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Article

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I. INTRODUCTION

People don't always say exactly what they mean. Judges and legislators are no exception. Judicial opinions sometimes painstakingly interpret the language of a statute or articulate some other legal rule and then summarize their holding in a sentence or two, often preceded by language such as "We therefore hold that . . . ." What follows this phrase may not coincide precisely with what is said in the rest of the opinion, even if the summary encompasses the particular facts of the case. In subsequent cases with other facts, the difference between those facts and the court's summarizing language can lead to litigation over what exactly the court meant.

Such is likely to happen with respect to *Morrison v. National Australia Bank*,[1] the Supreme Court's most recent opinions directed at extraterritorial enforcement of securities laws. Throughout this opinion, Justice Scalia, writing for the majority, defined the reach of the federal securities laws based

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1. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

on a single inquiry: whether the United States was the place of the securities transaction. In summarizing the holding, Justice Scalia wrote that the Securities Exchange Act of 1934 (Exchange Act) Section 10(b) applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[2]

The problem with this summary is that the National Australia Bank (NAB) securities at issue in the case were in fact listed in the United States, which was required so NAB could have American Depository Receipts (ADRs) trade in New York. For the many issuers that list the same securities both in the United States and in another country, the confusion created by Justice Scalia's summary of the holding could be problematic. The Supreme Court almost certainly did not intend to grant a right to sue in the United States when such securities are bought outside the United States. Federal district and appeals courts, however, will likely have to adjudicate the claims of plaintiffs raising this very argument.

The Supreme Court is not alone in creating this confusion; Congress has had its own drafting problems. In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[3] Congress wanted to respond to *Morrison* by giving the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) power to pursue the type of fraud alleged in *Morrison*—fraudulent conduct inside the United States that affects securities transactions outside the United States. The result would, in effect, reverse *Morrison* and make United States securities laws apply.[4] Congress drafted the

2. *Id.* at 2884; *see also id.* at 2886, 2888 (reiterating the reach of Section 10b).

3. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b) (2010)

4. Congress titled the section the "Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws" and amended three securities acts to add the following new subsection:

(c) EXTRATERRITORIAL JURISDICTION.—The jurisdiction of the district courts of the United States and the United States courts of any Territory described under subsection (a) includes violations of section 17(a), and all suits in equity and actions at law under that section, involving—(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

Id. § 929P(b) (amending The Securities Act of 1933.—Section 22 of the Securities Act of 1933 (15 U.S.C. 77v(a)), The Securities Exchange Act of 1934.— Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78aa), Dodd-Frank Act provisions based on the assumption that the question they were addressing was whether disputes involving the application of securities laws transactions outside the United States could be considered questions of subject matter jurisdiction. For forty years before *Morrison*, various circuit courts had analyzed the issue in just such a manner.[5] The Dodd-Frank Act provisions responded to *Morrison* by expressly giving federal courts jurisdiction in certain circumstances over SEC and DOJ suits concerning securities transactions outside the United States.[6]

The problem with the Dodd-Frank Act provisions is that the Supreme Court in *Morrison* had already decided that under existing law federal courts had jurisdiction over these cases.[7] Rather, the Supreme Court held that securities transactions outside the United States were not covered by the language of Section 10(b) of the Exchange Act, a question of the merits. Indeed, several months before, in late 2009, the Supreme Court in *Union Pacific Railroad v. Locomotive Engineers & Trainmen General Committee of Adjustment, Central Region* clarified its position that anything that does not go to the power of the courts to hear a case is a question of the merits and not of jurisdiction.[8] As long ago as 1959, in *Romero v. International Terminal Operating Co.*, the Supreme Court had approached extraterritoriality as a merits question.[9] Furthermore, in October 2009, the Solicitor General and the SEC, in their brief opposing the certiorari petition in *Morrison*, recognized that the extraterritorial question was not jurisdictional.[10] Combined,

and The Investment Advisers Act of 1940.—Section 214 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–14)).

5. *See, e.g.*, Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir.), *modified on other grounds en banc*, 405 F.2d 215, 217 (2d Cir. 1968); *In re* CP Ships Ltd. Sec. Litig., 578 F.3d 1306, 1313 (11th Cir. 2009); Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979).

6. *See* Dodd-Frank Act, § 929P(b) (2010).

7. *See Morrison,* 130 S. Ct. at 2877.

8. *See* Union Pac. R.R. Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region, 130 S. Ct. 584, 598–99 (2009).

9. *See* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 359, 381–84 (1959), *cited in Morrison*, 130 S. Ct. at 2877.

10. *See* Brief for the United States as Amicus Curiae at 9, Morrison v. National Australia Bank, 130 S. Ct. 2869 (2010) (No. 08-1191) ("If a particular suit is otherwise an appropriate means of enforcing a 'liability or duty created by' the Exchange Act or rules promulgated thereunder by the Commission, Section 78aa unambiguously vests the district courts with jurisdiction to resolve it."). *See id.* ("Thus, under the plain terms of Section 78aa, the

these developments make it all the more puzzling that Congress still approached extraterritoriality as a question of jurisdiction when drafting the Dodd-Frank Act.

While the Congress's intent in passing the Dodd-Frank Act seems directed at empowering the SEC and DOJ to combat securities fraud, one can credibly argue that they failed to do so.[11] The Dodd-Frank Act provisions merely restated what *Morrison* had already clearly stated: specifically, that federal courts had jurisdiction in these types of cases. Because the Dodd-Frank Act only approached the question of jurisdiction, and did not address the substantive reach of Section 10(b) of the Exchange Act, Congress arguably left the SEC and DOJ with no more power than they had the day *Morrison* was decided.

Many lower court judges are not eager to frustrate the intent of Congress, and Congress obviously intended the Dodd-Frank Act to empower the SEC and DOJ to pursue transnational securities fraud. Other judges might say, however, that the intent of Congress is in the language of the statute, and nothing more.[12] If the statute is worded so as to be meaningless, so be it. The Supreme Court also has rarely been shy of highlighting when Congress fails to draft a statute that reflects its true intentions.[13] It is possible that before a case reaches the Supreme Court, Congress will change the

geography of an alleged fraudulent scheme—*i.e.*, whether it was conceived and executed in whole or in part outside the United States—is irrelevant to the district court's subject-matter jurisdiction.").

