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Extraterritorial Imperatives

Henry Harfield

Rachel E. Deming

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Henry Harfield and Rachel E. Deming***

I. INTRODUCTION

The observation that good fences make good neighbors is as applicable to nations as it is to the individuals to whom Robert Frost spoke.[1] The territorial integrity of a nation is recognized by international law and jealously guarded by each nation's municipal law. It is increasingly difficult, however, to preserve territorial imperatives when the significance of physical boundaries is lessened by technological advances in transport and communication. Effective enforcement of the domestic laws of one country is hampered when the malefactor, or the proof of his guilt, is located in another country and action in that country in aid of enforcement violates its territorial integrity unless carried out by its officials in accordance with its own rules of order. The object of this paper is to identify and comment on the consequences that flow from the failure by national neighbors to maintain good fences.

To that end, it is useful to focus on the example of so-called bank secrecy as one illustration that demonstrates the catalog of problems caused by extraterritorial imperatives. The following five cases provide a framework for analyzing these problems.

In *First National City Bank of New York v. IRS* (*"First National"*)[2], the Internal Revenue Service ("IRS") requested the production of records of a corporation's accounts maintained at the head office of a U.S. bank and at its branch office in Panama.[3] In response to a subpoena *duces tecum*, the bank produced the records of the account maintained at its office in the United States but declined to produce records of the account maintained in Panama. Refusal was based on a contention that Panamanian law prohibited production. The Second Circuit Court of Appeals required production, finding that there was insufficient proof that Panama would impose criminal sanctions on the branch for compli-

* Counsel, formerly a senior partner, Shearman & Sterling, New York; LL.B., Columbia University, 1937; B.A., Yale University, 1934.

** Associate, Shearman & Sterling, New York; J.D., University of Michigan, 1982; A.B., University of Michigan, 1977.

1 R. FROST, *Mending Wall*, in COMPLETE POEMS OF ROBERT FROST 47 (1959).

2 First Nat'l City Bank of New York v. IRS, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) [hereinafter *First National*].

3 *In Re* First Nat'l City Bank of New York, 166 F. Supp. 21 (S.D.N.Y. 1958).

ance with the subpoena.[4] Following a change in Panamanian law which imposed a nominal fine for compliance with a foreign subpoena, the same court declined to enforce a similar subpoena that was served on another U.S. bank.[5]

In the foregoing cases, enforcement of the subpoenas was sought by the U.S. Government or one of its agencies. In *Ings v. Ferguson*,[6] a trustee in bankruptcy sought to enforce subpoenas requiring production of records maintained in Cuba and Canada served on three Canadian banks with agencies in the United States. The district court quashed the subpoena insofar as it applied to records of the Cuban branch of one of the banks, finding that Cuban criminal law prohibited compliance, but enforced it in respect of the records of the Canadian branch on the ground that applicable Canadian law imposed no criminal sanctions for compliance.[7] On appeal the Second Circuit reversed the order enforcing the subpoena, holding that the proper procedure was to seek judicial assistance from Canada in the form of letters rogatory or similar means.[8] As the Second Circuit explained,

> Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures. Whether removal of records from Canada is prohibited is a question of Canadian law and is best resolved by Canadian courts. . . . Full opportunity to obtain such a decision is afforded to the Trustee by the procedural laws of this country and Canada.[9]

United States v. First National City Bank[10] ("*Omar*") involved an attempt by the IRS to levy on property of a Uruguayan entity, Omar, S.A. The IRS served a notice of levy on the bank's New York head office affecting property of or debts due to Omar in the United States. The District Court granted an injunction restraining the foreign branches of the bank from disposing of any property held by those branches for Omar or repaying any deposits or other debts owed to Omar. The bank had no property or accounts for Omar in the United States, and it appealed from the order enjoining its foreign branches. A panel of the Court of Appeals for the Second Circuit vacated the injunction, and its decision was confirmed after an *en banc* review.[11] The Government

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[4] *First National*, 271 F.2d at 619-20; *cf.* United States v. Ross, 302 F.2d 831 (2d Cir. 1962).

[5] *In re* Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962).

[6] Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960).

[7] *In re* Equitable Plan Co., 185 F. Supp. 57, 60 (S.D.N.Y. 1960).

[8] *Ings*, 282 F.2d at 152-53.

