Conflicts between American & Foreign Law: Does the "Balance of the Interests" Test Always Equal America's Interests?

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I. Introduction

Recently I was in Austria speaking at a conference relating to international aspects of federal securities laws. My focus was the recent financial scandals in the United States, which had triggered a government effort to restore confidence in the economy by engaging in sweeping enforcement and legislative fixes in the form of the Sarbanes-Oxley Act of 2002.[1] I noted during the speech that several provisions of the Sarbanes-Oxley Act applied to foreign corporations. Several European lawyers expressed the belief that the United States' application of these laws to foreign issuers and executives demonstrated incredible hubris. They complained that the United States was attempting to legislate its ideas of good corporate governance and accounting standards in their countries. They argued that America's attempt to legislate for them would fail because the United States could never enforce its laws in foreign countries.

I told my colleagues that the United States has consistently taken the position that where its laws conflict with those of other nations, America's laws will prevail. Although the legal rationale for this position is premised on the so-called "balance of the interests" test, in fact, America believes that its laws are morally superior to those of other nations and it will not hesitate to enforce them when and if it is in America's national interest. I explained that the United States was a nation unique in its views of its own laws. Americans believe that their Constitution, laws, and legal system are the epitome of human genius. Indeed, our fundamental organizing documents, the Declaration of Independence and the Constitution, are revered in the same way the Israelites revered their Ten Commandments. The Israelites built a temple in Jerusalem to enshrine the Ten Commandments. Similarly,

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1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (to be codified at 15 U.S.C. §§ 7201 *et seq.*).

Americans have built a temple at the foot of Capitol Hill—the National Archives—enshrining their sacred scrolls. In a country where the vast majority of people are not of the same ethnic, racial, or linguistic stock, there is only one common bond—the law. Americans, whether their ancestors have been here 200 years or are just new arrivals, believe that the law—American law—will protect them and set them free to enjoy all the material pleasures of this world. It is this resort to the law that actualizes Americans as a people.

As a result, if there is a conflict between American law and foreign law, Americans will always choose that their law is applied. For example, in the 1980s, when the United States decided that insider trading was a species of fraud and outlawed it in this country,[2] it went on a campaign to force other nations to adopt insider trading laws similar to its own and to cooperate in their enforcement.[3] When foreign law stood as an obstacle to obtaining evidence of insider trading abroad, the United States "balanced its interest" in enforcing its own laws against other nations' policies of secrecy and concluded that its laws took precedence.[4]

When narcotics became pervasive within American society, the United States decided that it would wage a war against the international narcotics trade. One of its strategies was to prevent the transformation of dirty money derived from narcotics into legitimate funds. Consequently, America in the 1970s, 80s, and 90s passed a series of money laundering statutes. Again, the United States forced other countries in the world to adopt similar laws and/or cooperate with the United States when enforcing its laws.[5] As a result, bank secrecy law jurisdictions are evaporating.

Thus, I explained to my European colleagues that their statement that the United States could not enforce its laws abroad was misguided. I reminded them that this is a country that when it believed that General Manuel Noriega was violating its laws from a safe haven outside of the United States, it invaded Panama, arrested him, and brought him to trial in the United States. While I conceded that that was a drastic way to enforce its laws, the United States would not tolerate any nation or political official outside its borders flaunting American laws and American interests.

II. *In re Grand Jury Subpoena*

When I returned to the United States, I found sitting on my desk an opinion from Judge Chin of the Southern District of New York, which made the point I had raised with my European colleagues. In *In re Grand Jury Subpoena dated August 9, 2000*,[6] a grand jury was investigating a New York merchant banking corporation to determine if it had bribed a foreign official in contravention of the Foreign Corrupt Practices Act of 1977[7] in order to

2. *See generally* Chiarella v. United States, 445 U.S. 222 (1980).

3. William K. S. Wang & Marc I. Steinberg, Insider Trading, § 14.4.2 (1996).

4. *See* SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117–19 (S.D.N.Y. 1981).