11. Indeed, the day the President signed the Dodd-Frank Act, George Conway, the lawyer who argued and won the *Morrison* case for NAB, published a memo to his firm's clients stating that Congress's Dodd-Frank Act provisions may have done nothing meaningful at all. *See* George T. Conway III, *Extraterritoriality of the Federal Securities Laws After Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged,* WACHTELL, LIPTON, ROSE & KATZ (June 21, 2010), *http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.17763.10.pdf.*

12. *See, e.g.*, Mwasaru v. Napolitano, 2010 WL 3419458, at *4 (6th Cir. Sept. 1, 2010) ("[L]egislative intent should be divined first and foremost from the plain language of the statute. If the text of the statute may be read unambiguously and reasonably, our inquiry is at an end.") (citation omitted).

13. *See, e.g.*, Union Bank v. Wolas, 502 U.S. 151, 157–58 (1991) (rejecting what Congress may have intended and explaining "[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning") (citation omitted); Toibb v. Radloff, 501 U.S. 157, 164 (1991) (noting that "it makes no difference whether the legislative history affirmatively reflects" a certain intent, if "the plain language of the statute" is to the contrary).

legislative language and directly address the substantive reach of Section 10(b) of the Exchange Act. If not, sooner or later, there will be a litigant who chooses to challenge a SEC or DOJ suit and run the risk of losing on the basis that Congress did not empower the SEC or DOJ to bring the suit. The litigant would argue that Congress may have meant to create a cause of action for the SEC and DOJ, but did not do so.

The first part of this article will address whether there are any logical exceptions that can be found to the Supreme Court's limitation of the federal securities laws to transactions taking place within the United States. This article concludes that the answer to this question is no. The second part of this article will address whether the confusion arising out of Congress' language choices in the Dodd-Frank Act is such as to merit amendment to the statute. This article concludes that, while the statutory language probably gives the SEC the authority that Congress intended, the statute should still be amended.

II. MORRISON V. NATIONAL AUSTRALIA BANK

In late June 2010, the Supreme Court ruled in *Morrison v. National Australia Bank* that securities fraud suits could not be brought under U.S. law against foreign defendants by foreign plaintiffs who bought their securities outside the United States ("f-cubed" securities litigation).[14] In *Morrison*, Australian plaintiffs attempted to pursue claims under U.S. federal securities law after purchasing shares of an Australian bank on the Australia stock exchange and claiming they had been misled in Australia by statements by Australian bank officials regarding the performance of a U.S. subsidiary.[15] The Supreme Court rejected alleged fraudulent concealment of bad mortgage loans in a U.S. subsidiary as sufficient justification to apply Section 10(b) of the Exchange Act extraterritorially to transactions on the Australian stock exchange.[16]

In its opinion, the Supreme Court held that Section 10(b) of the Securities Exchange Act of 1934 does not apply extraterritorially,[17] and that "the focus of the Exchange Act is not upon the place where the deception originated, but upon

14. *See Morrison* 130 S. Ct. at 2888.
15. *See id.* at 2875–76.
16. *See id.* at 2883–84.
17. *See id.* at 2883.

purchases and sales of securities in the United States."[18] Thus, the Supreme Court rejected the proposal of the Solicitor General and the SEC to apply the Exchange Act to fraud in extraterritorial securities transactions that "[involve] significant conduct in the United States that is material to the fraud's success."[19] The Supreme Court concluded that Section 10(b) reaches only fraud in connection with the "purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[20]

In February 2010, twenty-one law professors from around the country filed an amicus brief with the Supreme Court in *Morrison*.[21] The brief urged the Supreme Court to establish a bright line rule limiting the application of the federal securities fraud statute to securities bought or sold in the United States.[22] The law professors' position was that the place of the transaction is the determining factor for deciding whether Section 10(b) applies.[23]

The fundamental premise of both the amicus brief and the Supreme Court's holding is that U.S. securities laws were intended to protect U.S. markets.[24] Congress has enacted specific provisions that allow the SEC to pursue conduct in foreign markets in particular situations that affect the securities of U. S. issuers or where conduct abroad is intended to evade the purposes of U.S. securities laws.[25] Otherwise, U.S. securities laws do not apply to securities traded abroad.[26]

III. DUAL LISTED SECURITIES AFTER THE *MORRISON* OPINION

Despite the bright line test adopted in *Morrison*, some open

18. *Id.* at 2884.
19. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2886–88 (2010).
20. *Id.* at 2888.
21. Brief of *Amici Curiae* Law Professors in Support of Respondents, Morrison v. National Australia Bank, 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 740747 [hereinafter Law Professors Amicus Br.].
22. *See id.* at 2. (arguing that such a bright line rule aligns with the legislative history and congress's original intent to cover only those foreign securities traded within the United States).
23. *See id.* at 6, 31.
24. *See id.* at 14–18; *Morrison*, 130 S. Ct. at 2877–85 (2010).
25. *See* Law Professors Amicus Br., *supra* note 21 at 19–20 (describing the purpose of Section 30 of the Exchange Act).
26. *See id.*

issues remain. In the vast majority of instances, the "location of transaction" test is a clear test; some issues linger, however, because the test remains ambiguous in a small but significant number of transactions. Transactions on a securities exchange are usually easy to place in a particular location—the location of the exchange. It is irrelevant whether the investor resides in the United States or abroad.[27] In addition, the vast majority of over-the-counter transactions also occur in one country or another. However, situations occur where the location of the transaction is ambiguous. This happens particularly in two instances. The first instance is where the transaction is in one country and a broker-dealer or other intermediary is in another. The second is in private transactions—particularly in derivative securities and similar instruments—implemented through steps taken both inside and outside the United States. In these two instances the application of *Morrison* may be unclear.[28] This article does not address these situations, but it is predictable that there will be a significant amount of post-*Morrison* litigation over which transactions take place inside the United States and which do not. Rather, this article addresses the impact of the *Morrison* decision on a small subset of securities transactions taking place outside the United States—transactions in securities that are also listed on a United States securities exchange.

27. This issue has already come up in at least two cases involving "f-squared securities litigation" (investors inside the United States who purchase securities outside the United States and then sue foreign defendants outside the United States). In *Cornwell v. Credit Suisse Grp.*, No. 08 Civ. 3758 (VM), 2010 U.S. Dist. LEXIS 76543 (S.D.N.Y July 27, 2010), plaintiffs argued that because they resided in the United States their transactions on foreign markets should be deemed to take place inside the United States. Judge Marrero rejected this claim and granted summary judgment to the defendants: "In *Morrison* the Supreme Court roundly (and derisively) buried the venerable 'conduct or effect' test . . . . Yet here, Lead Plaintiffs seek to exhume and revive the body." *Id.* at *6. In another case, plaintiffs representing U.S. investors who purchased shares in Toyota outside the United States claimed that the Court's holding in *Morrison* allows their claims to be brought under Section 10(b) because the investors' location determines the location of their transactions. The district court, however, rejected this argument at least for purposes of designating a lead plaintiff in the litigation, and it appears likely that courts will continue to reject the argument. *See* Stackhouse v. Toyota Motor Co., No. CV 10-0922 DSF (AJWx), slip op. (C.D. Cal. 2010).

