

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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TURKIYE HALK BANKASI A.S.,                    )  
AKA HALKBANK,                                    )  
  Petitioner,                                    )  
  v.   ) No. 21-1450  
UNITED STATES,                                    )  
  Respondent.                                    )  
- - - - -

Pages: 1 through 104  
Place: Washington, D.C.  
Date: January 17, 2023

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5                                    Petitioner,                    )  
6                                    v.                                    ) No. 21-1450  
7   UNITED STATES,                                    )  
8                                    Respondent.                    )  
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11                                    Washington, D.C.  
12                                    Tuesday, January 17, 2023

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14                                    The above-entitled matter came on for  
15                                    oral argument before the Supreme Court of the  
16                                    United States at 11:08 a.m.

17  
18                                    APPEARANCES:

19  
20                                    LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of  
21                                    the Petitioner.  
22                                    ERIC J. FEIGIN, Deputy Solicitor General, Department  
23                                    of Justice, Washington, D.C.; on behalf of the  
24                                    Respondent.  
25

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 21-1450, Turkiye Halk Bankasi versus United States.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE PETITIONER

MS. BLATT: Mr. Chief Justice, and may it please the Court:

Schooner Exchange held that general laws describing admiralty jurisdiction do not reach foreign sovereigns. The reasons for that clear statement rule -- notice and equality among independent nations -- apply with greater force here. It is outlandish to think that Section 3231 authorizes federal courts to convict Spain.

The U.S. does not dispute that criminal trials against sovereigns were unthinkable in 1789, would violate international law today, are unprecedented anywhere, and would risk retaliation. But all the same is true for sovereign instrumentalities, which by definition are

1 sovereign.

2           Schooner Exchange, after all, is an  
3 instrumentality case, a ship. And the FSIA  
4 defines foreign states to include  
5 instrumentalities. U.S. instrumentalities like  
6 the Export-Import Bank are sovereign.

7           The FSIA independently bars criminal  
8 jurisdiction. Section 1604 provides that  
9 foreign states shall be immune from the  
10 jurisdiction of federal and state courts.  
11 Reading the word "civil" into that text would  
12 mean Congress created special guardrails in  
13 civil cases but threw sovereigns to the wolves  
14 in criminal cases.

15           The executive applauds this result,  
16 arguing that it alone makes the common law of  
17 criminal immunity. But the executive does not  
18 make the law, and an immunity waivable by your  
19 prosecutor is no immunity at all.

20           Plus, the government's commercial  
21 instrumentality rule contradicts every common  
22 law benchmark, history, international practice,  
23 reciprocity, and the choice already made by  
24 Congress to define foreign states to include  
25 instrumentalities.

1           Finally, Section 1605's commercial  
2 activities exception cannot apply in criminal  
3 cases. Section 1330 grants jurisdiction for  
4 the exceptions in civil cases only. And a  
5 contrary reading produces two radically  
6 implausible and dangerous results.

7           Foreign states themselves would be  
8 stripped of criminal immunity in commercial  
9 cases, and because Section 1605 waives immunity  
10 in state courts, states could prosecute  
11 sovereigns and the executive would be powerless  
12 to stop it.

13           I welcome questions.

14           JUSTICE THOMAS: Ms. Blatt, just so I  
15 can analytically -- can understand analytically  
16 your argument, could you waive immunity in --  
17 in district court and would -- after the  
18 waiver, would they have jurisdiction?

19           MS. BLATT: No. Under -- subject  
20 matter jurisdiction is not waivable.

21           JUSTICE THOMAS: Is there another  
22 instance in which we have seemingly conflated  
23 subject matter jurisdiction and immunity?

24           MS. BLATT: I mean, I don't think so.  
25 Schooner Exchange is a jurisdictional holding.

1 This Court has said in many cases, although the  
2 holding goes to jurisdiction, it later got  
3 developed in the civil context as absolute  
4 immunity until the restrictive immunity  
5 developed.

6 But, I mean, the Foreign Sovereign  
7 Immunities Act also on its face says  
8 jurisdiction -- they shall be immune from  
9 jurisdiction in federal and state courts.

10 So, I mean, we have two independent  
11 arguments. The first is just a broad argument  
12 saying there's no jurisdiction under 18 U.S.C.  
13 3231 for foreign sovereigns. And if this Court  
14 rejects that, we have another argument saying,  
15 well, the FSIA on its face in Section 1604  
16 would cancel out any criminal jurisdiction that  
17 might otherwise exist under Title 18.

18 JUSTICE THOMAS: But I don't see how  
19 the -- the difficulty I'm having is  
20 understanding how the immunity claim is woven  
21 into subject --

22 MS. BLATT: Oh.

23 JUSTICE THOMAS: -- matter  
24 jurisdiction.

25 MS. BLATT: Sure. Our immunity claim

1 is, if there is subject matter jurisdiction and  
2 the Foreign Sovereign Immunities Act doesn't  
3 apply, we would say there's still a common law  
4 immunity because there just never has been a  
5 criminal prosecution of a sovereign or its  
6 instrumentality anywhere.

7           And the only argument the executive  
8 has is that it has the unilateral right to  
9 decide if there is criminal immunity, just  
10 like, you know, foreign sovereign immunity is a  
11 -- is a well-developed common law ground that  
12 courts develop, which is one of the reasons we  
13 say that the court has to decide that question.

14           JUSTICE THOMAS: But, normally, in --  
15 in an immunity case, you could waive immunity,  
16 and so it's -- it's rather personal, it could  
17 be an affirmative defense, but I don't normally  
18 think of it as a part of subject matter  
19 jurisdiction.

20           MS. BLATT: That's correct. The --  
21 the immunity argument is a tertiary argument.  
22 If you've already rejected the argument that  
23 there's no jurisdiction, then it's absolutely  
24 waivable by a sovereign or state or anyone  
25 else, the federal government. And, yes, so



1 absolutely, immunity is waivable.

2 JUSTICE THOMAS: Yeah.

3 MS. BLATT: It's just that if you  
4 agreed with us on either the FSIA or -- well,  
5 the FSIA has its own waiver provisions, so the  
6 sovereign can always waive under the FSIA.

7 JUSTICE THOMAS: But aren't you  
8 hamstrung there because that norm -- that's  
9 civil?

10 MS. BLATT: Well, no, our -- our main  
11 argument is that the Section 1604, which bars  
12 any jurisdiction, speaks more broadly than  
13 Section 1330, which opens up only civil  
14 jurisdiction. So the actual immunity confer --  
15 the immunity-conferring provision or  
16 jurisdictional-stripping provision is textually  
17 broader. It doesn't -- it's not limited to  
18 civil cases.

19 JUSTICE THOMAS: But then you trap  
20 yourself with the exception for commercial  
21 activity.

22 MS. BLATT: Right. So I don't think  
23 that's correct. But I -- for -- for the three  
24 reasons, text, structure, and -- and purpose.  
25 The text is that the only grant of jurisdiction

1 for the exceptions is in 1330.

2 And so the -- remember, the foreign --  
3 1330 is part of the FSIA. It's passed in one  
4 continuous act. The very first provision of  
5 the Foreign Sovereign Immunities Act is  
6 Section 1330, and it says there's civil  
7 jurisdiction for these exceptions. And then  
8 you get to the broad cancellation of all  
9 jurisdiction and then the 1605 waiver.

10 The second reason as to structure, why  
11 I don't think the commercial activities  
12 exception could possibly apply in criminal  
13 cases is you would think Congress would  
14 actually have -- care about how those cases  
15 would proceed, and all of the provisions that  
16 go to venue, service, answering the complaint,  
17 removal, are all on their face civil only, and  
18 so it leaves -- you know, it's just  
19 inexplicable.

20 And, finally, the results that I said  
21 are borderline, you know, cataclysmic, that 50  
22 states, all counties, and any city in this  
23 country that has prosecution authority would  
24 all of a sudden have jurisdiction to prosecute  
25 any country qua country, and because Congress

1 has expressly waived immunity and canceled it  
2 out on the statute, the executive branch can't  
3 do anything about it.

4 And so the executive can cry and say  
5 this could start a war, and you're stuck with a  
6 statement by Congress saying, yeah, but  
7 Congress waived immunity for all commercial  
8 activity exceptions. There's --

9 JUSTICE SOTOMAYOR: Ms. Blatt --

10 MS. BLATT: Sure.

11 JUSTICE SOTOMAYOR: -- assume I accept  
12 all of this, but I'm going to follow up on  
13 Justice Thomas's question. I have problems  
14 seeing immunity as subject matter jurisdiction.  
15 And assume I have that problem and say there's  
16 jurisdiction. That still doesn't answer the  
17 immunity question.

18 And if I go a step further and for all  
19 the reasons that you gave and say the Foreign  
20 Sovereign Immunities Act is only about civil,  
21 and waiver -- the waiver that's there is only  
22 about civil litigation, every aspect of civil  
23 litigation has to go through the FSI -- IA.

24 So now I come down to your common law  
25 immunity question. If that's what remains for

1 me, I've got two paragraphs in the Second  
2 Circuit decision. Both of them -- and most of  
3 the paragraph assumes that it runs on -- the  
4 common law immunity runs on the FSIA.

5 MS. BLATT: Mm-hmm.

6 JUSTICE SOTOMAYOR: But, if I say the  
7 FSIA doesn't deal with criminal, that undercuts  
8 all the reasoning of the Second Circuit. What  
9 do I do then?

