Travel Act: buttressing the FCPA

By D. Anthony Rodriguez and Michael P. Kniffen

Much attention has been given to the Department of Justice's investigation and prosecution of overseas corruption under the Foreign Corrupt Practices Act (FCPA) — and deservedly so. In 2011, the DOJ collected over a half-billion dollars in FCPA penalties and disgorgement, marking four consecutive years in which collections exceeded that amount — including the record amount of $1.8 billion in 2010.

As the DOJ has made clear, however, the FCPA is not the only statute at its disposal for prosecuting overseas corruption. U.S. companies should be familiar not only with the FCPA, but also with the mail and wire fraud statutes. 18 U.S.C. Sections 1341 and 1343. Companies should also be familiar with the Travel Act. 18 U.S.C. Section 1952. When combined with the FCPA, the DOJ has used the Travel Act to reach both public and commercial bribery abroad.

The Travel Act does not prohibit commercial bribery itself, but rather the use of the facilities of interstate or foreign commerce, such as mail, email, Internet, fax or telephone in the commission of an "unlawful activity." The Travel Act recognizes bribery as one of the covered "unlawful activities." 18 U.S.C. Section 1952(b). The government may charge a violation of the Travel Act even if the bribe was unsuccessful, so long as the facilities of commerce were used for the attempted bribe.

The Travel Act reaches commercial bribery that the FCPA does not. When coupled with the FCPA, the Travel Act allows the government to reach both public and commercial foreign bribery.

A bribery offense may be sufficient to support the elements of a Travel Act violation if the following occur: (1) travel in interstate or foreign commerce, or use of the mail or any facility of interstate or foreign commerce; (2) intent to promote, manage, establish, carry on, facilitate or distribute the proceeds of any bribery; and (3) performance of or attempt to perform an act promoting, managing, establishing, carrying, facilitating or distributing the proceeds of bribery. See *United States v. Welch*, 327 F.3d 1081, 1090 (10th Cir. 2003). The Supreme Court has held that Congress intended "bribery" to encompass state commercial bribery statutes. *Perrin v. United States*, 444 U.S. 37, 50 (1979). Thus, the Travel Act makes it a federal offense to violate state commercial bribery laws while traveling in or using the facilities of interstate or foreign commerce.

Scope.

Under the government's expansive interpretation, the Travel Act applies when the target of the bribe is located abroad. That means if you are in the U.S. (within a state with a commercial bribery statute), and you send an email or make a call with the intent to facilitate an overseas bribe, the government will argue that the Travel Act applies. Nor, according to the DOJ, can you escape the Travel Act by simply making the call or sending the email while traveling abroad if the purpose of the trip was to facilitate the bribery. It is only in those rare circumstances in which there is no territorial nexus to the U.S. that the government would concede the Travel Act would *not* apply. To illustrate, consider these examples:

Illustration 1: A California company sends its employee to Japan to obtain business. While in Japan, the employee offers a bribe to the Japanese company. Employee subsequently returns to California. Although the bribe occurred in Japan, the Travel Act applies because the employee travelled in foreign commerce with the intent to bribe.

Illustration 2: Same facts as Illustration 1, except that the employee stops at a conference in China first, visits the company's subsidiary in Taiwan, and then goes to Japan. The Travel Act still applies because interposing intermediate stops on a multi-legged journey taken for an unlawful purpose does not immunize the company or the employee from prosecution. See *United States v. Weingarten*, 632 F.3d 60, 71 (2d. Cir. 2011); *United States v. Carson*, No. 8:09-cr-00077-JVS, Order Denying Defendants' Motion to Dismiss Counts 1, 11, 12 and 14 of the Indictment, Doc. No. 440, C.D. Cal. Sept. 20, 2011, at 14-15.

Illustration 3: A California company sends its employee to its Taiwanese subsidiary to act as an intermediary. The employee stays in Taiwan for several years. At some point the employee visits Japan and offers a bribe. The employee returns to Taiwan and resumes his or her role as an intermediary. Subsequently, the employee returns to the U.S. Here, the Travel Act does not apply because the travel was between two foreign nations without any territorial nexus to the U.S., and thus "foreign commerce" is not implicated. See *Weingarten*, 632 F.3d 6 at 70; *Carson*, Doc. No. 440, at 14-15.

Extraterritoriality.

