

## **Crossing the High Seas: Are There Limits to Extraterritorial Reach for Prosecutions of Securities Laws?**

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As globalization shrinks the world, there has been a recent and renewed flurry of interest in the presumption against extraterritoriality<sup>1</sup>—that “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.”<sup>2</sup> As a result, some courts now appear more receptive to requests that they rein in the government’s efforts to “go after criminal activity that occurs in foreign countries.”<sup>3</sup> Proving that a statute should not apply extraterritorially may be far easier than proving that your client’s conduct was in fact extraterritorial: if globalization means anything, it is that there are no longer many financial transactions that have no connection at all to the United States. But if yours is a case involving a foreign defendant, foreign securities, or allegations of a foreign scheme, it is critical to understand the background and current state of the law on extraterritoriality; to think carefully about the allegations in your case; to make sure that the government is not exceeding its jurisdiction; and to guard vigilantly against efforts by the government to reframe one crime (like securities fraud) as another (like wire fraud) so as to circumvent *Morrison* and *Vilar*.

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<sup>1</sup> For example, a search of Westlaw’s federal databases for the string “(presumption or canon) w/3 (extraterritorial\* or territorial!)” returns 477 cases—half of which were published in the past 5 years.

<sup>2</sup> *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (Rehnquist, CJ) (quotations omitted).

<sup>3</sup> See *infra* 7 n.32 and accompanying text.

### The Birthplace of Extraterritorial Prosecutions

The presumption against extraterritoriality is a century old.<sup>4</sup> So, too, are the carve-outs for certain criminal statutes (and their misunderstandings and misrepresentations).

In late 1919, the United States owned a steamship called the *Dio*, which was then on a voyage to Rio de Janeiro. Four of its crew hatched a scheme to order and claim that they had bought 1,000 tons of fuel, but to take on board and pay for just 600 tons, pocketing the difference. When they returned to New York, they were charged with various counts of conspiracy, some of which were said to have occurred “on the high seas, out of the jurisdiction of any particular state,” others in Rio de Janeiro or on board the *Dio* itself.<sup>5</sup> The defendants objected to the court’s jurisdiction, and the district court agreed: because Congress “had always expressly indicated it when it intended that its laws should be operative on the high seas,” and it had not done so here, the relevant statute “must be construed not to extend to acts committed on the high seas.”<sup>6</sup> But on appeal, the Supreme Court held that—for *some* criminal statutes—there was an exception to that general rule:

[The presumption] should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents.<sup>7</sup>

It’s important to note that *Bowman* did not create a broad exception for all criminal statutes, as the Department of Justice has argued and other courts have held.<sup>8</sup> For the *Bowman* court, there were two distinct types of criminal statutes that needed to be treated differently: The first were “[c]rimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds”—offenses that “affect the peace and good order of the community.”<sup>9</sup> The second were criminal statutes that “are enacted because of the

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<sup>4</sup> *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (“Words having universal scope, such as ‘every contract in restraint of trade,’ ‘every person who shall monopolize,’ *etc.*, will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch. ... We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned.”).

<sup>5</sup> *United States v. Bowman*, 260 U.S. 94, 96 (1922).

<sup>6</sup> *Id.* at 97.

<sup>7</sup> *Id.* at 98.

<sup>8</sup> See, e.g., *infra* 4 n.19; *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.”); *United States v. Siddiqui*, 699 F.3d 690, 700 (2d Cir. 2012), *as amended* (Nov. 15, 2012).

<sup>9</sup> *Bowman*, 260 U.S. at 98.

right of the Government *to defend itself against obstruction, or fraud* wherever perpetrated.”<sup>10</sup> Because the conspirators’ scheme to defraud the ship’s owner—the United States—was a crime against the government, it fell within the second category and the presumption against extraterritoriality did not apply.<sup>11</sup>