[9] *Id.* at 152.

[10] United States v. First Nat'l City Bank, 379 U.S. 378 (1965) [hereinafter *Omar*].

[11] United States v. First Nat'l City Bank, 321 F.2d 14 (2d Cir. 1963), *aff'd on rehearing*, 325

sought and was granted a writ of certiorari. By a seven-to-two margin, the Supreme Court reinstated the injunction.[12] Writing for the majority, Justice Douglas asserted that the order merely froze the accounts and did not require the transfer of any property or indebtedness payable outside the United States into the United States; the record contained no satisfactory proof that the laws of any foreign country specifically prohibited obedience to it; and, given the interest of the United States in protecting its revenues, it was appropriate to make an order that did no more than maintain the "status quo."[13] Justice Harlan dissented,[14] basing his opinion on reasoning underlying the decision he wrote for an eight-to-one majority in *Banco Nacional de Cuba v. Sattatino*.[15] In *Sabbatino*, Justice Harlan wrote an analytical history of the act of state doctrine and reaffirmed the longstanding principle that the courts of this country should not adjudicate the validity of acts taken by a foreign sovereign within its own territory.[16] In his *Omar* dissent, he again stressed the territorial limits of the U.S. courts and disagreed with the majority's position that U.S. courts have the jurisdiction to impose a freeze on property owned by a foreign national and located in another country.[17]

In *United States v. First National Bank* ("*Loveland*"),[18] a federal grand jury investigating a possible violation of the antitrust laws, served the head office of the bank in New York with a subpoena requiring production of the records of the Frankfurt, Germany, branch relating to accounts maintained with it by a German target of the investigation. The bank moved to quash the subpoena on the ground that German law prohibited disclosure. It was conceded that no criminal sanctions would attach to the bank's compliance, and the Government opposed the motion largely on that ground. The Court of Appeals affirmed the district court's order enforcing the subpoena.[19] Writing for the court, Judge Kaufman noted that as a general proposition courts in the United States should refrain from requiring action in a foreign country that violated the laws or clearly articulated policies of that country, without regard to whether such laws were criminal or civil in nature.[20] In keeping with his

F.2d 1020 (2d Cir. 1964). There were at that time nine active judges on the Court of Appeals. One recused himself, and another died after argument but before decision, so that the decision of the majority of the panel was confirmed by a four-to-three vote.

12 *Omar*, 379 U.S. at 381-85.

13 *Id.* at 384-85.

14 *Id.* at 385-410.

15 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

16 *Id.* at 421-28.

17 *Omar*, 379 U.S. at 385, 410.

18 United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968) [hereinafter *Loveland*].

19 *Id.* at 905.

20 *Id.* at 902. Judge Kaufman stated that there was no satisfactory proof that compliance by the bank would violate a law or clearly articulated policy of Germany. *Id.* at 903-04.

construction of the Restatement (Second) Foreign Relations Law,[21] however, he declared that when the interest of the forum state in requiring the action outweighed the interest of the foreign state in prohibiting it enforcement was appropriate.[22]

In concept, judicious weighing of competing national interests is appealing, but only if the weighmaster has no actual or perceived conflict of interest.[23]

Until recently, significant decisions enforcing orders requiring action outside the jurisdiction of the forum state involved the government of the United States seeking information from nationals of the United States. A novel element was introduced in recent cases sustaining the lawfulness of orders requiring resident aliens to act unlawfully in foreign countries.[24]

These latter cases identify a disorder that is endemic among multinational enterprises, and may best be exemplified by a typical bank secrecy issue. A banking institution is organized and exists under the laws of Erewhyna (the "home country") and maintains establishments for the conduct of its business in a number of foreign countries (the "host countries"). In its home country, the bank's branch or branches are required to conduct their affairs subject to and in accordance with the laws of the home country. As a condition to the conduct of business in host countries, the bank's branches are required to operate in accordance with the laws of the respective host countries.

