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Extraterritorial Jurisdiction—Warning: Second Circuit Breaks with Supreme Court Trend for Stricter Presumption Against Extraterritoriality

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**EXTRATERRITORIAL JURISDICTION—WARNING:
SECOND CIRCUIT BREAKS WITH SUPREME COURT
TREND FOR STRICTER PRESUMPTION AGAINST
EXTRATERRITORIALITY**

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I. INTRODUCTION

“[L]EGISLATION OF CONGRESS, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States”—“a *longstanding principle* of American law.”¹ Known as the presumption against extraterritoriality, this canon of construction protects “against unintended clashes between [laws of the United States] and those of other nations which could result in international discord.”² Accordingly, the presumption aids the judiciary’s interpretation of Congress’s intention.³ This shields the United States from foreign policy consequences—unintended and unexpected by the other branches—that may result from an interpretation flaw.⁴

Although the “presumption had all but been given up for dead” in the late 1980s,⁵ the Supreme Court recently resurrected and fortified the presumption against extraterritoriality. In 1991, the Court in *EEOC v. Arabian American Oil Co. (Aramco)* held Title VII inapplicable extraterritorially; it could not regu-

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¹ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, codified at 42 U.S.C. § 2000e(f), *as recognized in* *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 n.8 (2006)) (emphasis added).

² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Aramco*, 499 U.S. at 248).

³ *Id.*

⁴ *Id.*

⁵ Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1098 (2015).

late employment practices of U.S. firms that employ Americans abroad.⁶ In the 2010 decision *Morrison v. National Australia Bank*, the Court rejected longstanding Second Circuit precedent and applied the presumption against extraterritoriality to securities fraud.⁷ Again in 2013, in *Kiobel v. Royal Dutch Petroleum*, the Supreme Court applied the presumption and held the plaintiff lacked extraterritorial jurisdiction under the Alien Tort Statute.⁸ In 2016, however, in *RJR Nabisco, Inc. v. European Community*, the Court held the Racketeer Influenced and Corrupt Organizations Act (RICO) could apply extraterritorially.⁹ But the Court severely limited the application of RICO to foreign conduct that violates “a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially.”¹⁰ Still, the Court held RICO’s private right of action *does not* overcome the presumption.¹¹ Thus, the Supreme Court has revived the presumption against extraterritoriality and reinforced a high burden to overtake the canon to apply a law extraterritorially.

Nevertheless, in *United States v. Epskamp*—a Second Circuit case of first impression—the court held 21 U.S.C. § 959(b)(2) applied extraterritorially and did not violate fair warning under due process.¹² This note argues that the Second Circuit incorrectly held extraterritorial jurisdiction applies to 21 U.S.C. § 959(b)(2) because of the selective application of statutory interpretation canons, disregard of mandatory precedent, and deviation from the Supreme Court trend to apply a stricter presumption against extraterritoriality.

II. FACTUAL BACKGROUND

On December 4, 2011, the defendant, a Dutch citizen named Nicolas Epskamp, arrived in the Dominican Republic to participate in a drug trafficking scheme.¹³ In early October before his arrival, the U.S. Drug Enforcement Administration (DEA) received information about this scheme.¹⁴ Thereafter, the DEA

⁶ *Aramco*, 499 U.S. at 249, 259.

⁷ See generally *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

⁸ *Kiobel*, 133 S. Ct. at 1669.

⁹ *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2103 (2016).

¹⁰ *Id.* at 2102 (quoting *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 136 (2d Cir. 2014)).

¹¹ *Id.* at 2106.

¹² *United States v. Epskamp*, 832 F.3d 154, 157–58, 162 (2d Cir. 2016).

¹³ *Id.* at 159.