### *A Return to First Principles in the Modern World*

A few years ago, the Supreme Court put extraterritoriality back in the spotlight with its now-landmark decision in *Morrison v. National Australia Bank*.<sup>12</sup> *Morrison* involved foreign-squared and foreign-cubed claims. The alleged fraud had taken place in Florida,<sup>13</sup> but the plaintiffs were (mostly) foreign, the issuer was foreign, and the plaintiffs’ losses had occurred on a foreign stock exchange. Because the Securities Exchange Act “omitted any discussion of its application to transactions taking place outside of the United States,” the Second Circuit decided that it was free to “discern” what Congress “would have wanted.” The Second Circuit reached roughly the right conclusion—dismissing the case for lack of “subject matter jurisdiction”—but for the wrong reasons.<sup>14</sup> The idea that the court had leeway here was, according to the Supreme Court, a “disregard of the presumption against extraterritoriality” that had “been repeated over many decades by various courts of appeals” in dealing with “fraudulent schemes that involve conduct and effects abroad.”<sup>15</sup> It had also led to results that were confusing and unpredictable, and that often ignored the presumption against extraterritoriality (which “would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case”).<sup>16</sup> And so the Supreme Court offered a new test for whether conduct is proscribed by Section 10(b): “whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange.”<sup>17</sup>

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<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> Helpfully, Justice Taft also discussed in dicta various examples of offenses that could be policed extraterritorially, all six of which appeared in a chapter of the U.S. Code titled “Offenses against the Operation of the Government.” For more, see *Bowman*, 260 U.S. at 98–99; see also *United States v. Abu Khatallah*, 151 F. Supp. 3d 116, 125–29 (D.D.C. 2015).

<sup>12</sup> *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

<sup>13</sup> *Morrison* centered on the National Australia Bank’s 1998 purchase of a Florida-based mortgage servicing company, HomeSide Lending. In 2001, it announced more than \$2 billion’s worth of write-downs, claiming that HomeSide’s modeling to determine future revenues had used overly optimistic assumptions.

<sup>14</sup> *Morrison v. Nat’l Australia Bank Ltd.*, 547 F.3d 167, 177 (2d Cir. 2008). The Second Circuit conceived of this as a “lack [of] subject matter jurisdiction,” *id.*, although it is in fact a merits question. See *Morrison*, 561 U.S. at 254.

<sup>15</sup> *Morrison*, 561 U.S. at 255.

<sup>16</sup> *Id.* at 266.

<sup>17</sup> *Id.* at 269–70.

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At around the same time, two prominent investment advisors, Alberto Vilar and Gary Tanaka, were trying to find a way to reverse their 2008 criminal convictions on charges of money laundering, investment advisor fraud, securities fraud, and mail and wire fraud.

In the 1980s, Vilar and Tanaka had offered their clients “guaranteed fixed-rate deposit accounts” and promised to keep most of their money in secure, high-quality deposits; instead, they invested in technology and biotechnology stocks and lost millions when the dotcom bubble burst. Vilar and Tanaka went on to make a series of increasingly risky investments, used client funds to cover withdrawal requests and later their own expenses, and then lied to their clients and the Securities and Exchange Commission about what had happened. The Department of Justice charged them with a host of crimes, including securities-fraud violations of Section 10(b) and Rule 10b-5. Vilar was convicted on all 12 counts and sentenced to 9 years in prison; Tanaka was convicted on 3 counts and sentenced to 5 years.

On appeal, Vilar and Tanaka raised a “host of challenges,” among them that their conduct was extraterritorial and, under *Morrison*, should not have been subject to Section 10(b) or Rule 10b-5. The government ignored Justice Scalia’s recent reminder that the Court would apply the presumption against extraterritoriality “in all cases,”<sup>18</sup> arguing that “the animating principle of *Morrison*—the presumption against extraterritoriality for civil statutes—simply does not apply in the criminal context.”<sup>19</sup> The Second Circuit disagreed:

Although Section 10(b) clearly forbids a variety of fraud, its purpose is to prohibit “[c]rimes against private individuals or their property,” which *Bowman* teaches is exactly the sort of statutory provision for which the presumption against extraterritoriality does apply. In sum, the general rule is that the presumption against extraterritoriality applies to criminal statutes, and Section 10(b) is no exception.<sup>20</sup>

The appeal did not help Vilar and Tanaka because the Second Circuit determined that—under the new *Morrison* test—at least some of their victims had entered into and renewed their agreements in Puerto Rico and New York.<sup>21</sup> (Vilar actually ended up with a worse sentence when his case was remanded.<sup>22</sup>) But the *Vilar* decision has firmly, and helpfully, restored the old *Bowman* rule:

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<sup>18</sup> *Morrison*, 561 U.S. at 248.

<sup>19</sup> Brief for Gov’t at 96, *United States v. Vilar et al.*, 2012 WL 1494574 (2d Cir. Mar. 26, 2012).