1. The bank has no branch and does not transact business in the United States. It has a branch in Host *A*, whose laws prohibit any bank or bank employee from disclosing account records or any information concerning the affairs of a bank customer. Violation of those laws is punishable by substantial fines, incarceration, and, in the case of the bank, forfeiture of its license to do business in Host *A*. A federal grand jury in the United States is investigating charges that one Kruc, a national of Libya, resident in Brazil, has violated U.S. law by bringing into and selling within the United States large quantities of heroin. Kruc is believed to maintain accounts with the bank's branch in Host *A*. Victor (Vic) Timm, a Swedish national resident in Host *A* and employed as an assistant manager of the bank's branch in that country, arrives in Miami in transit to Brazil, where he intends to meet with Kruc; he has in his briefcase the bank's credit file and a transcript of Kruc's account. At the Miami airport he is served with a grand jury subpoena requiring him to appear forthwith to

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21 RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

22 *Omar*, 379 U.S. at 902.

23 "I'll be judge, I'll be jury," said cunning old Fury; "I'll try the whole cause and condemn you to death." C.L. DODGSON, ALICE'S ADVENTURES IN WONDERLAND 21 (1979).

24 Although the *Ings* case involved requests for information from resident aliens, the court did not require the resident aliens to contravene the laws of any foreign country. *Ings*, 282 F.2d at 149.

testify about Kruc's dealings with the branch of the bank in Host *A* and to produce all and any records in his possession relating to Kruc's affairs. Upon his refusal, based on the mandate of Host *A* law, he is held in contempt and incarcerated, and the records in his possession are produced to the grand jury.[25]

2. The bank has a branch in the United States and a branch in Host *A*. In the matter of Kruc, a federal grand jury subpoena is served on the U.S. branch. In response to that subpoena, the manager of the U.S. branch appears and states under oath that neither he nor any officer or employee of the U.S. branch has any knowledge of Kruc's relation with the bank, that the branch has no records of any sort relating to Kruc, and that the *Host A* branch is prohibited by Host *A* law from producing its records, if any, except with its customer's consent or pursuant to order of a Host *A* court. The Host *A* branch, thereupon, applies to a court in that country for permission to comply with the subpoena. Permission is refused and the branch is enjoined by the Host *A* court from complying. The branch in the United States is held in contempt and fined for the failure of the Host *A* branch to violate the law and defy the order of the Host *A* court.[26]

3. Both the Home Country and Host *A* have placed an embargo on trade with *North Orienta* or its nationals. The United States has not done likewise; it maintains cordial relations with *North Orienta*. The Inquisitorial Authority of Host *A* (which, very roughly, corresponds to a federal grand jury) is conducting an investigation of Traders Ltd., a corporation chartered by and doing business in Host *A*, and of an individual who is a resident national of Host *A* and the registered owner of all that company's stock. The Authority suspects that Traders and the individual owner of its stock are *alter egos* (i.e., "fronts" or "covers") for one Kay Rattie, a resident of the United States, who, the Authority suspects, is a national of *North Orienta*, and owns a ninety percent interest in Inscrutable Enterprises, a U.S. partnership which holds in pledge all the shares of Traders as security for loans to Traders' sole stockholder.

There are two concurrent developments. The Authority serves on the Host *A* branch of the bank a subpoena requiring the bank to produce in Host *A* any and all account records, correspondence, credit files and other documents in the possession of the bank's U.S. branch which relate to Traders, Inscrutable Enterprises, and Rattie, or any of them. At or about that time, a federal grand jury in the United States, suspecting that Rattie, Inscrutable Enterprises and Traders, or any two or more of them, may have conspired to defraud the United States by underpayment of

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[25] *See In re* Sealed Case, 825 F.2d 494 (D.C. Cir. 1987); United States v. Field (*In re* Grand Jury Proceedings); 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

[26] *See* United States v. Bank of Nova Scotia (*In re* Grand Jury Proceedings), 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

income taxes, serves on the U.S. branch of the bank a subpoena requiring the bank to produce in the United States all records and documents, expressly including those in the possession of the bank's Host *A* branch which relate to the suspected conspirators, or any of them.

A. The bank declines to produce in Host *A* the documents of its U.S. branch on the ground that to do so would violate U.S. law.[27] Upon application of the Authority, a court in Host *A* holds the bank and its local manager in contempt, incarcerates the manager and imposes a daily fine on the branch.

B. The bank declines to comply with the grand jury subpoena in the United States insofar as it requires production of records of the Host *A* branch on the ground that to do so would violate Host *A* law. A court in the United States holds the bank and its local manager in contempt, incarcerates the manager and imposes a daily fine on the branch.

