No. 18-948

IN THE SUPREME COURT OF THE UNITED STATES

In re Grand Jury Subpoena

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF UNDER RULE 15.8 SUPPORTING COUNTRY A'S PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF UNDER RULE 15.8 SUPPORTING COUNTRY A'S PETITION FOR A WRIT OF CERTIORARI

On December 18, 2018, the D.C. Circuit issued a judgment purporting to exercise subject-matter jurisdiction under 18 U.S.C. § 3231, denying Country A sovereign immunity, compelling Country A to comply with a grand jury subpoena, and affirming the district court's order sanctioning Country A $50,000 every day that it does not comply with the subpoena.[1] The D.C. Circuit issued its mandate the same day.

Less than three weeks later (on January 4), Country A filed its petition for a writ of certiorari. On January 8, the D.C. Circuit issued an opinion elaborating on its December 18 judgment. Supp. App. 1a. The opinion confirms that, through its judgment, the D.C. Circuit (1) became the first American appellate court to exercise subject-matter jurisdiction under 18 U.S.C. § 3231 in an action against a foreign state, (2) deepened a circuit split on whether the FSIA categorically immunizes foreign states from American criminal jurisdiction, (3) cemented a separate circuit split on whether the FSIA (through 28 U.S.C. § 1330(a)) is the exclusive basis for subject-matter jurisdiction in an action against a foreign state, (4) parted ways with its sister circuits (including the Sixth Circuit) by holding that the FSIA's exceptions to

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[1] Because of the sealing order in place, we refer to Petitioner as "Country A." Country A is a wholly-owned agency or instrumentality of a foreign state, so it qualifies as a foreign state under the Foreign Sovereign Immunities Act (FSIA). Country A understands that it is only a witness in the underlying investigation.

jurisdictional immunity (28 U.S.C. §§ 1605–07) apply outside of § 1330(a)'s jurisdictional limits, and (5) confirmed that the courts of appeals are divided on whether an American court can order contempt sanctions (monetary or non-monetary) against a foreign state.

Those issues cry out for certiorari review. Congress enacted the FSIA in part to ensure "a uniform body of law" in jurisdictional and immunity matters involving foreign states. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (quoting H.R. Rep. No. 94-1487, at 32, *reprinted in* 1976 U.S.C.C.A.N. 6604). The fractures in the lower courts undermine that goal.

And the fault lines run on issues of outsized importance to American jurisprudence and international law: The conflicts cut to the heart of national sovereignty and international comity. If left to stand, the D.C. Circuit's judgment would create chaos in the international community—possibly alienating American allies, undermining diplomacy, and all but guaranteeing that American agencies and instrumentalities will (despite their protestations) face criminal proceedings abroad. The United States has rightly rejected the International Criminal Court as a threat to America's sovereign immunity from foreign criminal jurisdiction. With the decision below, America has said to the world, "Do as I say, not as I do."

I. THE D.C. CIRCUIT'S OPINION CONFIRMS THAT THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTIONS PRESENTED IN COUNTRY A'S PETITION.

In its petition, Country A describes multiple circuit splits: The courts of appeals are divided on (1) whether 28 U.S.C. § 1330(a) is the exclusive basis for subject-matter jurisdiction in an action against a foreign state, (2) whether foreign states are immune from American criminal jurisdiction, and (3) whether an American court may enter or enforce a contempt sanction against a foreign state. Petition for Certiorari (Pet.) 17–20, 28–29. The D.C. Circuit's opinion confirms all three splits.

Against this Court's teaching that "jurisdiction in actions against foreign states is comprehensively treated by [] section 1330" (*Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 n.5 (1989) (quoting H.R. Rep. No. 94-1487, at 14)) and eight other circuits' holdings that 28 U.S.C. § 1330(a) is the "'exclusive source of subject matter jurisdiction in suits involving foreign states'" (Pet. 18 (quoting *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991)), the D.C. Circuit purported to exercise subject-matter jurisdiction under 18 U.S.C. § 3231, a non-FSIA statute of general criminal jurisdiction that says nothing about foreign states.