<sup>20</sup> *United States v. Vilar*, 729 F.3d 62, 74 (2d Cir. 2013).

<sup>21</sup> *Id.* at 77 (“In light of these domestic transactions, we are persuaded that, based on the record evidence, a jury would have found that Vilar and Tanaka engaged in fraud in connection with a domestic purchase or sale of securities pursuant to Section 10(b) and Rule 10b-5.”).

<sup>22</sup> Nate Raymond, *Money manager Vilar gets new, longer 10-year U.S. prison term*, Reuters (Apr. 24, 2014) (“U.S. District Judge Richard Sullivan in Manhattan, who had imposed the original sentence, said a

criminal statutes do not apply extraterritorially unless Congress says so or “the law at issue is aimed at protecting ‘the right of the government to defend itself.’”<sup>23</sup>

### Defending Criminal Securities Cases in the wake of Morrison and Vilar

In *Vilar*, the Second Circuit provided a framework to gauge how other white-collar prosecutions are likely to fare under *Morrison*. The first question to ask is whether the criminal statute in question contains a “clear indication of an extraterritorial application”—whether Congress has stated that it intends the statute to apply internationally. The second question is whether the proscribed conduct falls within “the right of the government to defend itself.” And if neither of these is true, the statute ought to have no extraterritorial application.

In one sense, then, these cases return us to precedent that is a hundred years old. In another, they leave us with limited guidance in a brave new world: for *Bowman*, “extraterritorial” misconduct would have required a privately owned ship, while today most internet “wire” traffic flows through the United States at some point and defendants might be convicted for selling digital currency to a global market of anonymous users.<sup>24</sup> It will be some time before we learn how *Morrison* and *Vilar* will play out in these new, increasingly complex scenarios, but there are already a handful of key cases to guide us.

### Securities Fraud

Because *Morrison* and *Vilar* arose in the securities-fraud context, it is the area in which we know how courts are most likely to react. We know not only that Section 10(b) has no extraterritorial application; we also have tests for assessing whether proscribed conduct is extraterritorial or not. For conduct to fall with Section 10(b)’s reach, the security at issue must either be listed on a domestic exchange or the purchase or sale of the security at issue must have been made in the United States. The transaction “is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States.”<sup>25</sup>

In *United States v. Mandell*, for example, the Second Circuit upheld convictions for securities fraud—over the defendants’ objections that their conduct was extraterritorial—because the jury had heard “evidence of . . . private placement offerings” that required would-be investors “to submit purchase applications and payments to the company in the United States; the company

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longer term was justified because *Vilar* had taken steps to prevent victims from being repaid. Two victims have died waiting to get their money back, he noted.”).

<sup>23</sup> *Vilar*, 729 F.3d at 73.

<sup>24</sup> See *infra* 7 n.33 and accompanying text.

<sup>25</sup> *United States v. Mandell*, 752 F.3d 544, 548 (2d Cir. 2014); see also *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012) (“[T]ransactions involving securities that are not [listed] on a domestic exchange are domestic if irrevocable liability is incurred or title passes within the United States.”); see also *S.E.C. v. Bengier*, 2013 WL 593952, at \*9 (N.D.Ill. Feb. 15, 2013) (citing *Absolute Activist*); *S.E.C. v. Chicago Convention Ctr., LLC*, 961 F. Supp. 2d 905, 917 (N.D.Ill. 2013).

had discretion to accept or reject those applications on receipt. Under *Vilar*, these were ‘domestic transactions.’”<sup>26</sup>

Of course, bright-line rules are seldom as clear as they seem, and the government has already had some success in narrowing *Morrison*’s reach. In *United States v. Georgiou*, the Third Circuit was presented with an offshore pump-and-dump scheme: George Georgiou and his co-conspirators opened brokerage accounts in Canada, the Bahamas, and Turks and Caicos, which they allegedly used to trade, manipulate share prices, and sell stocks at an inflated value.<sup>27</sup> The Third Circuit agreed that the stocks, which were priced and traded over the counter on the Bulletin Board and Pink Sheets markets, were “not national securities within the scope of *Morrison*.”<sup>28</sup> But because the trades were “facilitated by U.S.-based market makers,” they “required ... incurring irrevocable liability” here, and Georgiou’s foreign trades on foreign markets were nevertheless “‘domestic transactions’ under the second prong of *Morrison*.”<sup>29</sup>