C. In order to free its manager and stop the running of the daily fine in Host *A*, the head office of the bank, in its home country, instructs the U.S. branch to comply with the Host *A* subpoena. Upon so doing, the bank and the manager of the U.S. branch are indicted by a federal grand jury and convicted for violation of U.S. law. As a result, a substantial fine is imposed on the bank, and its U.S. manager is sentenced to a year in the penitentiary.

D. In order to free its manager and stop the running of the daily fine in the United States, the bank instructs the Host *A* branch to comply with the U.S. subpoena. Upon so doing, the bank and its manager in Host *A* are indicted and convicted for violation of the laws of that country. As a result, the bank's license to do business in Host *A* is revoked, a substantial fine is imposed on the bank, and its Host *A* manager is sentenced to five years in the penitentiary.

II. STATUS OF RESPONDENT

The common denominator in all the cases that involve third parties in extraterritorial discovery is that the one called upon to act is a witness and not a party to the controversy. When there is a conflict between the mandate of the forum and that of a foreign country forbidding compliance with that order, it is obvious that there is a serious detriment to the prospective actor who has no interest in the controversy.[28]

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[27] *See, e.g.*, 26 U.S.C. § 999 (1983), 50 U.S.C. § 2407 (1983).

[28] Different considerations apply when the actor is a party to the litigation and seeks to impose liability on, or escape liability to, another party. Production of testimonial or documentary evidence outside the territory of the forum may be essential to establish a claim or defense, but may be barred by the law of another country. In those circumstances, the Supreme Court has held that the appropriate sanction is not to dismiss the claim or defense, but rather to deny the recalcitrant party the benefit of the unavailable evidence. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).

The nationality of the witness does not affect the weight of the burden imposed, although some courts have relied on the fact that the witness is an individual or corporate citizen of the United States to justify requiring the citizen to violate the laws of the foreign country.[29] Implicit in these decisions is the concept that the burden imposed by the courts is a reasonable incident of citizenship.[30]

Even more serious questions are raised when the burden is imposed on one who is neither an interested party nor a national of the country requiring that detrimental action be taken outside its sovereignty, such as when lawfully resident aliens are required by a host country to violate the laws of their home country or another host country. One court remarked,

> [I]t causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question.... Most important to our decision is the fact that these sanctions represent an attempt by an American court to compel a foreign person to violate the laws of a different sovereign on that sovereign's own territory.[31]

Although some have argued that the privilege of residing or conducting business activities within a country carries with it all the obligations of citizenship, the argument destroys itself for the following reasons. Consider an enterprise which owes primary allegiance to its home country and conducts business in Host Country *A* and Host Country *B*. If each host country imposes penalties both for violations of its own orders and for failure to violate the laws of other hosts, the result is an auction in which the enterprise is knocked down to the most brutal bidder. The consequence, as suggested by the three situations previously described,[32] is an anomaly in decisional law that raises serious and difficult questions of constitutional magnitude.

The burden of seeking information from a foreign source should lie with the party seeking the information. As discussed above, if the litigant is a private litigant, the appropriate procedure is for the litigant to seek the assistance of the courts in the foreign country rather than impose a burden on an uninvolved third party.[33] Some courts, however, have apparently ignored this approach when the U.S. Government requested the information.[34] But should courts issue subpoenas requesting

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29 *Loveland*, 396 F.2d at 900-01; *First National*, 271 F.2d at 620.

30 Blackmer v. United States, 284 U.S. 421, 436-37 (1932); *First National*, 271 F.2d at 620.

31 *In re Sealed Case*, 825 F.2d at 498.

32 *See supra* text accompanying notes 25-27.

33 *Ings*, 282 F.2d at 152; *see supra* text accompanying notes 6-9.

34 *See, e.g., Bank of Nova Scotia*, 740 F.2d at 825. In that case, the third-party witness claimed that production of the requested information violated the law of the Cayman Islands. In an effort to resolve the problem of conflicting laws, the government of the Cayman Islands had proposed proce-

information from an uninvolved party when production of that information constitutes a *prima facie* violation of the law of a foreign country, especially when the person requesting the information has made no effort to obtain the information through judicial procedures established in the foreign country? And is it fair to impose sanctions for lack of good faith in producing such information when the person requesting the information recognizes that he could not obtain the information directly, but can only get it by requiring the innocent third party to violate the law of another sovereign? Other courts have indicated a negative answer to both these questions, even when the requesting party is the United States.[35]

III. IMPLICATIONS FOR THE JUDICIARY

There are two propositions that seem self-evident. Every sovereign state has exclusive right to prescribe and enforce rules of conduct within its territory. Because that right is exclusive, no state has the right to prescribe and enforce rules governing conduct in the territory of another sovereign state.[36] The breadth of those propositions must be defined by considerations of allegiance.