10 MS. BLATT: Well, let me --

11 JUSTICE SOTOMAYOR: You want me to  
12 decide the question.

13 MS. BLATT: Yeah. But let me just  
14 start you back with Schooner Exchange. I mean,  
15 that is a Supreme Court case by Chief Justice  
16 Marshall that on its face says you don't  
17 construe general jurisdiction -- jurisdictional  
18 statutes. It is a admiralty jurisdictional  
19 statute that's in the very same judiciary act  
20 as --

21 JUSTICE SOTOMAYOR: You're --  
22 you're -- you're -- you're fighting my  
23 premises. So please don't fight my premises.

24 Assuming that I disagree with you on  
25 the two aspects of the question presented, that

1 it's not jurisdictional --

2 MS. BLATT: Yeah. So --

3 JUSTICE SOTOMAYOR: -- that it's a  
4 common law immunity question.

5 MS. BLATT: Yeah. So, if you thought  
6 that Congress authorized district courts to  
7 convict foreign states at the time of the  
8 founding --

9 JUSTICE SOTOMAYOR: No, that has to --  
10 that has to --

11 MS. BLATT: -- if you think that and  
12 you think that a broad grant that's not limited  
13 to civil cases does not protect foreign  
14 sovereigns and that Congress just didn't care  
15 about whether --

16 JUSTICE SOTOMAYOR: No, it's not a  
17 question of not --

18 MS. BLATT: -- foreign sovereigns  
19 could be convicted --

20 JUSTICE SOTOMAYOR: -- it's not a --

21 MS. BLATT: -- then all we have is  
22 immunity.

23 JUSTICE SOTOMAYOR: Ms. Blatt, please  
24 stop. It's not a question of not caring. It's  
25 a question of defining what the common law

1 immunity is.

2           The government gives us a lot of  
3 options. It says, yes, there's absolute  
4 immunity, and it appears to say it's absolute  
5 immunity from criminal prosecution if you're  
6 naming the state.

7           I don't know how you name a state  
8 unless you just say the country of X because it  
9 seems to exempt out all agencies and  
10 instrumentalities, and I don't know any  
11 government that doesn't act through agencies  
12 and instrumentalities.

13           So it seems to go a step further and  
14 say: Well, there's absolute immunity if those  
15 agencies and instrumentalities are doing  
16 sovereign acts. That begs the question here  
17 because the little bit that I've seen about  
18 this case is that the government not only owns  
19 this bank but that the government directs the  
20 activities of this bank and that the bank is  
21 involved in sovereign activities because it  
22 collects taxes for the sovereign.

23           It appears or some of the allegation  
24 is that it also engages in social services  
25 activities, and the allegations in the

1 complaint say the sovereign, the government,  
2 dictated what the bank was doing with respect  
3 to these transactions.

4 The other side will have to answer  
5 that for me. It seems sovereign enough to me.

6 MS. BLATT: Yeah. Well, you're --

7 JUSTICE SOTOMAYOR: But --

8 MS. BLATT: -- absolutely correct. Go  
9 ahead.

10 JUSTICE SOTOMAYOR: Okay. It seems  
11 sovereign enough to me, but I -- I don't know  
12 whether I should get there. Is this -- isn't  
13 this an issue that we should send back, given  
14 that the Second Circuit proceeded in its  
15 analysis from a series of assumptions that we  
16 would be disagreeing with?

17 MS. BLATT: So, to get there, you  
18 would have to say -- you'd have to say there's  
19 subject matter jurisdiction over sovereigns'  
20 instrumentalities and agencies, so we're wrong  
21 on 3231, the FSIA doesn't apply, and then, yes,  
22 you would say common law immunity is not  
23 uniformly in the hands of the prosecutor.

24 And if I --

25 JUSTICE SOTOMAYOR: Well, they concede

1 part of that.

2 MS. BLATT: Well, let -- let me just  
3 hit on what you said. The indictment 10 places  
4 says the government of Turkiye committed a  
5 crime and it did it through its bank. It 10  
6 times accuses the head of a foreign state of  
7 committing a gazillion criminal acts and says  
8 and you ran it through your bank that you  
9 owned, operated, and that is an affiliate of  
10 the Ministry of Finance and that the minister  
11 -- it's as if Janet Yellen and the Department  
12 of Treasury committed a crime.

13 JUSTICE GORSUCH: So, counsel, if I  
14 understand it, after fighting the hypothetical,  
15 you would agree that a -- that a remand for  
16 consideration of the common law immunity would  
17 be appropriate?

18 MS. BLATT: If you reject --

19 JUSTICE GORSUCH: Yes, yes, yes, yes.

20 MS. BLATT: Yes, yes, yes, obviously.  
21 If you reject all of our arguments, yeah,  
22 remand is definitely --

23 JUSTICE KAVANAUGH: Well, I -- I don't  
24 think that was the question.

25 (Laughter.)



1 MS. BLATT: Sorry.

2 JUSTICE GORSUCH: No, it wasn't, but  
3 that's okay. I think we've got -- exhausted  
4 it.

5 JUSTICE KAVANAUGH: If we disagree  
6 with you on the FSIA point --

7 MS. BLATT: Oh.

8 JUSTICE KAVANAUGH: -- just that, and  
9 then I think the question -- maybe I'm  
10 misinterpreting it, but it was my question too  
11 -- is it appropriate then to just remand and  
12 let the Second Circuit take it from there?

13 MS. BLATT: So, if the FSIA doesn't  
14 apply --

15 JUSTICE KAVANAUGH: Or is it  
16 inappropriate?

17 MS. BLATT: -- we have an independent  
18 certiorari question that says there's no  
19 jurisdiction under Title 18. So you're saying  
20 the Court just doesn't pass on that?

21 JUSTICE KAVANAUGH: Correct.

22 MS. BLATT: I mean, you can do  
23 whatever you want, obviously.

24 (Laughter.)

25 MS. BLATT: The reason you shouldn't

1 do that, because, if there's just this common  
2 law immunity for the first time in the history  
3 of the world and on the planet, time  
4 immemorial, you're saying that it's conceivable  
5 a foreign state can be indicted --

6 JUSTICE KAVANAUGH: Well --

7 MS. BLATT: -- if it lacks immunity.

8 JUSTICE KAVANAUGH: -- just to press  
9 you on that, so we're going to -- if we're  
10 going to take it at that level of generality, I  
11 think it's pretty bizarre for this Court to  
12 tell the President of the United States as a  
13 matter of his national security exercise that  
14 even though the Constitution doesn't prohibit  
15 what you're doing, even though a statute  
16 doesn't prohibit what you're doing, this  
17 Court's going to prohibit your exercise of  
18 national security authority. That -- talk  
19 about big steps.

20 MS. BLATT: It is the --

21 JUSTICE KAVANAUGH: That's huge.

22 MS. BLATT: It's huge that -- there's  
23 actually -- there's unreviewable authority of  
24 the executive branch's prosecution decision  
25 when it's acting pursuant to a congressional

1 authority. And so you first have to think that  
2 Congress gave jurisdiction for a federal court  
3 to convict a sovereign. It has nothing to do  
4 with the executive branch.

5 JUSTICE JACKSON: But why do we have  
6 to think that --

7 JUSTICE BARRETT: The language is  
8 pretty -- the language --

9 JUSTICE JACKSON: Yes.

10 JUSTICE BARRETT: -- is clear, 3231.  
11 I mean, it doesn't -- it's not qualified. So  
12 it seems like, if we disagree with your reading  
13 of Schooner Exchange as a subject matter  
14 jurisdiction case, I mean, as we just said in  
15 the last case, the word "jurisdiction" is of  
16 many, many meanings. I mean, in -- in many  
17 ways, it's kind of like a personal jurisdiction  
18 claim, and this goes back to what Justice  
19 Thomas was saying.

20 I mean, it seems to me like maybe one  
21 reason we don't see these prosecutions is  
22 because the executive understands foreign  
23 countries to have absolute immunity and so  
24 would rarely assert them, because I agree with  
25 Justice Thomas, we typically think of

1 something -- immunity as something that can be  
2 waived.

3           And then 3231 is just simply saying  
4 that if there is a situation in which there is  
5 no immunity, in which the conditions are  
6 otherwise right, that the district court is  
7 available, but there are all kind of reasons,  
8 maybe as a matter of substantive law, as a  
9 matter of an immunity defense, why that  
10 prosecution never gets brought.

11           MS. BLATT: Mm-hmm.

12           JUSTICE BARRETT: What's wrong with  
13 that?

14           MS. BLATT: Well, let me just take you  
15 back to the founding because, in the -- it's  
16 not just -- this is -- Section 9 is a  
17 jurisdictional provision that has the alien  
18 tort statute -- alien tort statute, and it has  
19 the -- the 1331 predecessor plus the admiralty  
20 jurisdiction.

21           In Section 13 of the same judiciary  
22 act, this Court got original jurisdiction over  
23 diplomats and their servants. This -- the  
24 first Congress made it a crime to prosecute a  
25 domestic servant or a diplomat.

1           And it seems inconceivable that the  
2 first Congress thought that a district court  
3 had jurisdiction to convict a foreign country.

4           And if I can just argue about  
5 instrumentalities, because I hear you about  
6 President Biden or President anyone on  
7 instrumentalities abroad, but we have over 90  
8 corporations. We have Voice of America,  
9 Export-Import Bank, and one person's freedom  
10 fighter is another person's terrorist.

11           Our foreign -- excuse me, our U.S.  
12 instrumentalities do stuff abroad and could be  
13 seen to aid and abet terrorism.

14           JUSTICE KAVANAUGH: Well, that's why  
15 we have a President who's elected to protect  
16 the national security of the United States and  
17 consider those issues. And this was President  
18 Trump and now President Biden agree and this is  
19 at the highest levels of negotiations between  
20 the United States and Turkey. This case is  
21 apparently part of those discussions and part  
22 of the effort to prevent Iran from sponsoring  
23 terrorism, getting involved in the  
24 Russia-Ukraine.