While *Morrison* is only a few years old, it is already apparent that a defendant is not necessarily off the hook simply because he can clear its transactional test. The government may try, and may be able to, find another way of charging your case: as having some domestic connection; as involving an offer made in or from the United States; or as wire or mail fraud. As the Supreme Court itself noted, “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States.”<sup>30</sup>

### Wire Fraud

The United States Code creates criminal liability for various types of fraud, including mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), and bank fraud (18 U.S.C. 1344). These statutes are, in many ways, the most interesting new frontier for the presumption against extraterritoriality: in an age where almost all “wire” communications pass through the United States at some point, wire fraud has become a mainstay for prosecutors looking to police international misconduct.

In one sense, these fraud statutes ought not to apply extraterritorially. They demonstrate no express Congressional intent that they should, and they are not obviously within the subset of statutes “enacted because of the right of the government to defend itself....” (Indeed, not long

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<sup>26</sup> *Mandell*, 752 F.3d at 549; see also *S.E.C. v. Battoo*, 158 F. Supp. 3d 676, 694 (N.D. Ill. 2016) (“[A]t least some purchasers of the Employer Plans and Maven Life variable annuity also incurred irrevocable liability in the United States. American citizens purchased the Employer Plans and Maven Life variable annuity, and at least one committed to Sunderlage’s investment scheme in the United States: Ken Voigt discussed and committed to investing in a Maven Assurance variable annuity in Illinois.”).

<sup>27</sup> *United States v. Georgiou*, 777 F.3d 125, 131 (3d Cir. 2015), cert. denied, 136 S. Ct. 401 (2015).

<sup>28</sup> *Id.* at 135.

<sup>29</sup> *Id.* at 136–37.

<sup>30</sup> *Morrison*, 561 U.S. at 266.



ago, the Second Circuit’s view was that the “identity and location of the victim, and the success of the scheme, are irrelevant.”<sup>31</sup> The Northern District of California recently held as much in *U.S. v. Sidorenko*, a wire fraud case involving foreign nationals whose only nexus to the United States was that they worked for an international agency that was funded, in part, by this country. Judge Breyer explained both how much and how little things have changed since *Bowman*:

That a statute might today be a desirable tool for the government to use in defending itself does not mean that it was enacted with today’s circumstances in mind. One cannot in good faith argue that the generic wire fraud statute charged here, of which the United States is not the only or inevitable victim, was ‘enacted because of the right of the government to defend itself against’ foreign frauds.

Of course, the United States has some interest in eradicating bribery, mismanagement, and petty thuggery the world over. But under the government’s theory, there is no limit to the United States’s ability to police foreign individuals.... This is not sound foreign policy, it is not a wise use of scarce federal resources, and it is not, in the Court’s view, the law.<sup>32</sup>

In another, more practical sense, the distinction may be largely academic. As we have already seen, convincing a court not to apply these statutes extraterritorially is relatively easy; convincing it that the misconduct at issue is extraterritorial—that is, that it has no nexus to the United States—is frequently far more difficult.<sup>33</sup> In a recent S.D.N.Y. case, for example, Arthur Budovsky was accused of running a Costa Rican business that “emerged as the ‘financial hub of the cyber-crime world, facilitating a broad range of online criminal activity, including credit card fraud, identity theft, investment fraud, computer hacking, child pornography, and narcotics trafficking.’”<sup>34</sup> Budovsky moved to dismiss the indictment, arguing that the alleged conduct occurred “wholly outside the United States,” and that if having users in the United States was enough to reach a foreign website, “any operator of any web business—located anywhere in the world—could be hauled into United States courts.”<sup>35</sup> Judge Cote was unmoved: “While the advent of the web may create a theoretical concern about the extraterritorial reach of U.S.

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<sup>31</sup> *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997).

<sup>32</sup> *United States v. Sidorenko*, 102 F. Supp. 3d 1124, 1130 (N.D. Cal. 2015). Judge Breyer was even more scathing at the hearing: “My first reaction in reading this indictment is that your office is to be congratulated because, apparently, you have reduced crime in the Northern District of California, and indeed in the United States of America, to such a point that you are using resources of your office to go after criminal activity that occurs in foreign countries.” Daniel Siegel, Judge Rips Feds For ‘Misguided’ Foreign Suit, Law360 (April 21, 2015).