¹⁴ *Id.* at 158.

learned, through tracked calls on a phone belonging to Watson (a British citizen and conspiracy member) that Watson switched the plane, going from an “H” registered aircraft to an “N” registered aircraft—a U.S. registered aircraft—to attract less suspicion from Dominican authorities.¹⁵

When Epskamp arrived in the Dominican Republic, he revealed to Podunajec (a translator hired by Watson) that his participation in the scheme would settle his drug debts and make him an additional 50,000 Euros.¹⁶ Podunajec also informed Epskamp, who was unsure if he was headed to Africa or Belgium, that Podunajec believed Epskamp would leave for Belgium with the cocaine but to ask “Ali” (a Lebanese man and another conspirator).¹⁷

In the early morning, around 3:45 a.m. on December 15, 2011, Watson picked up Epskamp.¹⁸ They dressed in their “uniforms,” as commanded by Ali via text, and headed to the airport.¹⁹ Upon arrival, the undercover pilots—outfitted with an audio and visual recording device—met them.²⁰ They proceeded onto an airplane with an “N” registration number on its tail that the Colombians had already loaded with around twenty suitcases containing over 1,000 kilograms of cocaine.²¹ Before departing, an airport official instructed Epskamp to deplane to speak with an immigration official, so Epskamp returned to the terminal, leaving Watson on the plane.²² Dominican police arrested Epskamp and Watson, and a thorough search revealed “approximately 1,000 kilograms of cocaine, divided into approximately 1,000 bricks.”²³

III. EPSKAMP IS CONVICTED BY A U.S. COURT UNDER 21 U.S.C. § 959(B) (2)

In November 2012, authorities transferred Epskamp to the United States and brought him to trial in the Southern District

¹⁵ *Id.* at 158–59 n.5 (noting that Dominican police—not associated with the investigation—searched the original plane Watson planned on chartering before drugs had been placed on it).

¹⁶ *Id.* at 159.

¹⁷ *Id.*

¹⁸ *Id.* at 160.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

of New York.²⁴ Prior to trial, Epskamp filed a motion to dismiss for lack of jurisdiction, which the district court denied.²⁵ In a seven-day jury trial, the court found Epskamp guilty on two counts, sentencing him to a 264-month incarceration.²⁶ Epskamp presented five issues on appeal; the Second Circuit chose to address two of those issues.²⁷ First, he argued that § 959(b)(2) does not extend extraterritorial jurisdiction, and even if it did, the requisite knowledge that he was aboard a U.S. aircraft did not exist.²⁸ Second, Epskamp claimed that the requisite nexus between his unlawful acts and the United States did not exist, thus violating his right to due process.²⁹ This note focuses solely on the first issue.

Epskamp was convicted under 21 U.S.C. § 959(b), which states:

It shall be unlawful for any United States citizen on board any aircraft, or any person on board an aircraft owned by a United States citizen or registered in the United States, to (1) manufacture or distribute a controlled substance or listed chemical; or (2) possess a controlled substance or listed chemical with intent to distribute.³⁰

Subsection (c) speaks to extraterritorial jurisdiction and reads: “This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States.”³¹ Epskamp brought two arguments regarding the construction of this statute: (1) that § 959(c) neglects to mention possession with intent to distribute, thus § 959(b)(2) does not extend to extraterritorial conduct; and (2) § 959(b) demands proof of the defendant’s knowledge that the unlawful acts occur “on board an aircraft owned by a United States citizen

²⁴ *Id.*

²⁵ *Id.* at 157 n.1.

²⁶ *Id.* at 157 (explaining the charges as (1) a violation of 21 U.S.C §§ 812, 959(b)(2), 960(a)(3) by conspiring to possess with intent to distribute a controlled substance on board a U.S. registered aircraft; and (2) possession with intent to distribute a controlled substance on board a U.S. registered aircraft, in violation of 21 U.S.C. §§ 812, 959(b)(2) and 18 U.S.C. § 2).

²⁷ *Id.* at 157–58.

²⁸ *Id.* at 158.

²⁹ *Id.*

³⁰ Comprehensive Drug Abuse and Control Act of 1970, 21 U.S.C. §959(b) (2013); *Epskamp*, 832 F.3d at 161 n.6 (noting that “Congress amended § 959 on May 16, 2016[,] to add a new subsection ‘a,’ to add a new subsection ‘b,’” and that those sections that were “b” and “c,” became “c” and “d,” respectively).