25           I mean, it's all -- that's why we have

1 a President to consider that, plus the  
2 implications if you do something like that, and  
3 we also have a Congress, which can put  
4 restrictions on it, but, again, assume your  
5 FSIA argument doesn't work.

6 I don't know. What expertise do we  
7 have to balance all those considerations?

8 MS. BLATT: Your expertise is to make  
9 sure that you think Congress actually  
10 authorized a federal court since the time of  
11 the founding, because the language hasn't  
12 changed, that Congress actually contemplated  
13 that there could be a criminal prosecution and  
14 conviction when it seems to me unthinkable  
15 after this country and the -- all the  
16 Federalist Papers and the -- and the  
17 constitutional debates and is so fundamental a  
18 principle of international law --

19 JUSTICE JACKSON: But is that a -- is  
20 that a matter of jurisdiction, or is it a  
21 matter of immunity? The thing that concerned  
22 me about your brief and perhaps even the way  
23 you're reading the Schooner Exchange case is  
24 that these are different concepts.

25 And so it's possible that you're

1 absolutely right that no one contemplated  
2 criminal liability of a foreign state, but as a  
3 matter of absolute immunity, not, as Justice  
4 Barrett was pointing out, if everything else  
5 was cleared away. There's no immunity in a  
6 particular case or whatever, whatever. And  
7 then the question is does the Court have  
8 jurisdiction.

9           And the language of 3231 it seems to  
10 me speaks to all offenses against the laws of  
11 the United States. It doesn't carve out or  
12 focus on any particular defendants. And so I  
13 just don't understand why you're making a  
14 jurisdictional argument.

15           Shouldn't we just be focused on  
16 immunity in this case?

17           MS. BLATT: Yeah. Let me go one more  
18 time on jurisdiction. Then I'll -- I'm going  
19 to give up and go straight to immunity and talk  
20 about the FSIA.

21           But, on jurisdiction, the argument in  
22 both the face of the opinion and every century,  
23 there's Berizzi Brothers, Samantar, and Kiowa  
24 Tribe, so you've got a case per century saying  
25 Schooner Exchange was a jurisdictional case.

1           The actual government -- argument of  
2 government counsel was do not misconstrue this  
3 statute because it would be a judicial  
4 declaration of war unless Congress gave you  
5 that authority. And I -- I read the opinion,  
6 but, you know, there's nine of you and one of  
7 me and you have all the power, so you're going  
8 to read the opinion how you want, but I read it  
9 on its face to say jurisdiction.

10           But now let's say -- okay, so we're  
11 done with that argument. Let me just talk  
12 about immunity. To say that you just bypass  
13 the FSIA is huge. Congress issued a -- passed  
14 a landmark statute in 1976 against --

15           JUSTICE JACKSON: In a very particular  
16 context.

17           MS. BLATT: Exactly.

18           JUSTICE JACKSON: The context, as I  
19 understand it, was that Congress was concerned  
20 that Americans who were suing foreign entities  
21 didn't have real assured certainty about  
22 whether or not their actions were going to be  
23 considered because a lot of the power to  
24 identify circumstances of immunity or not was  
25 with the executive branch, and so they wanted



1 to codify rules in the civil context for when a  
2 foreign country was going to be immune.

3 I don't see anything in this statute  
4 that suggests that Congress was focused on or  
5 was thinking about immunity for criminal  
6 prosecution.

7 MS. BLATT: Well, except for the  
8 language of a provision that does not limit it  
9 to civil, and it's the most fundamental  
10 provision in the statute, 1604, which grants  
11 immunity from jurisdiction.

12 But it also seems to us, which I said  
13 in our opening, that Congress just left this  
14 subject to juries and that, you know,  
15 amenability to fraud claims, all the special  
16 protection, the statute goes on for pages and  
17 pages. I have no doubt that Congress was  
18 thinking about civil prosecutions because those  
19 are the only kind that ever existed.

20 And I do think it is a big step to say  
21 that the -- this Court is going to say and  
22 leave it to courts when Congress has not  
23 spoken, and the only time Congress spoke, it  
24 granted broad immunity and then laid down these  
25 very specific procedures on how you would ever

1 go about entertaining jurisdiction over a  
2 foreign sovereign or its instrumentalities.

3 JUSTICE KAVANAUGH: If we are --

4 CHIEF JUSTICE ROBERTS: Ms. Blatt, if  
5 -- if we accept your arguments when it's  
6 applied to sovereigns as such, is there any way  
7 to distinguish those arguments when it comes to  
8 a 51 percent commercial enterprise that may or  
9 -- may or may not even be identified as  
10 associated with the sovereign, but the  
11 sovereign owns one more share than the -- to  
12 form a majority?

13 MS. BLATT: Yes. Our definition of an  
14 instrumentality is it has to be created and  
15 designated as such by the sovereign and  
16 ownership and control. So you wouldn't have --  
17 51 percent doesn't get you there. The -- but  
18 --

19 CHIEF JUSTICE ROBERTS: Why not? I  
20 mean, it's --

21 MS. BLATT: Under the FSIA, it does.

22 CHIEF JUSTICE ROBERTS: -- 51 percent  
23 to control and -- and ownership and all that.

24 MS. BLATT: Because I think for just,  
25 you know, anything kind of even arm of the

1 state or federal instrumentality, it's  
2 important to have the designation by the -- the  
3 government. And -- and created -- in other  
4 words, I don't think --

5 CHIEF JUSTICE ROBERTS: So you're  
6 saying they would choose? There's some where  
7 they're going to say this is us and others  
8 where they're going to say we just happen to  
9 own a majority of the shares?

10 MS. BLATT: That's what Congress does.  
11 And this Court has always deferred to  
12 Congress's judgment when it designates a  
13 federal instrumentality by statute. What I'm  
14 trying to prevent is a situation where if a  
15 foreign country just bought a U.S. company and  
16 had control. I don't think that means it's a  
17 foreign instrumentality.

18 If it's organically created by the  
19 foreign country, and, you know, here, it's --  
20 it's actually an affiliate of the Treasury  
21 Department -- or, sorry, the Ministry of -- of  
22 Treasury. So it's much more than that. So I  
23 don't think it can just be this 51 percent.

24 But cases like, you know,  
25 Lebron/Amtrak, Thacker, FDIC versus Meyer,

1 you've had a million cases involving federal  
2 instrumentalities, and it's always been enough  
3 that Congress designated it as such, and it is  
4 a sovereign but for the "sue and be sued"  
5 clause, which waives the immunity it would  
6 otherwise have.

7           And, again, what worries me and why I  
8 think Congress should have a vote is I don't  
9 think -- not every President and every foreign  
10 country may feel the way our President does.  
11 And all we're saying is that Congress should  
12 speak clearly before opening up federal courts  
13 to that jurisdiction.

14           Once Congress has its say-so, then  
15 there's nothing you can do about any  
16 prosecution. The government gets to decide who  
17 to prosecute. But, usually, there's  
18 congressional authority. And you have a bunch  
19 of cases saying sovereigns, including foreign  
20 sovereigns, aren't persons. It's just a  
21 presumption that general statutes don't include  
22 the sovereign. They don't --

23           JUSTICE BARRETT: Ms. Blatt, it seems,  
24 though, kind of going back to this immunity  
25 point, in other countries -- I assume that this

1 is a matter of international law -- the  
2 sovereign immunity, say, that the United States  
3 may enjoy, that it's not controlled by  
4 jurisdiction there, so why would it all fall  
5 apart if it's controlled by immunity doctrine  
6 and not jurisdiction here?

7 MS. BLATT: They have mini -- or not  
8 mini, maxi -- they have comparable FSIAs in  
9 some, like places like South Africa and Israel,  
10 but, yes, it's just been -- I mean, the world  
11 has been around for, like, 7,000 years, and no  
12 country has ever tried another country.

13 (Laughter.)

14 MS. BLATT: Well, it's just never  
15 happened. And so, to sort of say, well, some  
16 Second Circuit case can figure it out, district  
17 courts will muddle along as long as the  
18 President says it's okay. Our country's  
19 different. We're special. Hopefully --

20 JUSTICE BARRETT: Well, let me --

21 JUSTICE GORSUCH: For that --

22 MS. BLATT: -- no other country will  
23 retaliate.

24 JUSTICE BARRETT: Oh, just --

25 JUSTICE GORSUCH: Please.

1 JUSTICE BARRETT: -- just one more.  
2 Let's -- let's say that I disagree with you on  
3 the 3231 point --

4 MS. BLATT: Yeah, I gathered.

5 JUSTICE BARRETT: -- and so we are  
6 talking about the FSIA. And I'm looking at  
7 1604, which broadly, if you're just looking at  
8 1604, you know, they have these arguments about  
9 context of civil cases, but just looking at  
10 1604, you know, that language seems to grant  
11 immunity here.

12 But then, you know, the government  
13 says that when you get to 1605, that all of a  
14 sudden you're doing a switch, oh, no, no, now  
15 the exceptions only apply in civil cases.

16 I think, you know, that's a pretty  
17 good argument. What do you have to say to  
18 that?

19 MS. BLATT: Just 1330. Again, the  
20 FSIA -- I know it's a couple pages down in a  
21 blue brief, but it -- the act of the FSIA  
22 starts with Section 1330. It says there is  
23 jurisdiction for cases following -- falling  
24 within the exceptions in 1605 and 16 -- through  
25 1607. So the first provision of the FSIA --

1 JUSTICE BARRETT: But, if we disagree  
2 with you about the criminal grant of  
3 jurisdiction, does that argument work as well?