28. *See* In re Banco Santander Sec.—Optimal Litig., No. 1:09-cv-20215-PCH, slip op. at 1 (S.D. Fla. July 30, 2010) (dismissing complaint of foreign purchasers in foreign fund that invested in Bernie Madoff's funds who argued that they should be able to sue Banco Santander S.A. and other foreign companies in the United States).

A. APPLICABILITY OF SECTION 10(b)(5) AFTER *MORRISON*

The most problematic phrases in the entire *Morrison* opinion appear in two places. First, there is a summary of the holding which states: "And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which §10(b) applies."[29] Second, at the end of the opinion, there is similar language: "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." [30] Looking at these two sentences alone, the unanswered question is whether, for a security listed on a domestic exchange, the transaction in that security also has to take place on that domestic exchange or elsewhere in the United States. As explained more fully below, the answer to this question is almost certainly "yes" in view of what is said in the rest of the opinion, but these two sentences—if read in isolation—appear to leave that question ambiguous.[31]

Plaintiffs' lawyers are already using these sentences to

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

30. *Id.* at 2888. Justice Scalia probably used the summarizing language he did because the language in the Exchange Act reads: "the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 U.S.C. § 78j (2006). This sentence—which in essence means "any security"—was meant to ensure that the Securities Exchange Act, which was designed primarily to regulate U.S. exchanges, would not be avoided by people who trade securities off the exchanges. There is no distinction made in this part of the Exchange Act, however, between securities registered on national securities exchanges and those not so registered; indeed the express language states that they shall be treated the same. *Id.* The *Morrison* holding is that this Section 10(b) of the Exchange Act only applies to transactions in the United States. In other words, Section 10(b) applies to the purchase or sale of a security registered on a national securities exchange or any other security in the United States.

31. The Court in *Morrison* refers to "securities not registered on domestic exchanges" and goes on to say that with respect to such securities the foreign location of the transaction precludes the Exchange Act's applicability absent regulations from the SEC in the narrow circumstances permitted under Section 30 of the Exchange Act. *Morrison*, 130 S. Ct. at 2885. Securities that are registered on domestic exchanges are discussed as follows: "And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." *Id.* at 2884. The very same paragraph, however, begins with the following sentence: "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." *Id.*

argue that even if the overwhelming majority of an issuer's shares are traded outside the United States, as long as the issuer's shares are listed on a domestic U.S. exchange, transactions of all of the issuer's shares are covered by Section 10(b)(5).[32] It does not matter that the transactions take place on a foreign exchange.

Many Canadian companies, for example, have one class of common shares that trades on both the Toronto exchange and the New York Stock Exchange (NYSE). In other words, you could buy the shares on the NYSE and then sell the very same shares in Toronto, and vice versa. So with respect to such companies, applying the language of *Morrison* literally, Section 10(b) would apply to a purchase of securities in Canada on the Toronto exchange by a Canadian citizen, simply because the shares are also listed on the NYSE. This interpretation is inconsistent with what is said in the rest of the opinion, but it appears to be literally what is said in the *Morrison* opinion.[33]

The opinion adds confusion when it tries to distinguish the facts of *Morrison* from *Schoenbaum v. Firstbrook*.[34] *Schoenbaum* involved Section 10(b) claims by an American shareholder of a Canadian company (Banff) based upon sales in Canada by the company of its treasury shares to affiliated corporations at a price that the corporations allegedly knew was less than the true value of the shares.[35] Banff's common stock was registered with the SEC and traded on both the American Stock Exchange and the Toronto Stock Exchange.[36] According to the Supreme Court in *Morrison*, the treasury shares at issue in *Schoenbaum* were *not* listed on the American Stock Exchange.[37] However, as the Second Circuit's opinion in *Schoenbaum* made clear, the Banff treasury shares were shares of the company's common stock.[38] Indeed, the fact that the challenged transactions in *Schoenbaum* "involve[d] stock registered and listed on a national securities exchange," and thus directly affected the interests of American investors,[39] was

32. *See* Pls.' Supp. Mem. Concerning the Impact of *Morrison v. NAB* at 10–16, *in* In Re Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571 (S.D.N.Y. July 16, 2010).

33. *See Morrison,* 130 S. Ct. at 2884, 2888.

34. *Schoenbaum*, 405 F.2d at 200.

35. *Id.* at 204.

36. *Id.*

37. *Morrison*, 130 S. Ct. at 2878.

38. *Schoenbaum*, 405 F.2d at 205.

39. *Id.* at 208; *see also id.* at 206 (holding that Congress intended the

key to the Second Circuit's determination that Section 10(b) applied.

The *Morrison* opinion disapproves of *Schoenbaum*, its analysis, and the result reached therein.[40] The Supreme Court's express (if incorrect) statement that the transactions in *Morrison* did not involve stock listed on an American exchange,[41] however, combined with its statement that Rule 10b-5 applies to "transactions in securities listed on domestic exchanges," may be argued to leave some ambiguity as to the applicability of Section 10(b) to transactions that take place abroad in stock of a class also listed on an American exchange.[42]

Nevertheless, a reading of the entire *Morrison* opinion supports the view that the Supreme Court did not mean to extend the reach of Section 10(b) to foreign transactions in securities "listed on an American exchange." The Supreme Court's unequivocal holding is that Section 10(b) does not apply "extraterritorially."[43] It would drive an extremely large hole into that holding if the mere listing of a stock on an American exchange were enough to alter the extraterritoriality of a foreign purchase of the stock on a foreign exchange, as there are well over 400 foreign issuers that list their shares on both a foreign exchange and a U.S. exchange.[44]

Moreover, the Supreme Court repeatedly emphasizes the "focus" of American securities laws on "domestic transactions" and on "purchases and sales of securities in the United States."[45] Thus, the court's emphasis on "transactions in securities listed on domestic exchanges" is intended to define what conduct must be evaluated to assess "where a putative

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Exchange Act to be extraterritorial in order to protect American investors "who have purchased foreign securities on American exchanges.").

40. *Morrison*, 130 S. Ct. at 2878–81.

41. *See id.* at 2888 ("This case involves no securities listed on a domestic exchange . . . .").