5. *See generally* Money Laundering Control Act of 1986, 18 U.S.C. § 1956(f). This statute provides a broad grant of extraterritorial powers:

> There is extraterritorial jurisdiction over the conduct prohibited by this section if—
> (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and
> (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

6. *In re Grand Jury Subpoena*, 218 F. Supp. 2d 544 (S.D.N.Y. 2002).

7. 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd-2, 78ff (1997), amended by the International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C §§ 78dd-1 to 78dd-3, 78ff.

secure mineral rights in a foreign republic. The grand jury subpoenaed practically all of the corporation's records dating from 1991, both in New York and in the foreign country. The foreign country was not identified in the opinion, to preserve secrecy of the grand jury investigation. In response to the subpoena, the corporation produced approximately 300,000 pages of documents, but refused to produce 1,100 responsive documents located in New York, which it claimed were protected by the republic's executive privileges. None of the documents located in the corporation's offices in the republic were produced because to do so would violate the laws of that republic.[8]

The president and principal owner of the merchant bank was a close advisor to senior officials in the republic and had been appointed by the republic as a special consultant to advise on commercial and economic fares.[9] The republic, which is recognized by the United States and is an important ally of this country, issued a statement authored by two of the republic's highest ranking legal officials recounting the various appointments granted to the corporation and its president and principal owner for the purpose of providing advice and counsel on issues pertaining to the development of trade between the republic and the United States and other matters of state.[10] The statement concluded that communications between the corporation and republic officials are part of the executive deliberative process of the executive branch of the republic and are highly confidential matters protected by the republic's executive privileges.[11] The minister of justice opined that any information the president of the corporation possessed was considered "strictly confidential" and "protected by the sovereign rights of the Republic" and "not subject to transfer to any third parties."[12] The opinion described the republic's laws on these issues and the agreement between the corporation and the republic that any transfer of information was possible only with the agreement of the executive branch of government. Finally, the minister of justice's opinion cautioned that no document could be removed that contained information of state importance, especially information connected to national interest, without following the procedures set forth by the laws of the republic. The minister of justice also provided a letter stating that criminal disclosure of state secrets may be punishable by incarceration of up to three years and "generally that 'information given to any party by the [Republic] that relates to the national interests of [the Republic] . . . cannot be removed from the territory . . . without the permission of the [Republic].'"[13]

To protect the confidentiality of the documents sought by the grand jury, the republic sought and received permission from the court to intervene in the motion of the United States to compel production of the corporation's documents withheld from the grand jury.[14] The republic claimed that the documents subpoenaed by the grand jury were covered both by the state secrets privilege and the deliberative process privilege.[15] Under the state secrets privilege, the republic argued that the documents were absolutely privileged from production because there was a reasonable danger that compulsion of the evidence would expose

8. *In re Grand Jury Subpoena*, 218 F. Supp. 2d at 547.
9. *See id.* at 548.
10. *See id.*
11. *See id.*
12. *Id.* at 549.
13. *Id.* (alteration in original).
14. *See id.*
15. *Id.* at 559–62.

matters relating to national security.[16] The executive deliberative process privilege, it argued, protected communications between the government and its advisors, in this case the corporation.[17]

In his decision, Judge Chin ignored the republic's laws and, instead, balanced the interests of the United States and the republic in the enforcement of conflicting laws, concluding that America's interests in enforcing its own law prevailed. First, he applied federal law rather than the law of the republic to both of these privileges, reasoning that foreign law is inapplicable to a grand jury investigation of U.S. criminal laws under the Federal Rules of Evidence that apply in all criminal cases.[18] Second, the court also rejected international comity as a basis for invoking these privileges. Comity, the court reasoned, does not require that the United States give more deference to a legal principle under foreign law, than U.S. law would afford that same legal principle in a domestic situation.[19]