4 MS. BLATT: Not as well.

5 JUSTICE GORSUCH: What do you have  
6 left in those circumstances? Let -- let --  
7 let's say we -- we accept your 1604 argument.  
8 Put aside the jurisdictional statutes for the  
9 moment. Just looking at 1605, why wouldn't it  
10 apply in criminal cases too?

11 MS. BLATT: So very much we were  
12 leaning on Section 1330 as for text. That's  
13 our only textual hook. But the structure and  
14 the consequences is because -- and the  
15 consequences are pretty extreme because, on its  
16 face, it says it applies in state courts, and  
17 it just would allow any state to prosecute a  
18 sovereign. And that can't be what --

19 JUSTICE GORSUCH: So state courts  
20 would have jurisdiction. And could -- could  
21 foreign sovereigns -- and I'm sorry for going  
22 over -- even remove to federal court --

23 MS. BLATT: No.

24 JUSTICE GORSUCH: -- in those  
25 circumstances?

1 MS. BLATT: Nope. And if you take the  
2 holding below that even though everything  
3 happened in Turkiye, commercial activities  
4 applies, it just blows open the FSIA in -- in  
5 every county, city, state court.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Thomas, anything?

8 Justice Alito?

9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: What do I do --  
11 what do I do with the fact that many other  
12 countries have S -- FSIA provisions that  
13 explicitly say they don't cover criminal cases?  
14 Those countries go exclusively on common law.

15 So you're making the argument that  
16 many people copy our act. But they don't copy  
17 it completely. They exclude criminal cases.

18 MS. BLATT: Yeah. So correct. Two  
19 points. One, we think that's what they did in  
20 1604, but you're -- you're absolutely correct  
21 that the ones we cite in Footnote 2 are  
22 specific to criminal.

23 And, two, the only thing we know about  
24 international law is that French highest court  
25 case that says you can't criminally prosecute a



1 -- the -- the Malta maritime authority for acts  
2 that relate to the sovereignty of the state.

3 JUSTICE SOTOMAYOR: Well, we --

4 MS. BLATT: And that's --

5 JUSTICE SOTOMAYOR: -- we have  
6 permitted a suit against a vessel that was  
7 owned by Mexico, I think it was --

8 MS. BLATT: Mm-hmm.

9 JUSTICE SOTOMAYOR: -- but operated by  
10 somebody else, correct?

11 MS. BLATT: Yeah, the Hoffman case,  
12 and you do have a lot of cases that we think  
13 they're -- they're talking about is there  
14 enough sovereign attributes over the ship.  
15 But, again, we do rely a lot on history that  
16 there's just no -- there's always been absolute  
17 immunity, no ands, ifs, or buts, for criminal  
18 cases.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: Ms. Blatt, you said in  
21 response to Justice Barrett's 1604/1605  
22 argument that you were leaning quite heavily on  
23 1330. But I'm wondering whether 1330 makes  
24 your position even stranger.

25 I mean, you're positing a statute that

1 starts at 1330 with the jurisdictional  
2 provision clearly only looking to civil cases,  
3 then switches to civil and criminal on the main  
4 immunity provision, and then switches back when  
5 you get to exceptions to immunity to only civil  
6 cases.

7 And I would think that you look at  
8 those three sections and you think they should  
9 all work together, they're all governing the  
10 same universe of claims, and that suggests that  
11 1604 is doing only civil, just as 1330 clearly  
12 is and as you say 1605 is.

13 MS. BLATT: Yeah, and so just -- just  
14 two points. And I think the backdrop of all of  
15 this is that the FSIA was trying to codify  
16 international practice in law. And  
17 international law -- I don't think the  
18 government can dispute this -- is there's been  
19 absolute criminal immunity.

20 So Congress had no reason to do  
21 anything at all about procedures or anything  
22 else when it came to criminal cases because  
23 there's no such thing. So Congress passed a  
24 very broad immunity statute, and then  
25 everything else it has to say about the subject

1 is civil because those are the only kind of  
2 cases that could go forward.

3 So, yeah, I see how, you know, you're  
4 -- what -- you know, the sort -- the -- you --  
5 you did, but if you just look at it from what  
6 Congress had in front of it, there was no such  
7 thing. The government has two subpoena cases  
8 and that's it. There's never been a criminal  
9 prosecution of a sovereign or its  
10 instrumentality here or anywhere.

11 And so just Congress -- otherwise, one  
12 would think that if Congress knew that it was  
13 even possible, they might have allowed removal.  
14 They might have done things like been  
15 respectful on service and said maybe you should  
16 send it to the embassy instead of FedEx. They  
17 just -- they presumably would have said  
18 something.

19 JUSTICE KAGAN: Well, maybe Congress  
20 thought -- would they have said something if  
21 they thought that there was common law immunity  
22 so that a statute didn't have to get involved?  
23 Then they wouldn't have passed a statute with  
24 any involvement of criminal actions.

25 MS. BLATT: Oh, no, Justice Kagan. We

1 know -- you've said this so many times -- that  
2 the FSIA was to clear all this immunity up once  
3 and for all because it was a disaster. It was  
4 --

5 JUSTICE KAGAN: Well, but what was a  
6 disaster was a lot of civil actions. As you  
7 say, the criminal actions were never brought.

8 MS. BLATT: And they would have done  
9 something about juries. I mean, I just think,  
10 again, the one thing -- just to not have any  
11 protections or any procedures seems to me quite  
12 odd when Congress thought so comprehensively  
13 about even the notion of sovereign immunity.

14 And so, to us, it seems odd that  
15 Congress -- I think it's attributing that  
16 Congress is just -- I know you might not like  
17 the word "indifferent" -- but would let the  
18 Justice Department or the President, rather,  
19 the President control how these things happen.

20 There would be juries, there would be  
21 fraud claims, there would be no removal if this  
22 -- if state -- if state courts -- if state --  
23 states can -- I mean, I think the government's  
24 view is that states could prosecute and you'll  
25 have to figure out how it's preempted under I

1 don't know what law they're going to -- I'm  
2 sure you'll ask them about preemption, but I  
3 don't even know how they would muddle through  
4 how this would work out in state court under  
5 common law immunity.

6 JUSTICE KAGAN: Okay. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Gorsuch, anything?

9 Justice Kavanaugh?

10 JUSTICE KAVANAUGH: I do have a few  
11 questions, sorry.

12 MS. BLATT: That's okay.

13 JUSTICE KAVANAUGH: On the common law  
14 immunity point, let's just zero in on that. I  
15 think the other side makes two main arguments.  
16 One, there is a long tradition of deferring to  
17 the executive with respect to assertions of  
18 statements of support for immunity or not. So  
19 that's one argument.

20 And the other argument is that there's  
21 a long tradition they say where state-owned  
22 corporations engaged in commercial activity  
23 don't have that common law immunity.

24 So if you could take those two --

25 MS. BLATT: Mm-hmm.

1 JUSTICE KAVANAUGH: -- first. I have  
2 more after that, but anyway.

3 MS. BLATT: Sure. So, on the first  
4 two, I mean, the Tate letter -- the high  
5 watermark for let's just do whatever the  
6 executive says is the Hoffman case, where  
7 there's that footnote that says State  
8 Department's views are important but will  
9 decide itself. But the high watermark is  
10 before the Tate letter that says the executive  
11 branch can't control the judiciary.

12 And I do think there's some separation  
13 of problem -- powers problems plus a due  
14 process problem when you have a adjudicator  
15 that defers -- bindingly defers to one side of  
16 it's a criminal case, it's self-dealing, and  
17 there's a due process violation.

18 So that's just problematic even in the  
19 civil. It's more problematic in criminal,  
20 where someone's -- not liberty because you  
21 can't put a foreign government in jail, but  
22 there's massive political ramifications of  
23 being convicted.

24 On your second question about how the  
25 immunity doctrine developed, the government is

1 just wrong. It developed on the commercial  
2 axis, not instrumentality axis. They have two  
3 cases that dealt with instrumentalities, but  
4 the axis in the common law is one of  
5 commercial.

6 So, if the government is right about  
7 the restrictive immunity developing along the  
8 commercial, that frees them from -- frees them  
9 and allows them and states too, I guess, to  
10 prosecute any sovereign itself.

11 The Defense Department, National Park  
12 Service, they, you know, sell Cokes and stuff.  
13 I mean, our sovereign governments involve --  
14 do -- do engage in lots of commercial  
15 activities.

16 JUSTICE KAVANAUGH: Okay. Next, they  
17 say for at least the past 70 years, the federal  
18 government has been applying federal criminal  
19 jurisdiction often through subpoenas to foreign  
20 government-owned corporations.

21 Same, what -- what's your answer to  
22 that?

23 MS. BLATT: So there's been hundreds  
24 of thousands if not a million and they --  
25 subpoenas and they came up with five. Five.

1 That's not much.

2           And then they're over -- we cite this  
3 on page 11 of our reply brief. They go all  
4 over the country saying a civil subpoena is not  
5 even enforceable against a foreign government  
6 because it's offensive to their dignity, it's  
7 offensive to international law, and so it seems  
8 a little much to be worried about their ability  
9 to -- to get criminal subpoenas when they can  
10 either call up -- we have a treaty or -- you  
11 know, I don't -- I don't know.

12           And I also think there's a huge  
13 distinction between a subpoena and actually  
14 telling a foreign country, having them  
15 convicted by a jury, that they're a criminal.

