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Mystery Subpoena Case at Supreme Court Could Expand US Authority

The D. C. Circuit's underlying decision expands the possibility that a federal criminal subpoena could override a claim of sovereign immunity when also coupled with an invocation of a foreign blocking statute.

By Peter B. "Bo" Rutledge and Amanda W. Newton – January 15, 2019

Rare Supreme Court holiday activity and ongoing news coverage about special counsel Robert Mueller's investigation has drawn much attention to the enigmatic case of *In Re Grand Jury Subpoena*. In some regards, the matter is unremarkable, presenting familiar issues of international litigation. Upon further examination, however, the case—about which little is publicly known—may have the potential to expand the authority of United States courts over foreign states and their agencies or instrumentalities.

In re Grand Jury Subpoena began when a foreign state-owned corporate entity refused to comply with a subpoena issued by the U.S. District Court for the District of Columbia during a grand jury investigation of an undisclosed criminal matter. After the court issued its subpoena, the corporation filed a motion to quash, arguing that its status as a state-owned corporation ensured protection by foreign sovereign immunity and that compliance with the subpoena would force the corporation to violate the laws of its state of incorporation.

Issues of this sort are hardly novel. Courts routinely grapple with claims of sovereign immunity (including in cases involving subpoenas and other forms of compulsory judicial process) and with claims that compliance with discovery requests would violate foreign law. Indeed, over a century ago, cases like *In re Balz* and *Ex Parte Hirtz* addressed claims about a party's foreign immunity affecting their amenability to jurisdiction and other forms of process. (Notably, the court rendered these decisions during a time when common law largely governed the contours of immunity from process, a topic to which we'll return.)

More recently, the Supreme Court held in *Republic of Argentina v. NML Capital* that sovereign immunity did not categorically excuse private third parties from complying with post-judgment discovery orders enforcing a federal court judgment against a foreign sovereign. Similarly, decisions like Judge Frank Easterbrook's colorful opinion for the U.S. Court of Appeals for the Seventh Circuit in the 1990 *Reinsurance* case have wrestled with conflicts between American discovery law and foreign blocking statutes, including in cases where the party invoking the foreign blocking statute bears some juridical relationship to the foreign sovereign.

In re Grand Jury Subpoena takes place against this familiar backdrop, but with the added twist that the criminal grand jury subpoena was issued to a foreign corporation in which, at the time of the subpoena's issuance, a foreign sovereign likely had at least a direct majority ownership (based on application of the Supreme Court's test in *Dole Food v. Patrickson*).

Under consistent Supreme Court case law, the Foreign Sovereign Immunities Act is the "sole basis" for obtaining jurisdiction over a foreign sovereign or state-owned entity. Because the FSIA confers jurisdiction only in "nonjury civil action[s]," the corporation argued that the district court lacked subject matter jurisdiction to hear the case.

The D.C. District and Circuit courts promptly rejected the jurisdictional argument, finding that 18 U.S.C. § 3231, which provides for jurisdiction over "all offenses against the laws of the United States," supplemented the FSIA's grant of jurisdiction over foreign state-owned entities in criminal cases. To hold otherwise, the D.C. Circuit reasoned, would "completely insulate" foreign corporations from criminal liability.

The D.C. Circuit then assumed that sovereign immunity would lie in a criminal case before determining that the FSIA's exceptions to sovereign immunity were germane because they pertained to "any case," rather than "any civil action." The court found one such exception satisfied and, after determining that the corporation failed to prove that foreign law prohibited compliance, ordered the corporation to comply with the subpoena.

The long-term impact of the D.C. Circuit's decision may be twofold. First, in light of the Supreme Court's refusal to stay the subpoena's enforcement (following a brief respite from Chief Justice Roberts), the D. C. Circuit's

decision expands the possibility that a federal criminal subpoena could override a claim of sovereign immunity when also coupled with an invocation of a foreign blocking statute.

Second, and perhaps more importantly, the decision may illuminate the viability of the “common law” doctrine governing immunity from process. The D.C. Circuit’s comment that “the immunity defense [in a criminal case] was a creature of the common law” has led some to argue that foreign state entities are still entitled to common law immunity, while others have suggested that *In re Grand Jury Subpoena* confirms that the FSIA is the exclusive source of exceptions to sovereign immunity.

Thus, the more-lasting impact of the D.C. Circuit’s decision may be to retest the relationship between the FSIA’s reticulated framework and common law decisions like *Balz* and *Hirtz*. In light of the Supreme Court’s decision in *Samantar* that federal common law continues to govern foreign official immunity (as opposed to foreign sovereign immunity), the debate rages on over what body of law (and ultimately what branch of government) sets the boundaries of immunity for a foreign sovereign (or its agency or instrumentality) from federal criminal process.

Nevertheless, predicting the gravity of *In re Grand Jury Subpoena* is difficult, because little is known about the case other than what is stated in the short, three-page opinion by the D.C. Circuit. The matter has been kept wholly under seal, protected by security so tight that the entire floor of the D.C. Circuit’s courthouse was emptied while the three-person panel heard arguments on Oct. 14. That secrecy has led to speculation that the subpoena is part of the larger investigation by special counsel Robert Mueller into Russia’s influence in the 2016 presidential election, and decisions on the stay applications by Chief Justice Roberts and the Supreme Court have done little to dampen the theory.

Regardless of its potentially inflammatory political consequences, *In re Grand Jury Subpoena* could change the landscape of criminal subpoenas in the United States. The bar should watch carefully for how the courts interpret the relationship between the FSIA and common law and, more broadly, the collision between American compulsory process and foreign blocking statutes (especially in cases involving sovereigns or their agencies and instrumentalities).

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