³¹ *Epskamp*, 832 F.3d at 161.

or registered in the United States.”³² The Second Circuit rejected both.³³

IV. SECOND CIRCUIT APPLIES EXTRATERRITORIAL JURISDICTION TO § 959(B)(2)

The Second Circuit held that extraterritorial jurisdiction applied to § 959(b)(2) based on congressional intent expressed through the structure and context of the statute, and was confirmed by the statute’s enactment history.³⁴ This was a case of first impression for the Second Circuit, but the court noted that all other federal courts to confront this issue concluded that extraterritoriality extends to § 959(b)(2) possession with intent to distribute.³⁵ The court first minimized the significance of the presumption against extraterritoriality by explaining that it is merely a presumption and that “it is overcome by clearly expressed Congressional intent for a statute to apply extraterritorially.”³⁶ Hence, the court decided to apply principles of statutory interpretation to determine if Congress manifests intent for extraterritorial application.³⁷

First, the court looked to the plain and unambiguous meaning of the statute’s text and quickly admits that the statute portrays “an example of less than crystalline drafting.” Particularly, the wording in subsection (c) expressly applies extraterritorial jurisdiction to manufacturing and distribution, but not to possession with intent to distribute.³⁸ Next, supported by a district court’s holding, the court reasoned that the use of the term “any” to construe the provision’s jurisdictional scope favors a broad extraterritorial application, “while purposefully retaining a distinct nexus to the United States.”³⁹ But the court qualified that, usually, “generic terms like ‘any’ or ‘every’ do not rebut the

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 161–62, 166.

³⁵ *Id.* at 163 n.7 (citing *United States v. Lawrence*, 727 F.3d 386 (5th Cir. 2013); *United States v. Knowles*, No. 12-266(2),(3)(ABJ), 2016 WL 3365373, at *5–7 (D.D.C. June 16, 2016); *United States v. Bodye*, 172 F. Supp. 3d 15, 18–20 (D.D.C. 2016); *United States v. Malago*, No. 12-20031-CR, 2012 WL 3962901, at *2–5 (S.D. Fla. Sept. 11, 2012)).

³⁶ *Id.* at 161 (quoting *Weiss v. Nat’l Westminster Bank PLC*, 768 F.3d 202, 211 (2d Cir. 2014)).

³⁷ *Id.* at 162 (citing *United States v. MacAllister*, 160 F.3d 1304, 1307 (11th Cir. 1998)).

³⁸ *Id.*

³⁹ *Id.* at 163 (citing *Knowles*, 2016 WL 3365373, at *6).

presumption against extraterritoriality.”⁴⁰ The court further asserted that the venue provision in § 959(c), which states that defendants “will usually be tried at their ‘point of entry’ into the United States,” conveyed Congress’s intention that the whole statute apply extraterritorially.⁴¹ The court conceded, however, that § 959(c) “mudd[ies] the textual waters” based on the doctrine of *expressio unius est exclusio alterius* and the lack of the express inclusion of possession with intent to distribute.⁴² But to reach its desired outcome, the court justified this canon as a suggestion, not a requirement.⁴³

The Second Circuit admitted that the text may be “insufficiently plain to overcome the presumption against extraterritoriality,” and next looked to the statutory scheme and context.⁴⁴ First, the court looked at the context and proclaimed Epskamp’s reading of the statute illogical because limiting the scope of § 959(b)(2) would establish “a purely domestic crime within a statute aimed at combatting international narcotics smuggling and importation where every other provision applies extraterritorially.”⁴⁵ Next, the court argued that applying the statute extraterritorially prevents violation of the “canon that statutes should be read to avoid making any provision superfluous, void, or insignificant,” because 21 U.S.C. § 841(a) already made purely domestic possession with intent unlawful.⁴⁶ Yet, in a footnote, the court admitted that the Supreme Court suggests that the presumption against superfluity alone is not enough to overcome the presumption against extraterritoriality.⁴⁷ Nevertheless, the Second Circuit believed based on its reading of the text, the statutory structure, and the context that Congress clearly intended for extraterritoriality to extend to § 959(b)(2).⁴⁸

⁴⁰ *Id.* (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013)).

