

Challenges to the DOJ's Jurisdiction Over Extraterritorial Conduct

Part One of a Two-Part Article

By David S. Krakoff
James T. Parkinson,
Lauren R. Randell,
Veena Viswanatha
and Bree Murphy

The United States is often criticized for trying to be the world's policeman — for trying to prosecute wrongdoing all over the world, even when the connection to U.S. interests is, at best, tenuous. The Supreme Court has in recent years begun imposing limits on the application of federal laws to wide swaths of extraterritorial conduct, in *Morrison v. National Australia Bank*, 561 U.S. 247 (2010), and related cases. The Court limited the extraterritorial reach of the federal securities laws (*Morrison*); limited the extraterritorial reach of the Alien Tort Statute (*Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013)); and made it harder for U.S. courts

David S. Krakoff, James T. Parkinson and Lauren R. Randell are Partners and Veena Viswanatha and Bree Murphy are Associates at BuckleySandler LLP.

to get personal jurisdiction over foreign defendants (*Daimler AG v. Bauman*, 134 S. Ct. 746 (2014)). But to what extent does the *Morrison* line of cases help challenge the notion of the United States as the world's policeman?

Our answer is, not much. The Supreme Court's focus in recent years appears to be on limiting the ability of foreign civil plaintiffs to recover under U.S. law for wrongs committed abroad, leaving the DOJ's ability to prosecute misconduct around the world relatively intact. The most recent case in the *Morrison* line — *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016) — was the first to address a criminal statute, and that case ended up barring civil plaintiffs from recovering under RICO for injuries that only took place abroad, while at the same time preserving the DOJ's ability to pursue criminal RICO charges stemming from the same conduct.

The case led some commentators to conclude that the DOJ was getting everything it wanted — the ability to use RICO

extraterritorially, while getting “pesky” civil plaintiffs out of the way of criminal enforcement actions. See, e.g., Amy Howe, Opinion Analysis: In the End, RJR Prevails in European Community's RICO Lawsuit, *SCOTUSblog*, June 20, 2016; see also Peter J. Henning, RJR Nabisco Ruling Bolsters Justice Dept.'s Pursuit of FIFA, *New York Times*, June 27, 2016.

Coupled with the fact that the DOJ's jurisdiction is rarely challenged in court because so many defendants choose to settle, the outlook may appear bleak for foreign criminal defendants challenging the DOJ's seemingly expansive jurisdiction. But *RJR Nabisco* and other recent decisions of lower federal courts still provide hope for successful challenges to extraterritorial criminal jurisdiction in certain cases. This article examines a few of those options — specifically, the extent to which the presumption against extraterritoriality from the *Morrison* line of cases applies to criminal statutes; the fruitful challenges that remain apart from the presumption against extraterritoriality; and

due process limits on the DOJ's ability to prosecute extraterritorial conduct.

MORRISON AND RELATED CASES

At first glance, *Morrison* and its progeny seem to reflect a Supreme Court concerned with how far U.S. courts can reach around the world. *Morrison* involved alleged civil violations of federal securities laws by National Australia Bank, a foreign bank whose shares were not traded on any U.S. exchange. The plaintiffs, Australians who purchased the bank's shares on a foreign exchange, alleged that the bank had made actionable misrepresentations in connection with the acquisition of a U.S.-based mortgage servicer. The Supreme Court held that the plaintiffs could not sue under the federal securities laws for trades that took place on foreign exchanges; rather, federal securities laws are subject to the presumption against extraterritorial application, and nothing in the relevant statute indicated that it should apply extraterritorially. The Court heard *Kiobel* a few years later. *Kiobel* concerned claims brought by Nigerian nationals under the Alien Tort Statute for violations committed by the Nigerian government in that country. The Court applied the presumption against extraterritoriality to the Alien Tort Statute and held that nothing in the statute allowed plaintiffs to bring claims for violations that occurred abroad. During the very next term, the Court heard *Daimler*, in which Argentinian nationals sought to sue a German car manufacturer and its Argentine subsidiary for violations of the Alien Tort Statute and

the Torture Victim Protection Act committed in Argentina. Ultimately, the Court rejected the plaintiffs' argument that a California federal court could exercise jurisdiction over the German corporation because it had a subsidiary in California, when the claims only concerned extraterritorial conduct by a foreign entity.

From *Morrison* through *Daimler*, each case involved barring foreign civil plaintiffs seeking relief under U.S. federal law for misconduct that took place overseas. None of the cases addressed the ability of the DOJ to prosecute foreign misconduct, and the DOJ has argued that those cases did not impact its reach. See, e.g., *United States v. Harder*, ___ F. Supp. 3d ___, 2016 WL 807942, at *8 (E.D. Pa. Mar. 2, 2016).

RJR NABISCO

The recent *RJR Nabisco* decision is the first of the post-*Morrison* Supreme Court decisions to address a criminal statute. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct.2090 (2016). The European Community and several of its member states sued RJR Nabisco for engaging in money laundering and mail and wire fraud, among other things, primarily in Europe. Because the plaintiffs had to prove predicate criminal acts to recover civil damages, the Court analyzed both the criminal and civil aspects of RICO. It again applied the presumption against extraterritoriality reaching a split result — civil plaintiffs could not recover without showing a domestic injury, but there was sufficient evidence to rebut the presumption against extraterritoriality on the criminal

side. The Court held that Congress had intended that RICO reach foreign criminal racketeering activity in many instances.

The conventional wisdom is that not only RJR Nabisco, but also the DOJ scored major victories with the Supreme Court's ruling. See, e.g., Peter J. Henning, *RJR Nabisco Ruling Bolsters Justice Dept.'s Pursuit of FIFA*, *New York Times*, June 27, 2016. As noted above, the DOJ was able to ensure it could continue to prosecute foreign racketeering under RICO, while also getting private plaintiffs out of the way, thereby ensuring that civil RICO litigation did not interfere with criminal enforcement actions.

Editor's Note: In next month's issue, the authors discuss the presumption against extraterritoriality in criminal cases, as well as exceptions to this "rule" that some courts have been more than willing to embrace. Yet, despite the trend toward increased application of American federal laws to extraterritorial conduct, there has also been some judicial pushback against overreaching federal prosecutors. In this regard, the authors will look at defenses that have shown some success and could be used in future cases — as long as a defendant is willing to go through the litigation process rather than settling.

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