision.")).

263. *Cedeno v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473-74 (S.D.N.Y. 2010), *aff'd sub nom.* *Cedeno v. Castillo*, 457 F. App'x 35 (2d Cir. 2012).

264. *See supra* notes 224-33 and accompanying text.

CONCLUSION

This Article cannot hope to capture the myriad ways *Morrison* might be invoked by criminal defendants going forward. Instead, we have sought to illustrate by way of example how lower courts should approach statutory interpretation in this area generally. Remaining faithful to *Morrison*'s holding requires courts to ask whether a statute evidences Congress's considered judgment that extraterritorial application of the statute is warranted. As we have argued, courts ought not focus on whether such applications are wise policy because those are determinations appropriately entrusted to the political branches. But in a time when U.S. law enforcement agencies are increasingly asserting their power overseas,²⁶⁵ it is incumbent upon courts to insist that Congress speak with clarity and that the Executive operate within the boundaries of clearly established law.

265. See, e.g., Benjamin Weiser, *A New York Prosecutor with Worldwide Reach*, N.Y. TIMES, Mar. 27, 2011, at A1 (discussing international sting operations).