<sup>33</sup> *Cf. United States v. Budovsky*, 2015 WL 5602853, at \*4 (S.D.N.Y. Sept. 23, 2015) (citation omitted) (characterizing *Sidorenko* as a “rare” case and explaining that “[a] jurisdictional nexus exists ‘when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests.’”).

<sup>34</sup> *Id.* at \*1.

<sup>35</sup> *Id.* at \*5.

criminal laws, in this case the Indictment has sufficiently alleged the conduct of a criminal business with the aim of causing harm to U.S. citizens and U.S. interests.”<sup>36</sup>

### *S.E.C. Civil Enforcement Actions*

Extraterritorial issues also arise in SEC civil enforcement actions. *Morrison* was a private civil action brought under the Exchange Act of 1934, but courts soon held that its presumption against extraterritoriality applied with equal force to the Securities Act of 1933 and to S.E.C. civil enforcement actions brought under either statute.<sup>37</sup>

In *S.E.C. v. Benger*, for example, the S.E.C. accused defendants of “us[ing] selling agents in various foreign countries, who, it is alleged, targeted elderly citizens, and for want of a better word, scammed them through the use of boiler room tactics.”<sup>38</sup> The defendants, who acted as escrow agents, lived and were paid in the United States, put together stock purchase agreements in the United States, and received and distributed proceeds in the United States. But the Northern District of Illinois applied *Morrison* to the S.E.C.’s Section 10(b) claims, held that what mattered for extraterritoriality purposes was where the parties “closed their stock purchase and transferred title,” and found that, in *Benger*’s case, that was Brazil.<sup>39</sup> Because “[t]he transactions about which the SEC complains are not domestic transactions,” they were thus not “within the gravitational field created by the Supreme Court in *Morrison*” and the court granted defendants’ motion for summary judgment on those claims.

The Southern District of New York has also wrestled with *Morrison*’s second prong: what it means for a securities transaction to constitute “a purchase or sale . . . made in the United States.”<sup>40</sup> In *S.E.C. v. Goldman Sachs*, the court’s focus was not so much on whether Section 10(b) should apply extraterritorially (it should not), but on what it means for the alleged misconduct to be wholly extraterritorial. Judge Jones held that it was not enough for the S.E.C. to allege that Goldman trader Fabrice Tourre had “act[ed] in and from New York City”—what

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<sup>36</sup> *Id.*

<sup>37</sup> The government has, at times, argued that *Morrison* is or ought to be cabined by the Dodd-Frank amendments. *See, e.g., S.E.C. v. Tourre*, 10 CIV. 3229 KBF, 2012 WL 5838794 (S.D.N.Y. Nov. 19, 2012) (“The SEC does take the position that the 2009 Dodd–Frank Act has repealed *Morrison*’s applicability to the SEC, but only for conduct occurring after Dodd–Frank’s enactment.”). For a helpful discussion of that argument—and the differences between merits questions and subject-matter jurisdiction—see *Chicago Convention Center*, 961 F. Supp. 2d 905 (N.D. Ill. 2013).

<sup>38</sup> *Benger*, 2013 WL 593952, at \*2 (N.D. Ill. Feb. 15, 2013).

<sup>39</sup> *See generally id.* at \*4.

<sup>40</sup> *S.E.C. v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 157 (S.D.N.Y. 2011) (“Although firm in its holding, the securities at issue in *Morrison* were traded only on foreign exchanges. As a result, *Morrison* was largely silent regarding how lower courts should determine whether a ‘purchase or sale is made in the United States.’”).



mattered was where the purchasers had “incurred ‘irrevocable liability.’”<sup>41</sup> In light of *Morrison* and the S.E.C.’s failure to allege that any party had incurred such liability in the United States, the court dismissed the S.E.C.’s Section 10(b) and Rule 10b-5 claims.