A state may prescribe rules governing conduct of its nationals outside its territory, but may enforce those rules only by action against its national within its own territory.[37] A state may not prescribe rules governing extraterritorial conduct of aliens, but to the extent that such conduct has a territorial effect violating domestic rules, may enforce those rules by action in its own territory against the alien.[38] A state which seeks to coerce its national to act in another state in violation of the latter's domestic rules of conduct has no right to enforce that action in the foreign state, nor to proscribe enforcement by the foreign state, within its territory, of its domestic rules.[39] It would seem to follow that a state has no right (as distinct from power) to coerce a friendly alien, whose lawful activities subject him to its jurisdiction, to violate the domestic rules of conduct established by a foreign state of which he is a

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dures for cooperation in production of information protected by Cayman bank secrecy laws. The U.S. Government responded that it would "try out the proposed procedures," but that it retained the right to order production of such information from persons or institutions in the United States. *Id.* at 823-24. The U.S. Government subsequently sought, and the court imposed, sanctions against the third-party witness for failure to produce all the information requested. *Id.* at 820.

35 *See, e.g., In re Sealed Case*, 825 F.2d at 498-99.

36 RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 20 comment b, 37 comment b (1965).

37 *Id.* §§ 7 comment a, 30.

38 *Id.* §§ 17, 20 comment b.

39 *Id.* §§ 30 comments b, c, 37 comment b.

national or resident.[40]

The vexatious problem, of which the bank secrecy cases are typical, arises when an individual or enterprise faces conflicting mandates of states to whose jurisdictions he or it is amenable. A requirement of extraterritorial action has implications for the jurisprudence and economic concerns of the state imposing the requirement, as well as for international law.

It is beyond the scope of this paper to consider in detail the international law and the economic aspects. It does seem clear that intrusion of one state on the internal affairs of another raises questions of international law that are no less important when the intrusion is covert, or otherwise indirect, than when it is direct.[41] Experience demonstrates that expansive use of extraterritorial process produces retaliatory measures.[42] The adverse effect on international commercial and financial intercourse is evident. The implications for the jurisprudence of the United States, which may be less evident, are nevertheless serious and may be of constitutional magnitude.

The questions may be encapsulated as follows: Fairness has been recognized as a fundamental of our system of law.[43] Is it fair to use the judicial power of the United States to coerce, in a friendly foreign state, action that would not be tolerated if a foreign state sought to coerce such action in the United States? Is it fair to penalize one who is subject to the jurisdiction of the United States for his failure to act in a foreign state so as to subject him in that state to penalties for violation of its domestic rules of order? If, in either case, the judicial power of the United States is applied unfairly, does the sanction imposed constitute a deprivation of property or liberty without due process of law?

Different but equally troublesome questions arise when, at the instance of the executive branch, the judicial branch makes an order that, in like circumstances, it would decline to make at the instance of a private litigant. In that situation, the constitutionally required independence of the judicial branch may be compromised in two respects.

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40 *See In re Sealed Case*, 825 F.2d at 498-99.

41 One possible illustration is the War of 1812 (which nobody won): "Nominally the quarrel with Britain was over her preying on American sailors and her support of restless Indians on the northwest frontiers of the United States." C. BEARD & M. BEARD, BASIC HISTORY OF THE UNITED STATES 172 (1944). *See also* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, 146-50 (judgment on the merits).

42 RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 Reporters' notes at 121.

43 First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983). "[W]hen a foreign sovereign asserts a claim in a United States court, the consideration of 'fair dealing' bars the state from asserting a defense of sovereign immunity to defeat a setoff or counterclaim." *Id.* (quoting National City Bank v. Republic of China, 348 U.S. 356, 365, *reh'g denied*, 349 U.S. 913 (1955)).