The Travel Act's jurisdictional reach over foreign bribery is an unsettled area of the law. In deciding a private securities case unrelated to the Travel Act, the Supreme Court held that a statute does not have extraterritorial reach unless Congress clearly expressed its affirmative intention to give the statute extraterritorial effect. *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2877-78 (2010).

Arguably, since under *Morrison* general references to "foreign commerce" do not defeat the presumption against extraterritoriality, the Travel Act's express and repeated references to "foreign commerce" may not be sufficient to confer extraterritorial jurisdiction. But, thus far only one court has considered *Morrison* in connection with the Travel Act, and that court found that *Morrison* did not apply to Travel Act violations. See *Carson*, Doc. No. 440, at 6-7.

Relying on *United States v. Bowman*, 260 U.S. 94 (1922), the *Carson* court held that criminal statutes may apply extraterritorially even without an explicit Congressional statement. Because *Morrison* did not address a criminal statute or expressly overrule *Bowman*, the *Carson* court held that the Travel Act could be applied to conduct outside of the U.S.

Moreover, also relying on the fact that the alleged bribe was completed in California, the *Carson* court determined that there was no need to consider extraterritoriality issues.

Illustrations.

The Travel Act and the FCPA are not mutually exclusive. In fact, the government regularly includes counts under both statutes in prosecutions. Here are several examples of recent Travel Act/FCPA prosecutions:

United States v. Control Components, Inc., July 31, 2009 (C.D. Cal.). California-based valve maker Control Components Inc. (CCI) pleaded guilty to violating the FCPA and the Travel Act. CCI's guilty plea under the Travel Act involved bribing employees of private companies in contravention of California's anti-commercial bribery law. CCI agreed to pay $18.2 million as part of its plea agreement for the FCPA and Travel Act violations.

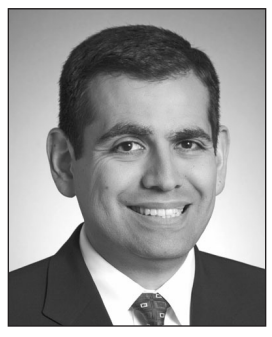
United States v. Frederic Bourke, July 10, 2009 (S.D.N.Y). Bourke was found guilty of a conspiracy to violate the FCPA and the Travel Act for bribing senior government officials in Azerbaijan to ensure privatization of the State Oil Company. The indictment made clear that the "unlawful activity" at issue under the Travel Act was the violation of the FCPA's anti-bribery provisions. He was sentenced to a year and a day in prison and fined $1 million.

United States v. Stuart Carson, April 8, 2009 (C.D. Cal.). Six former executives of CCI were indicted for violating the FCPA and the Travel Act. The executives were charged with paying bribes to employees of private companies under California's commercial bribery law.

United States v. Steven Ott and Roger Young (ITXC Corp.), July 27, 2007 (D.N.J.). Two former ITXC executives pleaded guilty to conspiring to violate the FCPA and the Travel Act in connection with illegal payments made to employees of foreign state-owned and foreign-owned telecommunications carriers in Nigeria, Rwanda, and Senegal. The purpose of the payments was to obtain and retain contracts for ITXC. The executives received five years probation and 3 to 6 months of home confinement.

United States v. Robert E. Thomson and James C. Reilly, July 1, 2004 (N.D. Ala.). Two former officers of HealthSouth Corporation were indicted for violating the Travel Act and the FCPA in connection with the alleged bribery of the director general of a Saudi Arabian foundation. The officers were acquitted of all chargers after a jury trial.

The Travel Act reaches commercial bribery that the FCPA does not. When coupled with the FCPA, the Travel Act allows the government to reach both public and commercial foreign bribery. In addition to the justified concern about FCPA issues, corporate compliance programs also must be designed to prevent and detect commercial bribery.



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US high court to hear oral arguments in *Kiobel*

By Beth Stephens

Is a corporation a person? According to the federal Dictionary Act, the answer is "yes." The word "person" includes corporations and other business entities. 1 U.S.C. Section 1. But what does it mean to say that a corporation is a person? Does it have the same rights as those of us who fall into the living, breathing subgroup of "persons"? What legal rights or duties go along with corporate personhood?