16           JUSTICE KAVANAUGH: Okay. And you  
17 said Congress -- you said earlier Congress  
18 should have a vote. The way I conceptualize  
19 this, it's Youngstown category 2.

20           MS. BLATT: Yep.

21           JUSTICE KAVANAUGH: So Congress  
22 doesn't authorize, Congress hasn't prohibited,  
23 but Congress does have a vote. If we rule  
24 against you and Congress says no, that -- we  
25 don't agree with the President's national



1 security determinations in this area and we're  
2 going to take this option off the table, my  
3 reading of the Constitution is Congress could  
4 do that. So Congress has a voice even if you  
5 lose.

6 MS. BLATT: Yeah, my reading under the  
7 section 2 is you're going to give them the  
8 deference that they are due in foreign policy  
9 if Congress hasn't spoken.

10 And, again, you've already tied two  
11 hands behind my back saying 1331, they've  
12 spoken.

13 JUSTICE KAVANAUGH: Right.

14 MS. BLATT: So, yeah, then I -- I'm  
15 having trouble in, you know, part 2. But, if I  
16 think I'm in part 2 right, Congress has given  
17 general jurisdiction for federal courts and  
18 could not have possibly contemplated that that  
19 meant sovereigns could be convicted and it left  
20 it up to the -- I don't know who the first  
21 attorney general was, Randolph maybe, I don't  
22 know -- but whatever that guy's name was, that  
23 they left it up to him to prosecute Britain.

24 JUSTICE KAVANAUGH: The Solicitor  
25 General, again, representing the

1 Administration, says nothing could embarrass  
2 the executive branch more than a judge-made  
3 principle that would vitiate a federal criminal  
4 prosecution.

5 Do you want to respond to that?

6 MS. BLATT: Yeah. I mean, I was not  
7 impressed by that given how ahistorical that  
8 this prosecution is. It is -- countries kill  
9 people. They engage in extrajudicial killing  
10 all the time, and the notion -- and -- and  
11 instrumentalities do things like lots of stuff.

12 JUSTICE KAVANAUGH: Well, should it be  
13 all or nothing? I mean, that's taking a tool,  
14 telling the President then, actually, if you  
15 want to go after this bank, you can't use this  
16 tool, you have to use a more extreme tool.

17 MS. BLATT: The more extreme tool is a  
18 massive CFR provision that is for Iran sanction  
19 violations, it's like 80 pages, that tells you  
20 how you go after sanction violations. It has  
21 massive penalties, massive. You can -- I don't  
22 want to say you can shut our bank down, but you  
23 can shut banks down for sanction violations.

24 JUSTICE KAVANAUGH: But the --

25 MS. BLATT: So what are they doing in

1 criminal other than insulting the sovereign?

2 JUSTICE KAVANAUGH: Well, I mean, if  
3 you -- again, I don't know, but the news  
4 reports suggest this was discussed with  
5 President Erdogan, that Turkey's foreign  
6 minister is coming to the United States this  
7 week. I mean, I don't -- you know, I don't  
8 know about all of that. But I do know that we  
9 don't know about all of that.

10 MS. BLATT: Yeah. But I know that you  
11 shouldn't let 12 Manhattan jurors figure this  
12 out, which is what you're doing. You're  
13 letting them go to a jury and put a foreign  
14 sovereign on trial. That's what the indictment  
15 says, is that the government of Turkiye  
16 committed a crime and did it through its arm of  
17 state.

18 That's just a serious accusation. We  
19 think it's false. And I get that the executive  
20 always gets to decide what to do for criminal  
21 prosecutions, but I really think you have to  
22 assume Congress gave the executive that power  
23 from day one when it wouldn't even let foreign  
24 courts deal with diplomats and it made it a  
25 crime to charge their servants.

1 JUSTICE KAVANAUGH: Okay. That's it.

2 MS. BLATT: Okay.

3 JUSTICE KAVANAUGH: Thank you for your  
4 time. Sorry to take up so much of it.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Barrett?

7 JUSTICE BARRETT: Ms. Blatt, I think  
8 one --

9 (Laughter.)

10 JUSTICE BARRETT: Not yet.

11 (Laughter.)

12 JUSTICE BARRETT: I think one of your  
13 compelling consequentialist arguments is this  
14 argument about the states going wild if the  
15 FSIA doesn't apply.

16 But, presumably, you know, states have  
17 broad grants of criminal jurisdiction in their  
18 courts. Is it -- you know, have states -- I'm  
19 just wondering if you know as an empirical  
20 matter, have states tried to prosecute  
21 commercial entities or instrumentalities?  
22 And -- and, if so, is it common law immunity  
23 that holds it back, or is this kind of the  
24 finger in the dike so that, you know, the --  
25 the instrumentalities can say, oh, no, you

1 know, the FSIA deprives you of jurisdiction?

2 MS. BLATT: Well, if you've just ruled  
3 against me that the FSIA doesn't apply, they  
4 don't have anything but common law immunity,  
5 whether that's a federal common law immunity  
6 that applies in state court or what have you,  
7 but, empirically, I think what we --

8 JUSTICE BARRETT: Right. I'm just  
9 talking about the -- I -- I'm not talking about  
10 going forward. I'm just saying --

11 MS. BLATT: Oh. No.

12 JUSTICE BARRETT: -- right now, have  
13 states even tried it?

14 MS. BLATT: No, because there's been  
15 no -- no decision that has said that -- that --  
16 I mean, you're the Supreme Court. So no. But  
17 OPEC fixes prices. So that's -- that's a --  
18 that's an antitrust violation.

19 JUSTICE BARRETT: Sure. But  
20 prosecutors are clever, right? I mean, I'm  
21 just wondering, if the FSIA is the only thing  
22 that's holding this back in its provision  
23 depriving states of, you know, jurisdiction to  
24 adjudicate such claims, have they tried it and  
25 made these arguments, and -- and you're just

1 saying that you think not --

2 MS. BLATT: I don't -- I don't know of  
3 any.

4 JUSTICE BARRETT: -- because no one  
5 has ever thought that --

6 MS. BLATT: I do -- have seen -- I  
7 have seen cities, I think, prosecute, I think,  
8 Mexico for environmental violations, but it  
9 was, like, really random. But I don't -- it  
10 was really random.

11 JUSTICE BARRETT: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Jackson?

14 JUSTICE JACKSON: So, if -- if you're  
15 right that there's common law absolute immunity  
16 for criminal prosecutions, criminal violations  
17 of foreign states, I guess I'm still struggling  
18 with how you get that out of 1604, and  
19 wouldn't -- wouldn't we expect that Congress  
20 would have said something about that?

21 We look at 1604 and it's a single  
22 sentence conferring immunity but conferring  
23 immunity except as provided in 1605 and 1607,  
24 which suggests to me that whatever Congress was  
25 codifying here, it thought there were

1 exceptions to it.

2 MS. BLATT: Mm-hmm.

3 JUSTICE JACKSON: So how do you read  
4 this to be referencing the criminal absolute  
5 immunity that you say existed at common law?

6 MS. BLATT: Well, so if you just put  
7 1605 exceptions to the side, which is -- you  
8 know, Justice Thomas hit on that the first  
9 thing, it's just a plain text reading of 1604.  
10 It says the jurisdiction.

11 JUSTICE JACKSON: But I can't put it  
12 to the side because the plain text of 1604 says  
13 you get immunity except as provided in 1605 and  
14 1607. So, if that's the structure of --

15 MS. BLATT: Well, 1330 --

16 JUSTICE JACKSON: Yeah.

17 MS. BLATT: -- only grants  
18 jurisdiction for civil cases under those  
19 exceptions. But, again, I mean, you either buy  
20 our, you know, these provisions work in tandem,  
21 or you're looking at the structure of -- that  
22 Congress just left this completely unregulated  
23 and left it to the common law.

24 I mean, if you -- if this Court is --  
25 I would -- I mean, if the court wants to say

1 there's a muscular absolute immunity for  
2 criminal prosecutions that would apply in state  
3 court too, I don't know how you enforce this on  
4 state court. It would have to be, I guess, on  
5 final review from a state court.

6 That would be okay, but you'd just  
7 have these battles with the executive branch  
8 under, you know, Justice Kavanaugh's reasonable  
9 view that the executive branch gets to bring  
10 whatever prosecutions it wants. But the other  
11 side of the "v," where there's a due process  
12 right, it's just weird to say but the judiciary  
13 can't decide a dispositive question of the law  
14 because your adversary decided it for you and  
15 said, well, you have no immunity.

16 So we're up against a case where you  
17 say, well, there's immunity, but the executive  
18 branch is saying, well, yeah, but I get to  
19 decide it because I know what's best.

20 JUSTICE JACKSON: All right. Thank  
21 you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Mr. Feigin.

25



1                                   ORAL ARGUMENT OF ERIC J. FEIGIN  
2                                   ON BEHALF OF THE RESPONDENT  
3                   MR. FEIGIN: Thank you, Mr. Chief  
4 Justice, and may it please the Court:  
5                   Petitioner is asking for an  
6 extraordinary and unprecedented rule under  
7 which any foreign government-owned corporation  
8 could become a clearinghouse for any federal  
9 crime, including interfering in our elections,  
10 stealing our nuclear secrets, or something like  
11 here, evading our sanctions and funneling  
12 billions of dollars to an embargoed nation,  
13 using our banks, and lying to our regulators.  
14                   And that unprecedented rule is based  
15 on essentially nothing. The reply brief drops  
16 all their reliance on their secondary sources  
17 and anything in customary international law  
18 because none of them apply to foreign  
19 government-owned corporations, which are  
20 separate juridical entities when they are  
21 performing non-sovereign functions like the  
22 banking function here.  
23                   And if this is -- I -- I think  
24 opposing counsel called it a cataclysm. If  
25 this is a cataclysm, I think it's quite telling

1 that only three disinterested countries have  
2 joined an amicus brief in this case. We're not  
3 hearing the kind of outcry that you would hear  
4 if this were unprecedented.