Against this Court's and the Sixth Circuit's holdings that the FSIA's exceptions to jurisdictional immunity (§§ 1605–07) are civil in nature and operate only within § 1330(a)'s jurisdictional limits (Pet. 8, 20)

(citing *Verlinden*, 461 U.S. at 489, and *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002)), the D.C. Circuit rejected the notion that the FSIA's immunity "exceptions are categorically unavailable in criminal cases." Supp. App. 15a. The D.C. Circuit acknowledged that the "the few circuits to consider th[e] issue have reached differing conclusions" about whether the FSIA categorically immunizes foreign states from American criminal proceedings. Supp. App. 5a.[2]

And against the Fifth Circuit's holding that American courts have no authority to enter (let alone enforce) contempt sanctions against foreign states (Pet. 28–29) (citing *Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006)), the D.C. Circuit held that "'contempt sanctions against a foreign sovereign are available under the'" FSIA. Supp. App. 18a (quoting *FG Hemisphere Assocs., LLC v.*

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[2] In its opinion, the D.C. Circuit tries to mask its disagreement with the Sixth Circuit by suggesting that the *Keller* court might have reached a different result if it had considered 18 U.S.C. § 3231's jurisdictional grant. Supp. App. 13a. The D.C. Circuit gives the Sixth Circuit little credit, but in any case, the D.C. Circuit mischaracterizes *Keller*. The *Keller* court explained that "[t]he jurisdictional grant of the FSIA [§ 1330(a)] is silent on the subject of criminal actions" and quoted with approval a district court's reasoning that "since the FSIA is the only method of obtaining jurisdiction over foreign sovereigns, and § 1330(a) refers only to civil, and not criminal, actions there is no criminal jurisdiction." 277 F.3d at 818–20 (quoting *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 750 F. Supp. 838, 843–44 (N.D. Ohio 1990)).

Democratic Republic of Congo, 637 F.3d 373, 379 (D.C. Cir. 2011)).

The disagreements in the lower courts are not going anywhere. It is time for this Court to weigh in.

II. THE D.C. CIRCUIT MANUFACTURED SUBJECT-MATTER JURISDICTION UNDER 18 U.S.C. § 3231 BY IGNORING THE FSIA'S TEXT AND THIS COURT'S HOLDINGS.

In concluding that it had subject-matter jurisdiction under 18 U.S.C. § 3231—a statute of general jurisdiction that says nothing about foreign states—the D.C. Circuit reasoned that "[i]t is hard to imagine a clearer textual grant of subject-matter jurisdiction" than in § 3231. Supp. App. 6a (quoting § 3231: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."); *see also id.* at 6a–7a ("'All' means 'all'; the provision contains no carve-out for criminal process served on foreign defendants. And nothing in the [FSIA's] text expressly displaces section 3231's jurisdictional grant."). But the same can be said about almost all grants of general subject-matter jurisdiction (civil and criminal), including those at issue in *Amerada Hess* that this Court held do not apply in actions against foreign states. *See, e.g.*, 28 U.S.C. § 1350 (Alien Tort Statute: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."); 28 U.S.C. § 1331 (granting subject-matter jurisdiction

over "all civil actions arising under the Constitution, laws, or treaties of the United States").

Indeed, the D.C. Circuit accepted the very argument that this Court rejected in *Amerada Hess*—that if Congress intended to preclude courts from exercising subject-matter jurisdiction over foreign states under statutes outside of 28 U.S.C. § 1330(a), it would have enacted *pro tanto* repealers of those non-FSIA statutes. This Court said the opposite in *Amerada Hess*. *See* 488 U.S. at 437–38 ("In light of the comprehensiveness of the statutory scheme in the FSIA, we doubt that even the most meticulous draftsman would have concluded that Congress also needed to amend *pro tanto* the Alien Tort Statute and presumably such other grants of subject-matter jurisdiction in Title 28 as § 1331 (federal question), § 1333 (admiralty), § 1335 (interpleader), § 1337 (commerce and antitrust), and § 1338 (patents, copyrights, and trademarks).").