⁴¹ *Id.* (quoting 21 U.S.C. § 959).

⁴² *Id.*

⁴³ *Id.* (quoting *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 370 (2d Cir. 2006) (The “*expressio unius est exclusio alterius* canon is merely ‘an aid to construction,’ and not conclusive as to Congress’s intent.”)).

⁴⁴ *Id.* at 164.

⁴⁵ *Id.*

⁴⁶ *Id.* at 164–65 (quoting *Milner v. Dep’t of Navy*, 562 U.S. 562, 575 (2011)).

⁴⁷ *Id.* at 165 n.10 (citing *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 253–54 (1991)).

⁴⁸ *Id.* at 166.

So, “although not necessary,” the court looked to the legislative history to confirm its holding.⁴⁹ The court discussed that when Congress enacted the Comprehensive Drug Abuse Prevention and Control Act in 1970, § 1009—the precursor to the current § 959—“applied extraterritorially in its entirety.”⁵⁰ But when Congress enacted the Anti-Drug Abuse Act of 1986, it amended and added subsection (b) “Possession, Manufacture, or Distribution by Person On Board Aircraft.”⁵¹ Therefore, the court extrapolated that because of the prior statute’s extraterritorial nature, “Congress ‘might have casually assumed that a new subsection would [be extraterritorial] as well.’”⁵² The Second Circuit concluded that Congress intended to extend extraterritorial jurisdiction to § 959(b)(2) based on the structure, context, and legislative history.⁵³

V. WARNING: SECOND CIRCUIT DEPARTS FROM SCOTUS TREND

In *Epskamp*, the Second Circuit overstepped its authority when it disregards the plain language of 21 U.S.C. § 959(b) and the presumption against extraterritoriality, thereby extending extraterritorial jurisdiction to include possession with intent to distribute. While the Second Circuit investigated Congress’s intent, the results are far from clear.⁵⁴ If the extraterritorial application of § 959(b) were clear like water, there would be no confusion. But this statute is more like milk. Even put through a purifier, the end result still lacks clarity.

The Second Circuit weakly justified its holding based on statutory structure and context; meanwhile, it disregarded other viable and arguably more persuasive canons of construction—even blatantly making exceptions to Supreme Court precedent. To begin, the Second Circuit acknowledged that the statute lacks “crystalline drafting,” and its analysis should have ceased because of the presumption against extraterritoriality.⁵⁵ According to the Supreme Court, “[w]hen a statute gives no clear indica-

⁴⁹ *Id.* at 165.

⁵⁰ *Id.* at 165–66.

⁵¹ *Id.* at 166 (quoting Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986)).

⁵² *Id.* (quoting *United States v. Bodye*, 172 F. Supp. 3d 15, 19 (D.D.C. 2016)).

⁵³ *Id.*

⁵⁴ See generally *id.* at 162–66.

⁵⁵ See *id.* at 162.

tion of an extraterritorial application, it has none.”⁵⁶ Moreover, “crystalline,” according to Merriam-Webster Dictionary, means something that is “clear and shining like a crystal.”⁵⁷ Essentially, the court declared that the statute lacks clear drafting, yet rather than adhere to the presumption against extraterritoriality, the court continued to support its argument with reasoning to find for extraterritoriality—denigrating the presumption’s purpose.⁵⁸ The *Morrison* court explained that the critical purpose behind the presumption against extraterritoriality is to limit “judicial-speculation-made-law,” which “preserv[es] a stable background against which Congress can legislate with predictable effects.”⁵⁹ To preserve this purpose, the Supreme Court held that “possible interpretations of statutory language do not override the presumption against extraterritoriality.”⁶⁰ This makes the Second Circuit’s interpretation of the statutory language unconvincing.