The court noted that in this country the courts have consistently held that where U.S. law enforcement is involved, America's interest outweighs the interests of foreign states where their respective laws conflict.[20] Indeed, in the history of the United States, there have only been two cases where discovery of information held abroad was denied, and both are distinguishable. In *United States v. Rubin*,[21] the Eighth Circuit affirmed a decision of the district court quashing a subpoena issued by a defendant (not the United States) for Cayman Island bank records of another party.[22] Thus, in *Rubin*, America's national interest was not at stake. In *In re Sealed Case*,[23] the court refused to hold a foreign bank in contempt for failing to produce records that would have violated foreign law. The court merely refused to sanction the bank, but did not uphold the foreign nation's national interests in the face of America's interest.[24]

The court in *In re Grand Jury Subpoena* rejected the republic's argument that the act of state doctrine required the application of the republic's law and forbade a U.S. court from inquiring into the republic's assertion of privilege under its law.[25] The court held that the act of state doctrine did not apply because, while the republic's act of intervening in an American grand jury proceeding and asserting privilege may be an official act of a foreign sovereign, it was not an act performed within its own boundaries.[26] Here, the republic, by claiming privilege in a U.S. proceeding, in effect becomes a party to a pending grand jury matter. Therefore, the republic is seeking to enforce its laws here, rather than in its own territory, and the act of state doctrine does not apply.[27]

In determining whether to apply the act of state doctrine, the court also held that it had balanced America's interests against those of the republic and America's interests prevailed.[28] According to the court, the act of state doctrine cautions a court to defer to the

16. *See id.* at 552, 559.
17. *Id.* at 552.
18. *See id.* at 558.
19. *See id.* at 558–59.
20. *Id.* at 554.
21. United States v. Rubin, 836 F.2d 1096 (8th Cir. 1988).
22. *Id.* at 1102.
23. *In re* Sealed Case, 825 F.2d 494 (D.C. Cir. 1987).
24. *Id.* at 498.
25. *In re Grand Jury Subpoena*, 218 F. Supp. 2d at 556.
26. *Id.*
27. *See id.*
28. *See id.* at 557.

executive branch when it appears that its decisions "will 'embarrass or hinder the executive in the realm of foreign relations.'"[29] However, since the documents at issue were being sought by the executive branch, the court found no justification for the invocation of the doctrine by the republic.[30] Indeed, the court held that if it were to accept the republic's interpretation of the doctrine, it would make enforcement of the Foreign Corrupt Practices Act nearly impossible.[31]

The court then concluded that even if it had accepted the applicability of the act of state doctrine, it would merely bind the court to accept the republic's assertion of privilege and its interpretation of the republic's law.[32] Having done so, however, the republic's assertion of privilege and its interpretation of the law would be balanced against the interests of the United States in enforcing its law.[33] In assessing whether the state secrets doctrine should be applied in accordance with American law, which limits its application to national defense, foreign policy, and foreign intelligence activities, the court rejected the republic's contention that the release of these documents would disrupt the republic's foreign relations with a number of its neighboring countries.[34] The court held that the republic failed to demonstrate that the disclosure to an American grand jury would seriously disrupt its international relations, and neither had it cited any American case law indicating that that type of a potential danger was entitled to legal protection under American law.[35] Moreover, the court found that the documents were not entitled to a deliberative process privilege, because under American law the U.S. government made a showing of need for the documents, which overcame the republic's claim of privilege.[36]

In essence and in the final analysis, Judge Chin balanced the conflicting interests of the United States against those of the republic and decided to apply American law rather than the republic's law.[37] He found that the United States' interests in enforcing its criminal laws was strong, and that the republic should share in that interest since America was combating bribery in the republic.[38] While the court paid lip service to the republic's fundamental national interest in protecting the confidentiality of issues of state importance, the court found America's interests more compelling, and that they outweighed those of the republic.[39]

III. The Balancing Test

The court's decision may seem curious at first blush because the United States is seeking to enforce an anti-corruption statute in a country that has no interest in its enforcement and believes that its enforcement will impair its national interests. Yet, neither Judge Chin's decision finding that America's interests outweighed those of the Republic's, nor his choice of America's laws over a conflicting law of the republic is novel or unique. Indeed, it