The D.C. Circuit's holding also makes little sense. By the court of appeals' view, Congress needed to affirmatively grant subject-matter jurisdiction for civil cases against foreign states (through 28 U.S.C. § 1330(a)) but didn't need to do the same for criminal cases against foreign states—even though exercising criminal jurisdiction over a foreign state offends sovereign dignity in a way that exercising civil jurisdiction does not. Pet. 27. The court of appeals' decision also rests on the counterintuitive conclusion that Congress carefully limited jurisdiction in civil cases to "nonjury" actions (28 U.S.C. § 1330(a)) but had no qualms about letting juries decide a foreign

state's fate in criminal proceedings. *Compare Universal Consol. Cos. v. Bank of China*, 35 F.3d 243, 245 (6th Cir. 1994) (in 1791, "a suit against a foreign state was unknown to the common law").

The D.C. Circuit also tried to confine to the civil context this Court's holding in *Amerada Hess* and other cases that the FSIA's jurisdictional scheme is exclusive. *See* Supp. App. 12a–13a. The court of appeals' efforts on that score are polished revisionism and nothing more. Regardless, the D.C. Circuit ignored that in describing the FSIA as a "comprehensive" jurisdictional scheme, this Court tracked the statute's legislative history. *See* H.R. Rep. No. 94-1487, at 14 ("[J]urisdiction in actions against foreign states is comprehensively treated by [] section 1330 . . . ."); *see also id.* at 12–13 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states.").

The court of appeals also reasoned that this Court in *Amerada Hess* "gave no hint at all that it intended to create a loophole where, in criminal cases clearly covered by an exception to immunity, a district court would nevertheless lack subject-matter jurisdiction." Supp. App. 10a. What the D.C. Circuit called a "loophole" is the longstanding rule in international law that one sovereign may not exercise criminal jurisdiction over another. Pet. 7. At the very least, this Court should grant certiorari to clarify whether it included a civil-case limitation in its holdings that the FSIA's jurisdictional scheme is exclusive.

III. THE D.C. CIRCUIT'S OPINION IS ROOTED IN POLICY DIFFERENCES WITH CONGRESS AND, BY EXTENSION, INTERNATIONAL LAW.

The D.C. Circuit's opinion also confirms that policy concerns drove its jurisdictional analysis. The D.C. Circuit worries that adopting Country A's view would allow "a foreign-sovereign-owned, purely commercial enterprise operating within the United States [to] flagrantly violate criminal laws" and that "the U.S. government would be powerless to respond save through diplomatic pressure." Supp. App. 10a; *see also id.* at 11a ("We doubt very much that Congress so dramatically gutted the government's crime-fighting toolkit.").

But through 28 U.S.C. § 1603(a), Congress extended to a foreign state's agencies and instrumentalities (including a majority-owned corporation) the same immunity from American criminal jurisdiction that the foreign state itself enjoys. It is not for the D.C. Circuit or any other American court to second-guess Congress's policy choice on that score. *See 62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) ("even in the interest of justice," a court "may not in any case . . . extend its jurisdiction where none exists").

The D.C. Circuit tried to ground its policy concerns in supposed uncertainty over the pre-FSIA immunity

status of sovereign-owned corporations. *See* Supp. App. 11a ("The common law of criminal immunities for a corporation owned by a foreign state was [unsettled] in 1976 and remains today."). Those unidentified common-law principles could never override Congress's decision to treat foreign agencies and instrumentalities as the foreign state itself. 28 U.S.C. § 1603. In any case, the supposed uncertainty is a fiction. *See, e.g.*, *In re Investigation of World Arrangements*, 13 F.R.D. 280, 291 (D.D.C. 1952) (collecting cases treating sovereign-owned corporations as the sovereign itself).