When the criterion for an extraterritorial order is whether the national interest of the United States served by compliance outweighs the national interest of a foreign state in protecting its conflicting domestic law, should the judicial branch "sit in judgment on the acts of another [state] done within its own territory" despite its long-standing rule to the contrary?[44] In this context, a Court of Appeals said:

> [W]e see good reason for courts not to act on their own, even at the urging of the executive branch, when their actions may "hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[45]

When a court in the United States declines to exercise the judicial power of the United States to coerce extraterritorial action requested by a private litigant, on the ground that to do so would be contrary to principles of law declared by the judicial branch, should it exercise its power at the urging of the executive branch despite the evident disparity? Among the reasons the *Sabbatino* court assigned for declining to adjudicate the validity of a foreign act of state, even at the urging of the executive branch, was its perception that the Constitution proscribes encroachment by one branch of government upon the functions allocated to another.[46]

When the judicial branch has established as principles of law that the judicial power of the United States may not be invoked to examine the validity of a foreign state's acts within its own territory, or to compel extraterritorial action in certain circumstances, does exercise of that power at the instance of the executive amount to tolerance of an unconstitutional encroachment on the independence of the judicial branch?

The authors do not pause to answer the foregoing questions, because the answers are not theirs to give. But comment may not be amiss.

IV. HARD CASES MAKE UNJUST LAW

The judicial decisions that condone and perpetuate the anomalous treatment of territoriality have been formulated, especially of late, in the context of private behavior that is regarded by all (or almost all) nations as intolerably antisocial.[47] These are the "hard" cases that make rules which, when applied to conduct that is not so universally decried, make law that is at best dubious and at worst, bad indeed. When the legal

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[44] Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

[45] *In re Sealed Case*, 825 F.2d at 499, (quoting *Sabbatino*, 376 U.S. at 423); *see also* International Ass'n of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

[46] The importance of the independence of the judiciary was recently noted by Chief Justice Rehnquist and Justice Brennan at a meeting of justices from around the world. *Justices Rehnquist, Brennan Speak on Constitution*, 13 COLUM. U. REC. 8 (1987).

[47] *In re Sealed Case*, 825 F.2d at 499.

mandate of one nation conflicts with that of another nation, political and economic factors cannot be divorced from those that shape jurisprudence.

Indeed, the combined effect of economic factors and decisions in "hard" cases may fairly be said to distort jurisprudence. The simple fact is that the legal mandate of one country has of itself no legal effect in the territory of another country. The proposition may be illustrated by reference to the recent case of *Libyan Arab Foreign Bank v. Bankers Trust Co.*[48]

Libyan Arab Foreign Bank ("LAB"), a Libyan governmental entity, maintained deposit accounts, denominated in U.S. dollars with Bankers, a U.S. national, at the latter's head office in New York and at its branch office in London. In January 1986, U.S. law, in the form of an Executive Order, forbade payment of debts to Libyan governmental entities by persons subject to the jurisdiction of the United States. By its terms that law applied to the London branch as well as to the U.S. offices of Bankers. To be sure, the law had an initial extraterritorial effect in that Bankers London refused to make payments to or upon order of LAB. That was, however, a practical rather than a legal effect. Had Bankers London failed to respect the U.S. law, it would have been exposed to liability in the United States, but absent intervention by a court in England, that disrespect of U.S. law might have had no legal effect in London. In any event, LAB successfully brought suit in an English court, the result of which was that the U.S. law was given neither legal nor practical effect in England. The legal effect, potential liability of Bankers for non-compliance with the Executive Order, necessarily was confined to the territorial sovereignty of the United States. As a means of egress, the U.S. Government granted Bankers a license to make the payment U.S. law had unsuccessfully forbidden.[49] One possible moral is that good brakes and precise steering are essential to those who would play the game of brinksmanship without unacceptable damage to the vehicles they use.

In *Omar*, Justice Harlan (dissenting) characterized efforts to establish a jurisdictional justification for extraterritorial legal mandates as "procedural cake-walking."[50] In its origin, "cake-walking" referred to a dance in which those who performed the most intricate gyrations received a cake as a prize. In the context of extraterritorial legal adventures, the consequence is more likely to be ruptured jurisprudence.

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[48] 1986 L. No. 1567 (Q.B. Sept. 2, 1987).

[49] Financial Times, Oct. 13, 1987, at 1, col. 3.

[50] *Omar*, 379 U.S. at 395.