That was, however, not the end of Fabrice Tourre’s case, and over the next two years, the court continued to grapple with *Morrison*’s effect on alleged transgressions of other securities laws. For instance, even when securities are listed only on foreign exchanges or traded only abroad, defendants may still face charges based on a domestic *offer* of those securities. Tourre was accused of violating Rule 17(a) by offering (rather than selling) securities to foreign investors, and he moved for summary judgment on those claims. He argued that if the ultimate sale of a security is not domestic, then “neither the sale nor the offer is actionable under *Morrison*. . . . [A]n offer is actionable if and only if it is both domestic and ultimately un consummated.”<sup>42</sup> The court disagreed: “*Morrison* requires only that the S.E.C. prove that Tourre engaged in fraudulent conduct in connection with a domestic offer of those securities. To make that showing, the S.E.C. must prove only that the offeror was in the United States at the time he or she made the relevant offer.”<sup>43</sup>

#### What to Keep in Mind when Defending International White-Collar Cases

In theory, it is now as clear as it was a hundred years ago that there is a presumption that United States civil and criminal statutes do not apply beyond our borders. In practice, though, even “foreign” crimes will often reach our shores or affect our compatriots. Despite the clear spirit of *Morrison*, it already looks as though courts will resist efforts to dismiss foreign misconduct as “wholly extraterritorial.” Still, if your case is one in which the government is “wasting scarce resources” by “go[ing] after criminal activity that occurs in foreign countries,” consider your options:

1. *Think about where the conduct occurred.* If your case involves a foreign national or misconduct that occurred abroad, think critically about whether it has a sufficient nexus to the United States: Were the securities traded on a foreign exchange? Was the use of U.S.-based “wires” incidental or central to the alleged fraud?
2. *Think about personal jurisdiction.* Is the government able to reach your client?<sup>44</sup> In an S.E.C. investigation, for instance, the Commission has only nationwide subpoena

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<sup>41</sup> *Id.* at 159 (S.D.N.Y. 2011); see also *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012) (“[W]e hold that transactions involving securities that are not traded on a domestic exchange are domestic if irrevocable liability is incurred or title passes within the United States.”).

<sup>42</sup> *S.E.C. v. Tourre*, No. 10 CIV. 3229 KBF, 2013 WL 2407172, at \*7 (S.D.N.Y. June 4, 2013).

<sup>43</sup> *Id.* at \*10.

<sup>44</sup> *S.E.C. v. Sharef*, 924 F. Supp. 2d 539, 546 (S.D.N.Y. 2013) (dismissing case where defendant’s “actions [were] far too attenuated from the resulting harm to establish minimum contacts”); but see *S.E.C.*

power and it cannot compel foreign nationals to appear in the United States or produce their documents.<sup>45</sup> In a criminal case, the government may be able to extradite a defendant, but that process is long and arduous and you should consider negotiating for favorable terms if you are willing to waive extradition.

3. *Think about what the government is really alleging.* If your case is one in which the government has dressed securities fraud up as something else—like wire fraud—are they doing so to sidestep *Morrison*? Can you move to have the government identify the domestic “victims” now that the identity and location of the victim do in fact matter?
4. *Think about when you want to challenge the charges.* Is the government’s jurisdictional weakness obvious from the face of the indictment or is it a theory you need to develop through discovery? Remember that if you move to dismiss, courts will accept the government’s allegations as pled.<sup>46</sup>

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*v. Straub*, 921 F. Supp. 2d 244, 256 (S.D.N.Y. 2013) (“[E]ven if Defendants’ alleged primary intent was not to cause a tangible injury in the United States, it was nonetheless their intent, which is sufficient to confer jurisdiction.”).

<sup>45</sup> See, e.g., *S.E.C. v. Zanganeh*, 470 F. Supp. 1307 (D.D.C. 1978) (“[U]nder the facts stated, the Commission has no power to subpoena an alien non-resident to appear before it from a foreign land. Section 21(b) authorizes the Commission to require a witness’s attendance only “from any place in the United States or any State....”). The S.E.C. is authorized for “worldwide service of a summons in an action to enforce a subpoena that is issued under § 78u(b),” so if your client were served in the United States, returning to a foreign country would not insulate her. See, e.g., *S.E.C. v. LoveLines Overseas Mgmt., Ltd.*, MISC. 04-302RWRAK, 2007 WL 581909 (D.D.C. Feb. 21, 2007).

<sup>46</sup> See, e.g., *Budovsky*, 2015 WL 5602853, at \*5 (S.D.N.Y. Sept. 23, 2015) (“Budovsky argues ... that the Indictment’s claim that Liberty Reserve had 200,000 users in the United States could ‘only be supposition.’ Since in a motion to dismiss an indictment the facts alleged by the Government are taken as true, Budovsky’s evidentiary arguments do not require dismissal.”).