42. *See id.* at 2874; *see also id. at 2881 (explaining that 17 C.F.R. § 240.10b-5 is "promulgated under* § 10(b) of the Securities and Exchange Act"); *17 C.F.R. § 240.10b-5 (2010) (prohibiting fraudulent use of national securities exchanges*).

43. *Id.* at 2883 ("In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.").

44. *See* U.S. SECURITIES AND EXCHANGE COMMISSION, FOREIGN COMPANIES REGISTERED AND REPORTING WITH THE U.S. SECURITIES AND EXCHANGE COMMISSION (2009).

45. *See Morrison,* 130 U.S. at 2874.

violation occurs."[46] That is, the location of the *transaction* (and not the location of allegedly fraudulent conduct) determines whether the application of Section 10(b) would be extraterritorial and thus impermissible, or domestic and thus within the intended scope of the statute. The Supreme Court's language is not intended, however, to extend the application of Section 10(b) to transactions on foreign exchanges.

Furthermore, the Supreme Court was well aware that NAB had ADRs listed in New York and that Section 10(b) does apparently apply to ADRs (which were not an issue in the case).[47] In order for a foreign issuer to sponsor and list ADRs on a U.S. exchange, it must register the underlying, deposited shares with the SEC and, at least for the NYSE, actually list the underlying shares (though not for trading).[48] NAB's registration statements in the United States, for example, pertained to the "ordinary shares."[49] The Supreme Court nonetheless held that Section 10(b) did not apply to NAB's ordinary shares traded in Australia.[50] This holding is inconsistent with a theory that the Court would apply Section 10(b) to any security listed on a U.S. exchange even if the transaction in that security is outside the United States.

Many companies have ADRs trading in the United States. It cannot possibly be the case that the Supreme Court intended Section 10(b) to apply not only to the ADR itself but also to a foreign purchase of the underlying stock on a foreign exchange simply because the underlying shares are registered in the United States to enable the company to issue the ADR. Otherwise, Section 10(b) after *Morrison* would have a broader

46. *See id.* at 2884, n.9.

47. *See id.* at 2875, 2876 n.1 (explaining that NAB had ADR's trading in NewYork, but the ADR holders' claims were dismissed in district court. NAB had not disputed that investors who purchased its ADRs in the United States would be covered by U.S. securities laws.).

48. *See* 15 U.S.C. § 78l (2006).

49. Page 58 of the Supplemental Joint Appendix in *Morrison v. NAB*, the 20-F cover says that NAB's ordinary shares were "registered" on the "NYSE." Supp. Joint App. at 58 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010). This cover looks exactly like the 20-F cover for *Vivendi* that the plaintiffs there are relying on. The registration regulation is cited in the *Vivendi* plaintiffs' brief. *See* Plaintiffs' Supp. Mem. Concerning the Impact of *Morrison v. NAB* at 11, *in In re* Vivendi Universal , S.A., Sec. Litig., No. 02 Civ. 5571 (S.D.N.Y. July 16, 2010) (citing 17 C.F.R. § 240.12d1-1).

50. *See Morrison,* 130 S. Ct. at 2876–77 (affirming the District Court's ruling); *see also* In Re Nat'l Austl. Bank Sec. Litig., *2006 U.S. Dist. LEXIS 94162, at 15-16. (S.D.N.Y. Oct. 25, 2006).*

extraterritorial reach than ever before, the exact opposite of what the Supreme Court clearly intended. Such a reading of *Morrison* is illogical and is also contrary to the result in the case. It also makes little sense to argue that the result would be different, and Section 10(b) would apply to transactions in NAB's ordinary shares outside the United States, if NAB had listed its ordinary shares for trading on the NYSE instead of listing the ADRs. There is little substantive difference between these two types of arrangements.[51]

B. SECTION 30 OF THE EXCHANGE ACT

Congress specifically addressed the extraterritorial reach of the Exchange act in Section 30.[52] The *Morrison* opinion observed that Congress specifically addressed in Section 30 those situations where the SEC needs to protect investors in the United States against violations of the Exchange Act in foreign trading markets. The *Morrison* opinion also makes it clear that Congress did not intend the extraterritorial effect of the Exchange Act to go beyond the specific provisions of Section 30, which is Congress's only articulation of the extraterritorial reach of Section 10(b). The Supreme Court explained that Section 30(b) "seems to us to be directed at actions abroad that might conceal a domestic violation, or might cause what would

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51. As the Supreme Court explained in *Morrison*, an NAB ADR "represent[s] the right to receive a specified number of [NAB's] ordinary shares," and thus is functionally equivalent to a purchase of the stock itself. *Morrison*, 130 S. Ct. at 2875.

52. Section 30 provides:

(a) It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this title.

(b) The provisions of this title or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title.

15 U.S.C. § 78dd(a)-(b) (2010).

otherwise be a domestic violation to escape on a technicality."[53] The only situation where Section 30(b) contemplates the applicability of the Exchange Act to transactions outside the United States is when a transaction contravenes rules or regulations prescribed by the SEC to prevent evasion of the Act.[54] However, the SEC has not identified specific situations in which transactions in securities outside the United States are deemed as evasion of the Exchange Act simply because the same securities are also listed in the United States. As a result, the SEC has not promulgated any rules to address such a problem. Therefore, the mere fact that a security is listed in the United States, as well as abroad, does not automatically make transactions in that security outside the United States as evasion of the Exchange Act.

Likewise, Section 30(a) reinforced the Supreme Court's extraterritoriality analysis that "[i]ts explicit provision for a specific extraterritorial application would be quite superfluous if the rest of the Exchange Act already applied to transactions on foreign exchanges—and its limitation of that application to securities of domestic issuers would be inoperative."[55] The non-U.S. issuer is beyond the scope of Section 30(a) insofar as the transaction occurs in a foreign market.[56] It does not matter that the issuer—like NAB—has securities listed in the United States. Congress could have extended the coverage of Section 30(a) to all securities with dual listings by including in Section 30(a) the clause "non-U.S. issuers that have securities listed in the United States" in the statute. If Congress had done so, Section 30(a) would have applied to brokers or dealers in connection with such securities wherever the securities are traded. Congress, however, did not do so and explicitly limited Section 30(a) to transactions of securities by U.S. issuers.

As suggested in the law professors' amicus brief, the Supreme Court should avoid confusion over this issue by holding that Section 10(b) applies only to securities bought or sold in the United States.[57] This is likely the Supreme Court's

53. *Morrison*, 130 S. Ct. at 2882–83.

54. *See* 15 U.S.C. § 78dd(b) (2006).