5           What they're trying to do is ask  
6 courts, which courts have modestly quite  
7 recognized are the least capable branch of  
8 doing this, to invent a new immunity rule that  
9 overrides the policy judgments of the federal  
10 government, which were carefully considered in  
11 this case and carefully considered in the very  
12 rare cases where we decide it's necessary to  
13 take this step because civil sanctions just  
14 aren't going to cut it against a repeated  
15 violator of sanctions. And there's no license  
16 for that. We take these things very seriously.  
17 And there's no basis for the common law  
18 immunity rule the Court would be inventing.

19           And let's be clear, a -- an idea of  
20 common law immunity pervades, I think, all  
21 three arguments the Petitioner is making here  
22 because the idea that there is some common law  
23 immunity and that there's some implicit  
24 assumption in the air about these kinds of  
25 cases is exactly what informs their

1 interpretation of 3231, the FSIA, and the  
2 backdrop common law immunity.

3 I'm sorry, I ran a little over,  
4 Mr. Chief Justice.

5 JUSTICE THOMAS: Mr. Feigin, the --  
6 could you have indicted the country of Turkey  
7 itself as opposed to the bank?

8 MR. FEIGIN: Well --

9 JUSTICE THOMAS: And if you couldn't,  
10 then, analytically, what's the difference?

11 MR. FEIGIN: -- a couple of points on  
12 that, Justice Thomas. I'm not going to disavow  
13 the idea that in theory the executive could  
14 make that judgment.

15 That said, we do acknowledge that  
16 there is a strong customary international law  
17 principle against prosecuting a state qua  
18 state. We would not endeavor to do so.

19 And I think there are a couple of  
20 legal distinctions a court could draw. Number  
21 one, the court could say that as the basis for  
22 such a -- an immunity is very well established.  
23 That could be the very rare case where the  
24 court does decide not to defer to the  
25 executive, where it's really just bucking an

1 established trend, as opposed to perhaps trying  
2 to nudge the law in a particular direction, as  
3 we might be perceived to be trying to do in  
4 this case.

5           The second thing is -- is actually  
6 quite historical, Your Honor. One of the  
7 points the Petitioner makes in their briefs is  
8 that the original Crimes Act applied to  
9 persons. Now then, as now, "persons" obviously  
10 covers corporations, but it then, as now, is  
11 generally not understood to cover the  
12 sovereign. So one might think that  
13 contextually that's just not a thing that  
14 Congress contemplated in Section 13 of the  
15 Judiciary Act, which is the predecessor to  
16 today's 3231.

17           JUSTICE SOTOMAYOR: Mr. --

18           JUSTICE KAVANAUGH: On the state --  
19 state prosecution question that came up, my  
20 understanding was that if states tried to do a  
21 prosecution of something -- in something like  
22 this, that the federal government could submit  
23 a statement of interest, and the foreign  
24 affairs preemption doctrine exists to ensure  
25 that that kind of activity doesn't occur and,

1 if it did occur, that this Court would be  
2 available to review that kind of action by a  
3 state. Is that Garamendi, cases like that?

4 MR. FEIGIN: That's exactly our point,  
5 Your Honor. And a couple of broader points  
6 about that are, number one, there's no dispute,  
7 and Samantar, I think, makes quite clear that  
8 states could prosecute foreign officials, and  
9 there are some instances of them having done so  
10 in history for crimes like embezzlement or  
11 rape.

12 And the -- the second point I would  
13 make is that because -- is that they wouldn't  
14 be able to prosecute foreign government-owned  
15 corporations for their sovereign actions.  
16 There would be obvious common law immunity --

17 JUSTICE GORSUCH: But, counsel --

18 MR. FEIGIN: -- in those cases.

19 JUSTICE GORSUCH: -- counsel, I'm  
20 wondering to what extent you've considered the  
21 impact, though, of -- of saying that 1604  
22 doesn't provide immunity.

23 In the last discussion with Ms. Blatt,  
24 the point was made states really haven't tried  
25 this, maybe a municipality here or there. But,

1 if we hold that 1604 doesn't apply to criminal  
2 cases, then states would be free to try to  
3 bring lawsuits against Mexico for this or that,  
4 or perhaps China because of COVID, or who knows  
5 what a creative state prosecutor might come up  
6 with.

7 And, normally, when a federal official  
8 is charged with some crime in state court, you  
9 have a right to removal. I think it's 1442  
10 maybe. But there would be no corresponding  
11 right to removal by a foreign sovereign. And  
12 that's just -- that's a bit of an oddity, an  
13 incongruity in your argument.

14 And the only place for review of these  
15 state court actions would be in this Court at  
16 the end of the day, perhaps at the end of those  
17 federal -- those state prosecutions or on some  
18 emergency interlocutory basis.

19 And I just wonder, have you given  
20 careful thought to those consequences?

21 MR. FEIGIN: Well, we have thought  
22 about the consequences of our position, and  
23 we've given it careful thought. But the  
24 absence of a removal provision in those  
25 circumstances, I think, is actually a very

1 strong point in our favor.

2           Putting aside foreign officials, for  
3 which there is no removal provision also, we  
4 know that from Samantar, I think, if Congress  
5 were -- actually had been thinking about this  
6 at all, that is, criminal actions, when it  
7 enacted the Foreign Sovereign Immunities Act,  
8 it would have included criminal actions in the  
9 removal provision because even -- because I  
10 think, in the world the Petitioner is  
11 envisioning, courts automatically get right  
12 whether the Foreign Sovereign Immunities Act  
13 even applies in the first place, and that would  
14 necessitate on their view dismissal of the  
15 case.

16           And even that can be wrapped up in  
17 complicated questions. You see some of them in  
18 the Pangang litigation, where we are  
19 prosecuting a Chinese government-owned  
20 corporation for acts of economic espionage.  
21 And they could even have been brought up here.  
22 It's not entirely clear, although Second  
23 Circuit precedent kind of precluded us from  
24 making this argument below, and we're not  
25 contesting it for FSIA purposes, it -- it's not

1 entirely clear that the Turkish Wealth Fund is  
2 actually itself an instrumentality --

3 JUSTICE GORSUCH: Well --

4 MR. FEIGIN: -- of the state.

5 JUSTICE GORSUCH: -- let's put that  
6 aside because you didn't raise that. And just  
7 one last point on 1604. I understand the  
8 contextual arguments about 1605, and I get  
9 that.

10 But just on its plain language, we  
11 normally start with the statute itself, and if  
12 the statute itself is clear, we stop there.  
13 And, here, the statute's language doesn't parse  
14 out criminal versus civil. It's a -- it says,  
15 you know, courts shall have no jurisdiction to  
16 entertain, something like that, pretty broad  
17 language that would normally encompass both  
18 civil and criminal in a normal case.

19 So why wouldn't that -- why shouldn't  
20 we follow our usual practice here?

21 MR. FEIGIN: Your Honor, I think this  
22 is a case like United Air Regulatory Group or  
23 Brown & Williamson, where you have to look at  
24 the statute as a whole. And this statute, if  
25 you look at it as a whole from start to finish,



1 is concerned with criminal action -- civil  
2 action, excuse me.

3 For example, if you start with the  
4 title, which was created by Congress, and it's  
5 in the statutes at large, it refers to immunity  
6 from suit, that's a civil term. It was  
7 Congress's decision to place this in Title --

8 JUSTICE GORSUCH: I understand the  
9 contextual arguments.

10 MR. FEIGIN: Yeah, okay.

11 JUSTICE GORSUCH: I -- I -- I do. And  
12 I appreciate them and I don't mean to cut you  
13 off, but just looking at 1604 itself, have you  
14 got anything to help us on -- on the language  
15 there, or are you stuck and have to go to these  
16 contextual arguments?

17 MR. FEIGIN: Your Honor, I don't think  
18 it's an -- it would be unreasonable in complete  
19 isolation to read that provision as potentially  
20 applying to criminal cases as well.

21 JUSTICE SOTOMAYOR: Mr. Feigin --

22 MR. FEIGIN: I -- I --

23 JUSTICE SOTOMAYOR: I'm sorry.

24 Continue.

25 MR. FEIGIN: I'm sorry. I was just

1 going to say I think this is a case where every  
2 single other contextual factor, location,  
3 title, everything, you know, the operative  
4 provisions, which opposing counsel just told --  
5 okay -- cuts the other way.

6 JUSTICE SOTOMAYOR: I am a bit stuck  
7 on the drama of this, but the drama of this is  
8 also that U.S. Attorneys' Offices, there's 99  
9 of them in the country?

10 MR. FEIGIN: I believe it's 93 or 94.

11 JUSTICE SOTOMAYOR: Whatever the  
12 number is, it's up there. Do they have to get  
13 approval on every case that they bring against  
14 any defendant? Or --

15 MR. FEIGIN: We do have a process,  
16 Your Honor. A process was followed in this  
17 case.

18 JUSTICE SOTOMAYOR: No, no. Tell me  
19 what that process is. Do they need to get  
20 approval and from whom?

21 MR. FEIGIN: Your Honor, we do not  
22 have a formal written process, but I -- what I  
23 can tell you is the following. Some of the  
24 aspects --

25 JUSTICE SOTOMAYOR: So assume the

1 following: You don't have a formal written  
2 process --

3 MR. FEIGIN: Your Honor --

4 JUSTICE SOTOMAYOR: -- which in my  
5 mind means that some U.S. Attorney's Office in  
6 -- I hope it's not a city, I don't mean to  
7 denigrate anybody -- Timbuktu -- I'm making up  
8 a name, okay -- in Timbuktu, some U.S.  
9 Attorney's Office brings such a suit without  
10 getting approval.