These questions highlight a stark comparison: How is it possible that a corporation can have a constitutionally protected right to contribute unlimited sums of money to influence an election, but that same corporation cannot be sued for genocide? That is the unlikely result of two cases decided in 2010: the Supreme Court's decision in *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), in which the court held that the First Amendment protects a corporation's right to make electoral expenditures; and the 2nd U.S. Circuit Court of Appeals decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), which held that international human rights norms, including the prohibition against genocide, do not apply to corporations. *Kiobel* is scheduled for argument today before the U.S. Supreme Court.

In *Kiobel*, a group of Nigerians alleged that the Dutch oil company directly contributed to torture, executions and other abuses committed by Nigerian government security forces. The 2nd Circuit dismissed their lawsuit, concluding that international human rights norms do not apply to corporations. The Supreme Court is now considering both that challenge to corporate accountability and the broader question of whether any entity can be sued for human rights violations that take place in a foreign country. But the crux of the case, and the issue that has driven most of the opposition to this and similar human rights cases, is corporate opposition to accountability under international law.

The *Kiobel* decision brushed off the contrast between a corporate right to spend money to influence elections and corporate immunity from human rights norms, because *Citizens United* was based on U.S. constitutional law, while *Kiobel* applied international law. But, on this issue, constitutional law and international law are not apples and oranges. Both rely on a shared understanding of the nature of a corporation. International law recognizes that the rules that bind individuals together into a corporation are set by domestic law, and that domestic law governs whether a corporation can be held liable for wrongs committed by its officers and employees. If the Supreme Court applies in *Kiobel* the same concept of a corporation that it applied in *Citizens United*, it will find that corporations can be held accountable when they violate human rights.

Constitutional law decisions portray the corporation as a robust, multi-dimensional entity: a person in (almost) all its glory. Although the courts and commentators struggle to explain exactly what that entity is, they know that it exists, that it has agency, and that it plays important economic, social, and political roles on local, national, and global stages. They understand that corporations have rights independent of, and usually equal to, those of the individuals who fund, work for, or manage the corporation. Some of the cases stop just short of saying that a corporation lives and breathes.

In *Kiobel*, the corporation is not multi-dimensional. Indeed, it is not much more than a cipher: "corporation" is an empty label, an undefined term that either appears in an international document or not. No texture, no exploration of function and role. No discussion of just what is this thing we call a corporation. That analytical failing is what has led some courts and commentators to conclude that international law does not impose any obligations on corporations, not even the obligation to refrain from committing genocide.

These distinct approaches are not the product of differences between the ways that international and domestic law define corporations. To the contrary, international law recognizes the complex nature of a corporation and relies on domestic law to define the legal implications of the corporate structure. The problem is that the *Kiobel* majority, and commentators endorsing its views, ignore the robust corporate identity that they are quick to adopt when considering a corporation's constitutional rights.

International law parallels constitutional provisions by targeting conduct, without specifying what actors perform the acts at issue. As Kathleen Sullivan, counsel for Royal Dutch Petroleum in the Supreme Court case, has written, the First Amendment contains no "ontological restrictions on who or what may invoke its protection" and is "indifferent to a speaker's identity or qualities — whether animate or inanimate, corporate or nonprofit, collective or individual." Kathleen M. Sullivan, "Two Concepts of Freedom of Speech," 124 Harv. L. Rev. 143, 155-56 (2010). Human rights law is also written in terms of conduct, not actors: international law prohibits genocide, slavery, torture, and summary execution, and is similarly indifferent as to whether the actor is animate or inanimate, collective or individual. To paraphrase Justice Antonin Scalia's discussion of the First Amendment in *Citizens United*, the burden should be on the corporations and their allies to show that "corporations are *not* covered" by human rights prohibitions, rather than on the plaintiffs to show "that they *are*." There is no evidence that international human rights norms intend to exclude legal entities from their prohibitions.

Is a corporation a person? Personally, I think not, but I recognize that many people (natural as well as corporate) disagree with me. My goal here is to make a modest plea for consistency. If corporations are people with constitutional rights, they are people with duties as well. Our courts have recognized a complex set of corporate characteristics that constitute corporate personhood. That same set of characteristics, that same corporate personhood, requires that corporations be held liable for the injuries that they inflict — and even more (not less) so when the injuries at issue constitute human rights violations, the most egregious injuries identified by domestic or international law.

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What about mistakes that are the product of haste?

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ognition of "being right." If only I believed this all the time.