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

56. *See* 15 U.S.C. § 78dd(a) (2006) (applying only to transaction in securities that "the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States....").

57. Brief of *Amici Curiae* Law Professors in Support of Respondents at 31. The brief urges the Court to uphold the original intent of the Congress until

intent in *Morrison* when the Court referred to "transactions in securities listed on domestic exchanges."[58] The phrase likely included all transactions on those exchanges, not merely the listing of the securities on those exchanges. The entirety of the opinion—in particular the emphasis on the location of the securities transaction throughout the opinion—supports this interpretation.[59] Furthermore, the two strongest policy arguments supporting the *Morrison* opinion—applying Section 10(b) to foreign exchanges would (i) interfere with the laws of other countries and (ii) turn the U.S. into a Shangri-La for plaintiffs' lawyers suing on behalf of investors who purchased their shares on foreign exchanges—would be undermined by allowing worldwide class actions under U.S. securities laws against dual listed companies. In sum, it is clear that plaintiffs who made transactions of securities outside the United States do not have a cause of action under Section 10(b) just because these securities are listed on a U.S. securities exchange.

IV. THE DODD-FRANK ACT

Congress quickly responded to *Morrison*—language on extraterritoriality in the Dodd-Frank Act is based on proposals made before the *Morrison* case was even decided.[60] Many

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the legislature takes further action.

58. *Morrison*, 130 S. Ct. at 2884 ("And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.").

59. *Id.* at 2882 ("Nothing suggests that this *national* public interest [described in 15 U.S.C. § 78b] pertains to transactions conducted upon *foreign* exchanges and markets.") (emphasis in original); *id.* at 2883 (explaining that § 30(a)'s "explicit provision for a specific extraterritorial application would be quite superfluous if the rest of the Exchange Act already applied to transactions on foreign exchanges—and its limitation of that application to securities of domestic issuers would be inoperative."); *id.* at 2884 ("[T]he 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."); *id.* ("The primacy of the domestic exchange is suggested by the very prologue of the Exchange Act . . . "); *id.* at 2885 (Stating that under § 30(a) & (b), "it is the foreign location of the *transaction* that establishes (or reflects the presumption of) the Act's inapplicability, absent regulations by the Commission."); *Morrison*, 130 S. Ct. at 2885 (noting the "same focus on domestic transactions" in the Securities Act of 1933); *id.* ("Like the United States, foreign countries regulate their domestic securities exchanges and securities transaction occurring within their territorial jurisdiction.").

60. *See* H.R. 4173, 111th Cong. (2010). The House version of the bill, however, was enacted after the United States submitted its brief of October 2009 opposing the cert petition in *Morrison*. This brief expressly acknowledged

observers predicted that the Court in *Morrison* would bar f-cubed securities cases and that the SEC wanted Congress to be prepared.[61] Some members of Congress wanted to expand the private right of action to cover such cases, and others are content to simply give enforcement powers to the SEC.[62]

Section 7216 of the Dodd-Frank Act was originally drafted to provide extraterritorial jurisdiction with respect to antifraud provisions in the federal securities laws if there is 'conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors.'[63] The proposed language covered Section 22 of the Securities Act of 1933,[64] Section 27 of the Exchange Act[65] and Section 214 of the Investment Advisers Act of 1940.[66]

The SEC favored a similar provision, but one limited to extending jurisdiction of U.S. courts to cases brought by the SEC. The language that was ultimately written into the Dodd-Frank Act was apparently drafted by the SEC and was substantially similar to the earlier language of the act with the notable exception that coverage was limited to actions brought by the SEC or by the United States (the latter presumably being criminal cases).[67]

In all of these proposals, the legislative language was worded in terms of the federal courts' subject matter jurisdiction.[68] The focus on jurisdiction is surprising because briefs in the *Morrison* case were already approaching this issue on the merits of Section 10(b).[69] Nonetheless, Congress, as well

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that the extraterritorial reach of Section 10(b) was not a question of jurisdiction. *See* Brief of the United States as Amicus Curiae at 6.

61. *See* Brief of *Amici Curiae* Law Professors in Support of Respondents at 30–31 (citing H.R. 4173, 111th Cong. (2010)). The brief speculated several alternatives in which Congress may limit jurisdictions in deference to SEC.

62. *See id.* at 31.

63. *Id.* at 30.

64. 15 U.S.C. § 77v(a) (2006).

65. 15 U.S.C. § 78aa (2006).

66. 15 U.S.C. § 80b-14 (2006).

67. *Compare* H.R. 4173, 111th Cong. § 7216 (2009), *with* H.R. 4173, 111th Cong. § 929P (2010). The earlier bill did not specify who can bring the action. The later bill only allows the courts to have jurisdiction over an action or proceeding brought by or instituted by the Commission or the United States.

68. *See* H.R. 4173, 111th Cong. § 7216. "The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding . . . ."

69. *See generally* Supplemental Brief for Respondents at 2-5 *Morrison v.*

as the Second Circuit, approached the issue in *Morrison* as one of subject matter jurisdiction.

Meanwhile, before *Morrison* was decided, the Supreme Court ruled on *Union Pacific R. Co. v. Locomotive Engineers* in late 2009.[70] In *Union Pacific*, the Supreme Court held that Congress alone controls the jurisdictional reach of a statute, that jurisdiction is distinct from issues pertaining to the merits of a case, and that courts may not refuse to exercise jurisdiction based on their belief that no claim exists on the merits.[71] The Court's holding should not have been a surprise because the Court's opinion in *Union Pacific* relied heavily on the Court's prior holdings and other cases in which the same term was applied in a similar rule.[72]

Under the reasoning of *Union Pacific*, the scope of Section 10(b) is a question of merit, not a question of subject matter jurisdiction. Therefore, the federal courts have jurisdiction over cases brought under Section 10(b) including f-cubed cases. The question should be whether there is a cause of action under Section 10(b). The petitioners in *Morrison*, apparently realizing that they were very likely to lose the case and having second thoughts about taking it to the Supreme Court, mentioned asking the Court to remand the case to the Second Circuit for reconsideration as an issue of merit rather than an issue of jurisdiction in view of *Union Pacific*.[73] The Supreme Court denied this motion and made a ruling based on the merit of the same issue that the parties had characterized as jurisdictional in the Second Circuit and in the cert petition.[74]

NAB, 130 S. Ct. 2869 (2010) (discussing and citing cases). This concept was not new and goes back to *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), and *Bell v. Hood*, 327 U.S. 678 (1946).

70. Union Pacific R. Co., 130 S. Ct. 584 (2009).

71. *Id.* at 590, 596–99.