11 Can DOJ order them, under what  
12 authority, to dismiss the suit?

13 MR. FEIGIN: I think we could. First  
14 of all, I suppose that could be a rare case in  
15 which -- I suppose that could be a rare case in  
16 which the government might, if it did so in  
17 derogation of what we understand to be common  
18 law immunity, that is, it, for example, brought  
19 a criminal action against the Kingdom of  
20 Sylvania --

21 JUSTICE SOTOMAYOR: Whatever.

22 MR. FEIGIN: -- we could file a  
23 suggestion of immunity in that case, but,  
24 otherwise --

25 JUSTICE SOTOMAYOR: So --

1 MR. FEIGIN: -- I think the Attorney

2 General --

3 JUSTICE KAVANAUGH: Isn't your answer

4 yes?

5 MR. FEIGIN: -- exercises --

6 JUSTICE SOTOMAYOR: I'm sorry.

7 MR. FEIGIN: No, Your -- no, Your

8 Honor. I believe --

9 JUSTICE KAVANAUGH: Your answer is not

10 yes to could the -- could the President or the

11 Attorney General order the suit -- U.S.

12 Attorney to dismiss the suit?

13 MR. FEIGIN: I believe the Attorney

14 General and the President would be quite well

15 suited to ordering that suit --

16 JUSTICE KAVANAUGH: Sorry to

17 interrupt. I just wanted to --

18 MR. FEIGIN: -- dismissed and firing

19 the United States Attorney if the United States

20 Attorney were --

21 JUSTICE SOTOMAYOR: Well, that -- that

22 -- that --

23 MR. FEIGIN: -- to refuse to comply.

24 JUSTICE SOTOMAYOR: I don't know how I

25 would want to leave to the vagrancies of

1 individual prosecutors, whether it's federal or  
2 state, the right to insult another nation by  
3 giving them this unbridled power to initiate  
4 suits.

5 MR. FEIGIN: Well --

6 JUSTICE SOTOMAYOR: You're saying it's  
7 limited by the common law, but I'm -- putting  
8 aside that I don't know where the dividing line  
9 really is on what constitutes commercial and  
10 what constitutes sovereign, but that has a  
11 danger all its own, doesn't it?

12 MR. FEIGIN: Well, Your Honor, just to  
13 -- to finish up the -- the point on the U.S.  
14 Attorneys' Offices, I don't think any of the  
15 questions here could turn on whether there was  
16 a formal written policy. And just because --

17 JUSTICE SOTOMAYOR: Now what do I --

18 MR. FEIGIN: -- there's not a formal  
19 written policy --

20 JUSTICE SOTOMAYOR: -- what do I --  
21 what do I do with the hearsay news reports that  
22 came out that the prior administration was  
23 trying to apply pressure to drop this lawsuit  
24 on the Southern District of New York? This is  
25 a Southern District of New York case, correct?

1 MR. FEIGIN: It -- it is, Your Honor.

2 JUSTICE SOTOMAYOR: And -- and so what  
3 do I do with that?

4 MR. FEIGIN: Your Honor, I -- I think  
5 those are internal government deliberations.  
6 Some of them have been brought to light, but I  
7 think what they do show is there was a process.  
8 The U.S. Attorney did not just go through and  
9 indict the case without permission from main  
10 Justice.

11 But turning to the question of --

12 JUSTICE SOTOMAYOR: But main Justice,  
13 does it go seek permission from the Department  
14 of State? Because who is the executive to make  
15 this decision?

16 MR. FEIGIN: Your Honor --

17 JUSTICE SOTOMAYOR: We all agree it's  
18 the President, but there is no formula out  
19 there to tell us who speaks for the President.  
20 Is it -- you're saying in this lawsuit it's  
21 you, and I'd expect that.

22 MR. FEIGIN: Your Honor --

23 JUSTICE SOTOMAYOR: But I'm talking  
24 about, before it gets to the Supreme Court,  
25 who's going to speak so that state courts and

1 U.S. Attorneys' Offices will listen?

2 MR. FEIGIN: Your Honor, the -- the  
3 consultation process in this case, I'm given to  
4 understand, involved the other affected  
5 departments, like the Treasury Department that  
6 was lied to and the Department of State.

7 I stand here on behalf of the United  
8 States representing every single one of those  
9 agencies. They all stand behind this  
10 prosecution.

11 CHIEF JUSTICE ROBERTS: I --

12 JUSTICE ALITO: What if a --

13 CHIEF JUSTICE ROBERTS: -- I  
14 understood you to be drawing a distinction  
15 between the sovereign qua sovereign and  
16 instrumentalities earlier.

17 What do you do with what Turkiye said  
18 in its amicus brief, which is that Halkbank is  
19 an arm of the state indistinguishable from the  
20 government itself?

21 MR. FEIGIN: Well, I --

22 CHIEF JUSTICE ROBERTS: Do they get to  
23 have a say in that, or who makes that judgment?

24 MR. FEIGIN: This Court has  
25 definitively held that it is not the domestic

1 state that gets to make this judgment. That's  
2 in the First National City Bank against Banco  
3 Para Del Comercio Exterior de Cuba, where this  
4 Court held it was a matter of federal law or  
5 international law, but it's not something the  
6 state exclusively gets to designate.

7 The Court also said in that case that  
8 corporations are presumptively separate  
9 juridical entities, and that principle dates  
10 back to the founding, in fact, before the  
11 founding, where it was obviously possible to  
12 sue the East India Company.

13 JUSTICE KAGAN: But what do we --

14 CHIEF JUSTICE ROBERTS: Well, what do  
15 you --

16 JUSTICE KAGAN: -- do with the fact  
17 that --

18 CHIEF JUSTICE ROBERTS: I was just  
19 going to say, if it's a determination for the  
20 tribunal, what -- what do they look at?

21 MR. FEIGIN: So I think the -- there,  
22 although we don't think it applies on its own,  
23 the commercial activity exception that the FSIA  
24 has is helpful and informative, but, of course,  
25 the definition of "commercial" there isn't



1 particularly well fleshed out, and it's just  
2 something that courts have had to develop.  
3 But, here, we're talking about just what are  
4 sovereign and what are non-sovereign actions,  
5 the kinds of things that have been held to be  
6 sovereign actions, for example, the one foreign  
7 case they have on this, the French Supreme  
8 Court case involved the flagging of ships and  
9 registration of ships, which is exclusively  
10 something a sovereign could do, but it's not  
11 something that I think even the British common  
12 law courts had too much trouble with.

13           If you compare the Nabob of the  
14 Carnatic case and the Moodalay case that are  
15 cited in our briefs, which I believe both  
16 around the time or predate the founding, they  
17 distinguish between, for example, treaty-making  
18 authority of the East India Company, for which  
19 it couldn't be sued, and the just normal  
20 contracting authority for which it could.

21           JUSTICE KAGAN: What do we do with the  
22 fact that the FSIA rejects the distinction  
23 between sovereigns and their instrumentalities?  
24 I mean, that would suggest a kind of  
25 preexisting common law rule that the FSIA was

1 picking up from that -- that there was no sharp  
2 line between the two?

3 MR. FEIGIN: Well, no, Your Honor, I  
4 don't think that's -- that's quite right  
5 because, as we note in our brief, and we have a  
6 source that goes into this in more detail, the  
7 FSIA definition is broader because there are  
8 possible foreign policy implications with a  
9 case like this. And we don't deny them.  
10 That's why we take them so seriously and bring  
11 them so rarely.

12 But, under the common law, qua common  
13 law, they really haven't identified anything in  
14 customary international law or common law --

15 JUSTICE KAGAN: But you're saying that  
16 Congress --

17 MR. FEIGIN: -- that would apply here.

18 JUSTICE KAGAN: -- when Congress  
19 enacted the FSIA, Congress was changing the  
20 common law with respect to instrumentalities of  
21 sovereign states in that dramatic a fashion?

22 MR. FEIGIN: I don't think it was  
23 changing the common law. I think what it was  
24 trying to do was recognize that other cases  
25 could potentially have these kinds of

1 implications and ensure that it was taking care  
2 of those cases too.

3 In fact, if you look at the principal  
4 problem at which the FSIA was directed, it was  
5 the need for the executive branch to have to  
6 handle all -- the suggestion of immunity  
7 letters in all of these private suits. I think  
8 suits against corporations might even be more  
9 common than suits against states or suits  
10 against agencies of states. And, of course,  
11 Congress would not have wanted to leave the  
12 executive with that burden in those cases, and,  
13 admittedly, it wasn't handling that burden  
14 particularly well or particularly consistently.  
15 But it didn't by there -- by doing so move  
16 where the common law was and always has been.

17 And, in particular, this Court -- I  
18 think there are four principles that kind of  
19 show that these kinds of prosecutions are  
20 possible, all of which date back to the  
21 founding.

22 One is prosecutions against foreign  
23 officials, which date back at least to the  
24 1790s.

25 The second would be the

1 well-recognized difference between a  
2 corporation and the state, which likewise dates  
3 back prior to the founding.

4           The third would be the well-recognized  
5 distinction between sovereign and non-sovereign  
6 functions, which goes from the East India cases  
7 up to the French Supreme Court case and is,  
8 frankly, embodied in the FSIA today.