But what about mistakes that are the product of inadvertence or haste? Those are the ones that can drive you nuts. And no amount of explaining or excuses gets you off the hook. And often if you point out the mistakes that others make, they may never speak to you again. Many years ago I called a colleague in another district and teased him about his use of mixed metaphors in an otherwise well-written opinion. Twenty years later we renewed our friendship. A justice, now retired, told me he never pointed out grammatical errors to his colleagues at the risk of offending them. Better they should be offended and author a better opinion, one in which their colleagues will happily concur.

What I have said so far applies to briefs, motions, writ petitions, letters, and even a column. Some of my loyal readers gleefully pour over my monthly offerings searching for misplaced modifiers, spelling mistakes, factual errors, grammatical slips, and lapses in coherence and clarity. None are shy about pointing them out to me. I have waged a reasonable defense when appropriate and have acknowledged error when my back was to the wall. But it seems the more I own up to my blunders, the more I unwittingly encourage my readers to ferret out more of these wayward pests to drop on my doorstep. I cannot help but compare this ritual to my cat bringing home a decapitated mouse, which he deposits on the bed. "Hey guys, look what I caught." Nevertheless, I publicly disclose these gaffes so that we all profit from them.

My dear friend, my colleague, my buddy, the ever perspicacious Justice Nora Manella nailed… I mean, wrote me about an indefensible error I made in my last column. And just imagine, together we have taught legal writing to attorneys. I wonder if she will consent to teach with me in the future. If so, I bet she will demand top billing.

One may not like being reminded of his or her mistakes, but enlightenment is of greater worth than the recognition of "being right." If only I believed this all the time.

Justice Manella writes in her e-mail, "I was surprised to see your column drawing attention to the 'error' in the use of the objective, rather than nominative, version of the first person singular pronoun ('It is I' v.'It is me')." Parenthetically I concede this technical error, but defend it. This phrase is used so commonly that even Fowler begrudgingly acknowledges and tacitly accepts its use. "Who's there?" "It is I" sounds so stilted. I prefer, "No sweat, it's just me." And Fowler puts me in good company. He points out that "It's me" has distinguished ancestry. "Shakespeare wrote All debts are cleared between you and I, and Pepys [wrote] Wagers lost and won between him and I." (Fowler's Modern English Usage (2d ed. 1983), Oxford University Press, p. 258.)

But the "It is I" nit is not Justice Manella's main point. Her email continues with her puzzlement over my recognition of the "It is I" issue, while "at the same time," I committed "another error in the same column." She writes, "I refer specifically to the first sentence of paragraph seven." Here she quotes me: "'This all brought home to me that some of the most successful attorneys I know are those that have developed skills and insight into other disciplines.'" She then critiques. "'[T]hat'? Say what you will about lawyers, surely your friends are not inanimate soulless automatons, but sentient human beings who deserve to be collectively referred to as 'who.'"

Of course she is right on. She continues with a tongue-in-cheek escape clause, "Then I realized — ah hah — he's just baiting us again, hoping that sticklers (sticklettes?) like me will find yet another nit to pick. OK, I plead nolo to taking the bait. Very clever of you, though."

Of course I did not deliberately place this grammatical error in my column. The sentence in which it appeared replaced a sentence that was awkward and confusing, but one in which "that" was properly used. Just minutes before the column went to press, I called in to my hapless editor the replacement sentence with the offending "that." He is absolved of all responsibility.

My new offending sentence, unlike its predecessor, is clear, but grammatically incorrect. One can say "so what?" It is an annoying fly speck on an otherwise clear windshield. I would like to get a pass, but no dice. The cliché about haste comes to mind. Judges, lawyers and columnists should keep this in mind when drafting … anything.

In the opening paragraph, I told you I have deliberately inserted a grammatical error in this column. The first five readers who notify me of the intentionally placed mistake will receive a copy of my book Under Submission. Email me at arthur.gilbert@jud.ca.gov or email The Daily Journal on or before Oct. 5, 2012. The arbitrary decision of the judge, that's me, is final and there is no appeal. Justice Manella is disqualified from participating.

Oh heavens. I just thought of something. What about the dozens of grammatical errors other than the one I have intentionally placed in this column? This involves the moral issue also raised in the opening paragraph. That issue could be of greater importance than a solecism here and there. What do you think?

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