72. *Id.* at 596–97 (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Kontrick v. Ryan*, 540 U.S. 443 (2004)); *see also United States v. Denedo*, 129 S. Ct. 2213 (2009) (holding that absent constitutional constraints, Congress decides what cases the federal courts have jurisdiction to consider, and that it is erroneous to conflate jurisdiction with the merits); *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010) (holding that bankruptcy court's discharge of student loan without making finding of hardship, although erroneous, was not beyond court's jurisdiction); *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009) (holding that courts declined jurisdictions erred in "conflating the jurisdictional question with the merits").

73. *See* Morrison, 130 S. Ct. at 2877.

74. *Id.*

The Second Circuit in *Morrison* thus had erroneously considered the extraterritorial reach of Section 10(b) to raise a question of subject matter jurisdiction, affirming the District Court's dismissal under Federal Rule of Civil Procedure 12(b)(1).[75] In view of *Union Pacific*, the case should have been decided on the merits under Rule 12(b)(6). As Justice Scalia observed in *Morrison*:

> [T]o ask what conduct §10(b) reaches is to ask what conduct §10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, "refers to a tribunal's '"power to hear a case."' *Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment*, Central Region, 558 U. S. ___, ___ (2009) (slip op., at 12) (quoting *Arbaugh v. Y & H Corp.,* 546 U. S. 500, 514 (2006), in turn quoting *United States v. Cotton*, 535 U. S. 625, 630 (2002)). It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief. *See Bell v. Hood*, 327 U. S. 678, 682 (1946). The District Court here had jurisdiction under 15 U. S. C. §78aa to adjudicate the question whether §10(b) applies to National's conduct.[76]

The plaintiffs had asked for a remand to the Second Circuit in view of this error, but the Supreme Court refused and decided the case on the merits.[77] Justice Scalia's opinion went on to hold that, even though the federal courts had subject matter jurisdiction, there was no cause of action on the merits where the securities were not purchased in the United States.[78] The complaint was to be dismissed on the merits under Rule 12(b)(6).[79]

The difficulty is that nobody changed the language in the extraterritoriality provisions pending in Congress. The language was not changed even though the House passed the original bill in December 2009, a month and a half after the SEC and the Solicitor General told the Court this wasn't a question of jurisdiction.[80] The proposed legislative language

75. *See* Morrison v. National Australia Bank Ltd., 547 F.3d 167, 177 (2d Cir. 2008).

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

77. *See id.* In denying Morrison's request for a remand, the Court stated that because "nothing in the analysis of the courts below turned on the mistake, a remand would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion." *Id.*

78. *Id.* at 2888.

79. *Id.* at 2877.

80. *See* Petition for a Writ of Certiorari, *Morrison v. National Australia Bank, Ltd.* 130 S. Ct. 2869 (No. 08-1191) at 16 (arguing that in an enforcement action brought by the Commission, the "transnational character of the fraudulent scheme is relevant *only* to the question whether defendants'

continued to approach the question of extraterritoriality as one of subject matter jurisdiction rather than the merits under Section 10(b). The language ultimately adopted in Dodd-Frank in Section 929P of the Act is under the heading "Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws," and reads:

Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78aa) is amended—

. . . . .

by adding at the end the following new subsection:

"(b) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving—

"(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

"(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[81]

The Dodd-Frank Act contains similar provisions with respect to Section 17A of the Securities Act of 1933 and Section 214 of the Investment Advisors Act of 1940.[82]

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conduct violated Section 10(b).") The court already has jurisdiction under the "plain terms" of the statutory provisions that govern SEC enforcement suits. *Id*. Thus, Congress already decided that jurisdiction was proper, so the courts need not to.

81. Dodd-Frank Act, Pub. L. No. 111-203 § 929P(b)(2).

82. *Id.* § 929P(b)(1) & (3). Section 929Y of the Dodd-Frank Act also provides that the SEC shall solicit public comment and then conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Exchange Act should be extended to cover the same conduct with respect to which actions brought by the SEC and the United States are authorized under Section 929P of the Act. The study:

shall consider and analyze, among other things—

(1) the scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise;

(2) what implications such a private right of action would have on international comity;

(3) the economic costs and benefits of extending a private right of action for transnational securities frauds; and

(4) whether a narrower extraterritorial standard should be adopted. *Id.* §

Some lawyers defending against SEC suits under these provisions may argue that they do not affect the Court's holdings in *Morrison* as to what transactions fall within Section 10(b) because these provisions merely give federal courts jurisdiction that the *Morrison* opinion recognized courts already have. Because the Dodd-Frank Act language does not speak to the merits, *e.g.* the substantive reach of Section 10(b), Congress has not changed the Court's holding with respect to actions brought by the SEC or the United States. The Dodd-Frank Act's extraterritoriality provision thus does absolutely nothing other than affirm the opinion in *Union Pacific*, reiterated in *Morrison*, that this is not a question of subject matter jurisdiction because the courts have jurisdiction.

Such a literal reading of the Dodd-Frank Act clearly does not reflect the intent of Congress. The problem is that the SEC still might not fare well before some lower court judges who do not care about the intent of Congress when Congress fails to clearly express that intent. If the Dodd-Frank Act does not explicitly address the merits of an SEC claim under Section 10(b), and only speaks to jurisdiction, some courts may not be willing to read into the provision what Congress clearly intended: to empower the SEC to bring cases where the conduct was that described in the statute.

Lower courts, particularly most courts of appeals, probably would not be willing to deviate from the plain language of the Act without a credible alternative explanation for what Congress intended to do in these provisions other than empower the SEC and DOJ to bring such suits. Most judges will not be willing to tell Congress that, because of the way a statute is worded, it fails to accomplish anything at all. On the other hand, Congress enacts statutes; it does not enact "intent." In this instance, reconstructing what Congress intended involves construing every single enforceable substantive provision of three complex statutes as having been amended to

929Y(b)(1) — (4).

The provision requires that a report of the study be submitted and recommendations made to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House within 18 months. *Id.* § 929Y(c). For a number of reasons expressed in the professors' amicus brief in *Morrison*, such a private right of action is very worrisome from a policy perspective. *See* Law Professors' Am. Br. at 28–29. We do not address that issue here.

incorporate the conduct and effects tests used in the courts of appeals prior to *Morrison* if an action is brought by the SEC or DOJ. Some judges may say that amending the substantive provisions of these statutes is Congress's job, not theirs. Congress merely telling the courts what they already knew, that the courts have jurisdiction, is not enough. The Supreme Court in particular has frequently sent Congress back to the legislative drawing board and might do so here.