Additionally, the majority of the Second Circuit’s argument relied on weak precedent by unconvincingly cherry-picking statutory interpretation canons to apply. First, the Second Circuit’s argument that the use of the term “any” implies extraterritorial application is blatantly wrong because the court relied on a D.C. District Court case, and it even admitted the opinion’s inconsistency with mandatory Supreme Court precedent by stating that “generic terms like ‘any’ or ‘every’ do not rebut the presumption against extraterritoriality.”⁶¹ Next, the Second Circuit’s discussion of § 959(c) lacked vitality because the Supreme Court held that “when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.”⁶² Thus, this statute does not overcome the presumption against extraterritoriality in light of the Second Circuit’s neglect for mandatory authority.

Furthermore, the Second Circuit’s disillusioned belief that the statutory context and structure conquer the “recommended” doctrine of *expressio unius* and the presumption against

⁵⁶ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

⁵⁷ *Crystalline*, MERRIAM WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/crystalline> [<https://perma.cc/HC4A-EDYJ>] (last visited July 17, 2017).

⁵⁸ See *Epskamp*, 832 F.3d at 162.

⁵⁹ *Morrison*, 561 U.S. at 261.

⁶⁰ *Id.* at 264.

⁶¹ See *Epskamp*, 832 F.3d at 163 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013)).

⁶² *Morrison*, 561 U.S. at 265; but see *Epskamp*, 832 F.3d at 163, 165–66 & n.10.

extraterritoriality portrays the court's overly discretionary approach.⁶³ The court's argument that Epskamp read the statute illogically given the statute's purpose deserted the possibility that possession with intent to distribute is a very different crime than manufacturing and distribution of narcotics. Possession with intent to distribute tends to apply to those people acting as drug mules, not the central men running a drug trafficking scheme.⁶⁴ Next, even though the court's redundancy argument, relying on the presumption against superfluity, appeared to be a compelling assertion, this is far from the "clearly expressed" congressional intent that is required by the Supreme Court in *Morrison*.⁶⁵ Moreover, the court even divulged that the Supreme Court suggested that the presumption against superfluity, by itself, does not trump the presumption against extraterritoriality.⁶⁶

Last, even the Second Circuit's use of legislative history to confirm its holding and provide more clarity is mediocre because in the words of Justice Scalia, "[i]f one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history."⁶⁷ Nevertheless, the most concerning flaw in the Second Circuit's reasoning is the court's schism from the recent Supreme Court trend; thus, the Second Circuit's reasoning lacks the muster to overcome this high presumption against extraterritoriality.

The Second Circuit intentionally chose to focus on statutory structure and context paired with legislative history to get its desired result. However, the court's selective disregard of not only canons of construction—such as the presumption against extraterritoriality and the doctrine of *expressio unius est exclusio alterius*—but also of the Supreme Court trend of a stricter presumption against extraterritoriality muddies its argument for clear congressional intent. Under the impression that the Second Circuit's argument is sound, courts could be led into a trap

⁶³ See *Epskamp*, 832 F.3d at 166.

⁶⁴ Cf. 2 GERALD F. UELMEN & ALEX KREIT, DRUG ABUSE AND THE LAW SOURCEBOOK § 8:16 (2016) (explaining the roles of various actors in criminal drug distribution networks).

⁶⁵ See *Morrison*, 561 U.S. at 255; but see *Epskamp*, 832 F.3d at 165 n.10.

⁶⁶ *Epskamp*, 832 F.3d at 165 n. 10 (citing *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 253–54 (1991)).

⁶⁷ Reply Brief of Defendant-Appellant Nicolas Epskamp at 7–8, *United States v. Epskamp*, 832 F.3d 154 (2016) (No. 15-2028), 2016 WL 4150900, at *7–8 (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring)).

by its holding. Alternatively, a circuit split will likely develop. Most importantly, this holding risks a waterfall of judicially created law resulting in dangerous foreign policy implications unexpected by the other branches. Clearly, other courts should heed warning when they rely on this holding and resist extending extraterritorial jurisdiction, unless Congress's intent for extraterritorial jurisdiction is "*clearly* expressed."⁶⁸

⁶⁸ See *Morrison*, 561 U.S. at 255 (emphasis added).