29. *Id.* (quoting Bigio v. Coca-Cola Co., 239 F.3d 440, 452 (2d Cir. 2000)).
30. *See id.*
31. *See id.* at 557.
32. *See id.*
33. *See id.*
34. *Id.* at 560–61.
35. *See id.* at 561.
36. *See id.*
37. *Id.* at 562.
38. *Id.*
39. *Id.* at 562–63.

expresses this country's long held preference for application of its own laws when those laws conflict with foreign law. In *United States v. First National City Bank*,[40] Citibank received a grand jury subpoena in connection with an antitrust investigation related to its customers. Citibank refused to produce documents for one of its customer accounts located in Frankfurt, Germany because doing so would subject the bank to civil liability in Germany.[41] In evaluating Citibank's contention, the court considered five factors set forth in the Restatement (Second) of Foreign Relations Law of the United States § 40 (1965): the vital interests of each state; the hardship resulting from inconsistent enforcement; the extent to which the conduct is to take place in the territory of the other state; nationality; and the extent to which enforcement by an action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[42] Of these, the most critical to the court's analysis was the balancing of national interests of the United States and Germany.[43] The court examined the importance of each nation's laws to that nation's public policy and concluded, not surprisingly, that America's interests predominate.[44]

In *Societe Nationale Industrielle Aerospatiale v. United States District Court*,[45] the Supreme Court endorsed the modified and revised balancing standard in the Restatement (Revised) of Foreign Relations Law § 437(1)(c):

> (1) [T]he importance to the . . . litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[46]

Of these factors, the most important is the balancing of each nation's interests.[47] When American courts are called on to balance America's national interests against those of a foreign nation, can anyone rationally expect, especially in a post-9/11 world, that a court will place foreign interests above those of America, particularly where the United States is a party to the litigation? And if that premise is true, then is it not equally true that the balance of the interests test constitutes no test at all? Indeed, does not a balancing test merely leave a court at sea "to throw a heap of factors on a table and then slice and dice to taste?"[48] And, would not this taste test result in an American judge always seasoning in favor of America's interests?

IV. Conclusion

In the end what *In re Grand Jury Subpoena* reflects is not so much a principle of law regarding the balancing of interests, but what I had told my European brethren in Salzburg,

40. United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968).

41. *Id.* at 898.

42. *Id.* at 902; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965).

43. *See United States v. First National City Bank*, 396 F.2d at 902.

44. *Id.* at 902–03.

45. Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987).

46. *Id.* at 544 n.28 (alteration in original) (internal quotation marks omitted); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 437(1)(c) (Tentative Draft No. 7, 1986).

47. Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1476 (9th Cir. 1992).

48. Reins. Co. of Am., Inc. v. Administratia Asigurarilor de Stat (Administration of State Insurance), 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring).

Austria. When the United States determines that something is in its best interest, the interests of all other nations become secondary, regardless of whether that item falls within the realm of an economic, political, or legal field. As the court in *In re Grand Jury Subpoena* noted,[49] in virtually every criminal case where the U.S. government has sought information and documents held in a foreign country U.S. courts have ordered production despite foreign secrecy or blocking laws. U.S. interests, not surprisingly, have always been held to be paramount in American courts. Therefore, from a legal perspective, the balance of the interests test is virtually no test at all. In any case where the U.S. government asserts an interest in enforcing its laws overseas, America's interests will be held paramount by an American court.

The test that the courts should apply is a reasonableness test rather than a balance of the interests test. Is it reasonable to apply American law or foreign law under the circumstances? If a reasonableness test had been employed in *In re Grand Jury Subpoena*, the result would have been different. Under a reasonableness standard, there would be no basis for applying American law in order to enforce good government in a foreign nation that has no interest in the United States' interference, believing U.S. efforts impair its vital national interests.

49. *In re Grand Jury Subpoena*, 218 F. Supp. 2d at 562, n.7 (noting that there are only two cases where discovery was denied in the criminal context.).