This article does not attempt to predict what will happen if Congress does not change the statute before the issue reaches the Supreme Court. In the meantime, however, the line of defense articulated by Conway has merit and could pose a preliminary obstacle to the SEC in some of the enforcement actions it brings under these provisions of the Dodd-Frank Act.[83]

Despite Conway's argument that the statute does not, in fact, have extraterritorial applications due to an apparent drafting error, the SEC has several arguments in its favor. First, as pointed out above, is the seemingly obvious intent of Congress. There is no alternative explanation for what Congress intended to do in these provisions of the Dodd-Frank Act. Congress wanted the SEC and DOJ to be able to bring suits in certain circumstances and described those circumstances in Dodd-Frank. Congress could not possibly have intended only to give federal courts jurisdiction over SEC and DOJ cases simply for the purpose of dismissing those cases on the merits. Congress intended to change the law (or at least change judicial interpretation of prior law).[84]

83. *See* Conway, *supra* note 10, at 1 (arguing that Section 929P(b) does "not expand the geographic scope of any substantive regulatory provision," as the provision purports to do. Rather, the provision only addresses the "jurisdiction" of the district courts "to hear cases involving extraterritorial elements.").

84. Even if the statutory language in Dodd-Frank only expressly grants courts jurisdiction they already have, there remains the question of whether courts should interpret Section 10(b) differently in view of this new statute. The SEC could successfully argue that because of the Dodd-Frank provisions the holding in *Morrison* has to be modified for DOJ and SEC actions. The Supreme Court applied the extraterritoriality presumption in *Morrison* because the Court saw no indicia whatsoever that Congress intended Section 10(b) to apply to transactions outside the United States. *Morrison*, 130 S. Ct. at 2883 ("In short, there is no affirmative indication in the Exchange Act that 10(b) applies extraterritorially, and we therefore conclude that it does not."). But when Congress added the extraterritorial text in the jurisdiction provision in Dodd-Frank, Congress gave affirmative indication in the Exchange Act that the antifraud provisions of the Act apply extraterritorially. Congress thus

Second, there is a reason for the confusion on this issue because, up until *Union Pacific* in late 2009, courts of appeals had—however incorrectly—approached these questions as grounded in subject matter jurisdiction.[85] Congress used the framework that most courts had used for a long time to address this issue—the extraterritorial application of Section 10(b).[86] Congress adopted this framework despite the Supreme Court's finding in *Union Pacific* that the courts of appeals incorrectly applied subject-matter jurisdiction analysis. Thus, Congress's final language might reflect a difficult point of law, on which the courts have reached contrary conclusions. Congress adopted this framework despite the Supreme Court's finding in *Union Pacific* that the courts of appeals incorrectly applied subject-matter jurisdiction analysis. Thus, Congress's final language might reflect a difficult point of law, on which the courts have reached contrary conclusions.

Indeed, Congress has the final say on what is a question of subject matter jurisdiction. Under *Arbaugh v. Y.H. Corp.*,[87] Congress can make any issue one of subject matter jurisdiction by affirmatively including the issue in the statutory subject matter jurisdiction provisions.[88] Congress thus can legislatively reverse the presumption articulated in *Union Pacific* for a

implicitly modified the judicial construction of Section 10(b) as to DOJ and SEC enforcement actions when it affirmatively introduced statutory indicia of extraterritoriality. *See* United States v. Fausto, 484 U.S. 439, 453 (1988) (statutory construction canon against repeal by implication does not apply as strongly where the "repeal" simply involves a judicial construction of a statute). This approach involves using a 2010 statute to shape judicial construction of a statute enacted in 1934, an exercise that some courts may not be willing to undertake. Nonetheless, some courts may hold that the Dodd-Frank provisions for SEC and DOJ actions implicitly repeal *Morrison*'s judicial interpretation of 10(b) as incorporating a "transaction test."

85. *Morrison*, 130 S. Ct. at 2877 (recognizing that although the District Court incorrectly considered the extraterritorial reach of § 10(b) to raise a question of subject-matter jurisdiction, this decision was grounded in "Circuit precedent.") (citing *Schoenbaum*, 405 F.2d at 208.)

86. *See, e.g., Schoenbaum*, 405 F.2d at 208; In re CP Ships Ltd. Sec. Litig., 578 F.3d at 1313; Continental Grain, 592 F.2d at 421.

87. *Arbaugh*, 546 U.S. at 500.

88. *See Arbaugh*, 546 U.S. at 516 (noting that Congress has broad authority to "restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors, some of them also relevant to the merits of a case."). For example, Congress exercised this power to make an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332. *Id.* at 515.

particular statute and make the issue one of subject matter jurisdiction. Congress can also bestow jurisdiction when it wants to. The Dodd-Frank language apparently was intended by the SEC, when it was initially drafted, to codify the courts of appeals approach to extraterritoriality. The statutory language thus arguably works because it does two things: it turns the extraterritorial issue into a question of jurisdiction rather than the merits, and says that SEC and DOJ suits can proceed if brought in certain circumstances because there is jurisdiction.[89]

Under this line of reasoning, the Dodd-Frank provisions thus reinstate the securities case law that had existed in courts of appeals—most notably the Third, Eighth, and Ninth Circuits[90]—before both *Union Pacific* and *Morrison* were decided. *Union Pacific* was not a securities case, but its broad language as pointed out in *Morrison* emphasizes that questions of statutory interpretation pertain to the merits, not to jurisdiction, unless Congress says otherwise. Now Congress is saying otherwise. The Dodd-Frank language thus seeks to restore decades of judicial precedent (none of this precedent was from the Supreme Court, however, and as pointed out above was contrary to the Court's approach to jurisdiction even prior to *Union Pacific*).[91] This precedent in the courts of appeals

89. In preparing this article, we spoke with the attorneys in the SEC Office of the General Counsel who, along with the Solicitor General's Office, drafted the Government's *Morrison* amicus briefs (both at the certiorari and merits stage). They explained to us that throughout the legislative process they were substantially involved in providing technical assistance to members of Congress that included, among other things, explaining the provisions' intended effect of codifying the courts of appeals' approach to extraterritoriality with respect to SEC and DOJ enforcement actions.

90. *See, e.g.,* SEC v. Kaiser, 548 F.2d 109, 114 (3d Cir. 1977); Continental Grain, 592 F.2d at 421; Butte Mining PLC v. Smith, 76 F.3d 287, 290–91 (9th Cir. 1996).