The court of appeals acknowledged "the lack of reported cases—before and after the [FSIA]—considering criminal process served on sovereign-owned corporations." Supp. App. 11a. But instead of drawing the straightforward conclusion that the absence of reported cases reflects the absence of subject-matter jurisdiction, the court speculated that "[a]n equally likely explanation for the absence of cases is that most companies served with subpoenas simply comply without objection." Supp. App. 11a. There is no evidence—*none*—supporting the D.C. Circuit's speculation on that score. On the contrary, in the lone pre-FSIA case that the D.C. Circuit cited—*In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952)—a corporation owned by the British Government successfully challenged a grand jury subpoena on sovereign-immunity grounds. *Id.* at 291 ("[T]he corporation, Anglo-Iranian Oil Company, is indistinguishable from the Government of Great Britain.").

In another sign that the D.C. Circuit strained hard to reach its preferred result, the court of appeals cited Andrew Dickinson's article *State Immunity & State-Owned Enterprises* with the parenthetical "(positing that international law might allow criminal prosecutions of 'state-owned enterprises')". Supp. App. 11a. That is not what the article says—not even close. On the contrary, Dickinson acknowledged that "[i]t is generally accepted that, at least under the *present* state of customary international law, criminal proceedings cannot be brought in a municipal jurisdiction against a foreign state." 10 No. 2 Bus. L. Int'l 97, 124 (2009) (emphasis added). Later in the article, Dickinson argued in *two sentences* that state-owned enterprises should enjoy immunity from criminal jurisdiction but that a state-owned enterprise's "separate legal personality" *might* make it more difficult in a particular case for the enterprise to show that it was acting as the state's agent. *Id.* at 125. Dickinson was not purporting to describe the state of international law.

In any event, the problem that Dickinson hypothesizes is not a problem under the FSIA, for Congress has already decided (through 28 U.S.C. § 1603) to treat foreign states and their agencies and instrumentalities as one and the same for purposes of jurisdictional immunity.

IV. THE D.C. CIRCUIT ERRED IN CONCLUDING THAT THE FSIA'S EXCEPTIONS TO JURISDICTIONAL IMMUNITY CAN APPLY OUTSIDE OF THE CIVIL CONTEXT.

Ignoring the textual interplay between § 1330(a) and the FSIA's immunity exceptions in §§ 1605–07, the D.C. Circuit also concluded that the FSIA's immunity exceptions can apply in criminal cases just as in civil cases. But the only jurisdiction-granting statute in the U.S. Code that incorporates the FSIA's immunity exceptions is § 1330(a)—proof that the exceptions apply only within § 1330(a)'s civil-case limits. Indeed, the exceptions themselves—"[a]lmost all [of which] involve commerce or immovable property located in the United States"—are civil in nature. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017); *see also* Pet. 17–18; 28 U.S.C. §§ 1605–07. This Court should grant certiorari to settle the question once and for all.

V. THE D.C. CIRCUIT'S OPINION CONFIRMS THAT THE QUESTIONS PRESENTED ARE AMONG THE MOST IMPORTANT THAT THIS COURT COULD DECIDE UNDER THE FSIA.

The D.C. Circuit's opinion also underscores the importance and sensitivity of the questions presented in Country A's petition. Pet. 35–38. The court of appeals agreed that the jurisdictional issue is a "fraught question." *See* Supp. App. 11a ("[I]f Congress really intended to furnish a definitive answer to such

a fraught question, one would expect that answer to show up clearly in the Act's text . . . ."). Fraught indeed: On the world stage, the United States has argued with the force of history that one foreign sovereign may not exercise criminal jurisdiction over another. The courts below have now cast doubt on America's commitment to that longstanding rule.

CONCLUSION

For the reasons set forth in Country A's Petition for Certiorari and in this Supplemental Brief, this Court should grant certiorari and, having done that, should reverse the judgment below.

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