91. The federal courts over the years have been less than clear in explaining that extraterritoriality is not a question of subject matter jurisdiction. For example, in *Arbaugh,* 546 U.S. at 511–13, the Supreme Court pointed to one of its own decisions, E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244 (1991), in which it had characterized the extraterritorial effect of Title VII as jurisdictional, as an example of a decision in which it had been "less than meticulous" in distinguishing between subject matter jurisdiction and an ingredient of a claim for relief. *See*, *e.g.*, Litecubes, LLC v. Northern Light Prods., Inc., 523 F.3d 1353, 1368 (Fed. Cir. 2008) ("There is no indication that Congress intended the extraterritorial limitations on the scope of the Copyright Act to limit the subject matter jurisdiction of the federal courts."). Given the confusion created by the courts themselves, it could be seen as disrespectful of a coordinate branch of government for the courts—the district courts and courts of appeals in particular—to hold Congress to a higher standard of precision in its own drafting on the same issue when the intent of

held that extraterritoriality was a jurisdictional question and that certain suits could proceed because there was jurisdiction. Now, the SEC, in proposing the Dodd-Frank language,[92] is asking Congress to put this issue in the jurisdictional box where the courts of appeals had placed it, and to confer jurisdiction. Admittedly, nowhere in the legislative history is there a statement that the SEC or Congress wanted this to be a jurisdictional issue instead of an issue of the merits in SEC and DOJ suits. The SEC, however, has favored the way extraterritoriality was analyzed in the courts of appeals.[93] Even if, in the *Morrison* briefs, the SEC recognized that under Supreme Court precedent extraterritoriality was not a question of subject matter jurisdiction, the SEC still apparently wanted Congress to reinstate the approach of the courts of appeals in SEC and DOJ suits and drafted language that it believed did precisely that. Treating extraterritoriality as a jurisdictional question was part of this approach. Whether or not the Dodd-Frank language in fact works in this way (which would legislatively overrule Part II of the *Morrison* opinion along with the rest of that opinion) in SEC and DOJ suits, it was apparently intended to do so when it was drafted and sent to Congress by the SEC.

Third, the Supreme Court in *Morrison* attached relatively little importance to the difference between jurisdictional questions and questions on the merits when it decided the question on the merits, even though the question had been presented to the Court as one of jurisdiction. The Court did this even though the Petitioners asked the Court not to decide the case, but instead to remand to the Second Circuit in light of *Union Pacific*.[94] Part II of the *Morrison* opinion points out that the two questions are not the same,[95] but for purposes of this

Congress to allow certain SEC and DOJ actions is clear.

92. It is clear from the briefs in *Morrison* that the SEC as well as the parties to the case recognized that the Court saw the issue before it as being one of the merits, not jurisdiction. *See Morrison v. National Australia Bank, Ltd.*, Br. for the United States as Amicus Curiae Supporting Respondents, 2010 WL 719337, at *6 (Feb. 26, 2010).

93. *See* Petition for a Writ of Certiorari, *Morrison*, 130 S. Ct. 2869, at 6 (No. 08-1191) (arguing that the "Courts of Appeals have consistently and correctly held that section 10(b) reaches at least some transnational fraudulent schemes that cause injury outside the United States.").

94. *See Morrison*, 130 S. Ct. at 2877.

95. *See id.* (stating that to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, "refers to a tribunal's power to hear a case.").

case, it seemingly did not make much difference. The Court went ahead and decided the case anyway. Would the same Court later turn around and say that the same distinction—between jurisdiction and the merits—is so important that Congress only addressed jurisdiction when it actually meant to address the merits?

Finally, even if the SEC were to lose a case it brought under Section 10(b) because a court found the Dodd-Frank language insufficient to change the substantive reach of the statute, the SEC could argue that because the language in Section 17(a) of the Securities Act is broader, and because Section 17(a) has not yet been interpreted by the Supreme Court to preclude extraterritorial reach, courts should not now interpret Section 17(a) to preclude extraterritorial reach. In particular, the SEC could argue that the Dodd-Frank Act reveals Congress's intent with respect to the reach of Section 17(a) of the Securities Act, and that the courts should not subsequently interpret the statute in a manner contrary to that intent when they have not done so before. This argument might hold some sway, although the SEC would have to contend with the fact that the *Morrison* opinion is full of references to the Securities Act as well as the Exchange Act, and it is clear under *Morrison* that the presumption against extraterritoriality applies to both statutes.[96] Admittedly this is dicta insofar as it applies to Section 17(a) of the Securities Act, but very strong dicta expressed by the Court before enactment of the Dodd-Frank provisions on SEC and DOJ actions under Section 17(a).[97]

Admittedly, none of these arguments fully addresses the problem pointed out by Conway, that the Dodd-Frank provision nowhere addresses the substantive reach of the securities statutes.[98] The provisions merely speak of jurisdiction after the Supreme Court had expressly said there was jurisdiction, that jurisdiction was not the issue, and that there was no case on the merits. The legislative language was not changed after *Union Pacific*. *Union Pacific*, furthermore, was not a significant change to the Supreme Court's earlier approach to jurisdiction. The Dodd-Frank language passed through the House at a time when the drafters knew there was jurisdiction and that the question before the Court in *Morrison* was the merits. The

96. *See id.* at 2877, 2885.
97. *See id*.
98. *See* Wachtell, Lipton, Rosen, & Katz, *supra* note 10.

statute still does not directly address the merits. Collectively, the above arguments tilt the scales in favor of the SEC, but the situation Congress has left for the SEC and the courts is not a good one.

V. CONCLUSION

In sum, it is doubtful that many courts will flout the will of Congress and decide against the SEC on this issue, particularly in view of the circumstances in which Congress enacted these provisions. Although the statutory language had been drafted in anticipation of the Court's holding in *Morrison*, it was not known that it would go in the statute until *Morrison* was actually decided. The final full day of the Dodd-Frank House-Senate conference was the day the Supreme Court decided *Morrison*, giving the conferees limited time to react. It was later that morning that the Senate side of the conference committee adopted the SEC/DOJ provisions, and that evening that Congressman Kanjorski proposed the private study of private rights of actions.[99] Under these circumstances, Congress's intent to override *Morrison* in SEC and DOJ actions (even if less than artfully worded) is clear and is likely to carry substantial weight.

This is, however, legislative language that Congress did not change or explain despite months of notice that extraterritoriality was seen by the Supreme Court as a question of the merits rather than jurisdiction. Congress should do the right thing and enact a legislative fix before the government and private parties are burdened by litigation on this issue. Congress should make the statutory language in the Dodd-Frank Act say what it meant to say.

99. *See* H.R. Res. 3817, 111th Cong. (2009).