9           And the fourth would be the long  
10 history of deference to the executive. The --  
11 the --

12           JUSTICE GORSUCH: Mr. Feigin, what we  
13 don't have in that list, though, is any  
14 evidence at the time of the founding that a  
15 suit against a sovereign qua sovereign would be  
16 something that this -- our American courts  
17 would have accepted as -- in criminal cases.

18           And we talked about 3231 earlier with  
19 Ms. Blatt and the Schooner Exchange case. One  
20 can read that as jurisdictional or immunity.  
21 But the principle was pretty clear, wasn't it,  
22 at the time of the founding that one state  
23 couldn't set up its criminal courts to  
24 adjudicate the sovereign actions of another  
25 country. What do we do about that?

1           MR. FEIGIN: So, Your Honor, we're not  
2           contesting that principle, and I think what you  
3           do here -- and this -- this goes to one of --  
4           what I take to be one of Petitioner's main  
5           arguments today. What I would say about that  
6           are that there is a separateness between  
7           corporations and sovereigns and --

8           JUSTICE GORSUCH: I understand that,  
9           but that's contested factually here, and it's  
10          also not something the Second Circuit much  
11          addressed, as Justice Sotomayor pointed out an  
12          hour ago. And does that perhaps stand as an  
13          argument for remand for consideration of  
14          whether 3231 or general law principles I don't  
15          think of as common law -- I think of that as  
16          domestic -- but general international law  
17          principles preclude the prosecution here?

18          MR. FEIGIN: Well, Your Honor, if you  
19          wanted to remand on that very limited ground --

20          JUSTICE GORSUCH: It's not what we  
21          want to do --

22          MR. FEIGIN: Okay.

23          JUSTICE GORSUCH: -- or what we will  
24          do or what we have the power to do. It's what  
25          we are supposed to do under the law that I'm

1 looking -- looking for guidance on.

2 MR. FEIGIN: I don't think you need to  
3 do that, and let me take your --

4 JUSTICE GORSUCH: It's not what I need  
5 to do either. It's what we -- what we should  
6 do I'm asking for your thoughts on. And if the  
7 Second Circuit didn't consider this question,  
8 if it was an FSIA analysis, and if you concede  
9 that there is some general or international  
10 common law immunity for sovereigns that the  
11 court didn't consider below, is -- isn't a  
12 remand appropriate?

13 MR. FEIGIN: Well, I think the FSIA is  
14 more restrictive than common law in this  
15 respect because I think there could be  
16 non-sovereign functions that don't satisfy, for  
17 example, the commercial activity exception. So  
18 I think that should really -- should really be  
19 enough.

20 But, on the particular issue of  
21 separateness, if you'd let me take a quick stab  
22 at telling you why this is a -- this is  
23 crystal-clear under this Court's precedents, if  
24 we go back to the Cuba bank case whose name I'm  
25 sure I mangled in my exchange with the Chief

1 Justice, it makes clear that corporations are  
2 presumptively separate juridical entities.

3 And if you compare the Petitioner here  
4 and you look at the actual sources that are  
5 cited in Turkiye's brief, which are a couple of  
6 declarations filed in a civil Southern District  
7 case, what they make clear is that the -- the  
8 control over the bank is exercised through the  
9 majority shareholder status and the General  
10 Assembly of shareholders. They could sell  
11 those shares tomorrow. It's publicly traded on  
12 the Ankara stock exchange. They're subject to  
13 private banking and regulatory laws. And they  
14 can even be sued and they'll defend in their  
15 own name. I don't think anyone is saying you  
16 could attach the sovereign's own assets.

17 JUSTICE GORSUCH: I -- I -- I --

18 MR. FEIGIN: If you compare --

19 JUSTICE GORSUCH: I'm sorry to  
20 interrupt, but --

21 MR. FEIGIN: Yeah.

22 JUSTICE GORSUCH: -- we do have that  
23 before us --

24 MR. FEIGIN: Okay.

25 JUSTICE GORSUCH: -- and I appreciate

1 that. But I guess my question is a little more  
2 fundamental, which is you seem to agree -- I  
3 guess I just want to understand if you agree --  
4 that at the founding, the understanding of the  
5 predecessor of 3231 in light of this country's  
6 history, it really is the underdog and being  
7 more concerned about being sued abroad than  
8 haling others into our courts and -- and  
9 worried deeply about the possibility, if we  
10 did, what international repercussions would  
11 follow for a relatively weak new nation, that  
12 there is some core common law immunity that  
13 does apply to states, common law, general law,  
14 international law, that -- that some court has  
15 to apply and consider at some stage.

16 MR. FEIGIN: Your Honor, we do  
17 acknowledge that -- and we're not contesting  
18 that it -- it was -- it sprung up at some  
19 particular time in history past the founding,  
20 or we're not claiming --

21 JUSTICE GORSUCH: Or prior to the  
22 founding. I mean, Vowell --

23 MR. FEIGIN: Yeah, we -- we -- that  
24 applies to states qua states.

25 JUSTICE GORSUCH: Yeah.



1 MR. FEIGIN: But it does not apply --

2 JUSTICE GORSUCH: Here.

3 MR. FEIGIN: -- to foreign  
4 government-owned corporations.

5 JUSTICE GORSUCH: I -- I understand --  
6 I understand that point.

7 MR. FEIGIN: And -- yeah.

8 JUSTICE GORSUCH: Okay. Thank you.

9 JUSTICE JACKSON: And isn't the  
10 question that follows from that, so who should  
11 be deciding under these circumstances in this  
12 case whether we have a foreign corporation  
13 versus their argument that this really is the  
14 state? Shouldn't we send it back to the Second  
15 Circuit to really flesh that out?

16 MR. FEIGIN: Well, Your Honor, I -- I  
17 don't think you need to do that for a couple of  
18 reasons. Number one, even the professors on  
19 their side agree that there's always been  
20 deference to the executive on that kind of  
21 point. But, even --

22 JUSTICE JACKSON: On the point of  
23 who's --

24 MR. FEIGIN: On the point --

25 JUSTICE JACKSON: -- an

1 instrumentality?

2 MR. FEIGIN: Sorry. On the point of  
3 whether someone is -- whether a -- whether  
4 sovereign or non-sovereign functions are being  
5 exercised. I guess, on the question of who is  
6 an instrumentality, I think there's always been  
7 deference on that point too, subject to  
8 potentially -- I mean, I can't tell this Court  
9 that that's not subject to any form of judicial  
10 review, but, here, it's clearly covered by the  
11 Cuban bank case because, if you look at that,  
12 the bank in that case was created by Cuban law,  
13 it was a hundred percent owned by the Cuban  
14 government, it was financed by the Cuban  
15 government, it sent its profits to the Cuban  
16 government, and a Cuban minister was the  
17 president of the bank.

18 You don't -- it's on page 614. You  
19 don't even have all of those features here, and  
20 this is a corporation much like the kind of  
21 corporation the Court contemplates at page 624  
22 of that case, which is a corporation that's  
23 established so the government can do some kind  
24 of business, and when it does, when it acts  
25 through a corporation in our courts, it is

1 subject to the jurisdiction of the United  
2 States.

3 And let me just make a quick point on  
4 why this is clearly not a jurisdictional rule.  
5 I don't think the Court needs to look any  
6 further than pages 758 and 759, I think it is,  
7 of Ex parte Peru, in which the Court makes  
8 quite clear -- and this is another one of these  
9 in rem ship cases -- that the court has  
10 jurisdiction, it's just a question of whether  
11 it declines or doesn't decline to exercise it.

12 That's perfectly consistent with  
13 Schooner Exchange, which talks about waiving  
14 jurisdiction, although it spells it without an  
15 I, and it also refers to actions that are taken  
16 by the sovereign that are clearly actions the  
17 executive would take, like barring foreign  
18 warships from U.S. ports, which would be  
19 something you'd expect the President to do, not  
20 something that you'd expect any other branch of  
21 government to do.

22 JUSTICE ALITO: Can I take you back to  
23 the question of what would happen if, let's  
24 say, an elected district attorney brings a  
25 criminal case against a foreign state or

1 against a component of a foreign state or  
2 against a corporation that is set up, owned and  
3 controlled by the foreign state? What would  
4 happen then?

5 MR. FEIGIN: Okay, Your Honor. I  
6 mean, putting aside that that could happen with  
7 foreign officials already under this Court's  
8 law and we would be in the exact same spot, but  
9 --

10 JUSTICE ALITO: All right. Let's say  
11 it's against a foreign state. So it's --

12 MR. FEIGIN: So say the -- say we're  
13 against --

14 JUSTICE ALITO: -- it's the people  
15 against whatever.

16 MR. FEIGIN: If -- if -- again, Your  
17 Honor, if they brought a criminal action that  
18 said, like, Commonwealth of Virginia against  
19 the Kingdom of Sylvania --

20 JUSTICE ALITO: Yeah.

21 MR. FEIGIN: -- I think there we might  
22 well file a suggestion of common law immunity.

23 JUSTICE ALITO: All right. And so the  
24 court receives that and the court says well,  
25 fine, that's your opinion, but we don't agree.

1 Then what?

2 MR. FEIGIN: Well, Your Honor, that's  
3 subject to review in this Court just the same  
4 way --

5 JUSTICE ALITO: After the -- after the  
6 -- there's been a trial and an appeal through  
7 the state courts, until there's a final -- when  
8 there's a final decision from the supreme court  
9 of the state, then it could come here?

10 MR. FEIGIN: Well, Your Honor,  
11 presumably, there are some emergency procedures  
12 there. Again, you're -- you're presupposing  
13 that if the FSIA or something like that did  
14 apply that they'd be in -- in safer  
15 circumstances. There might be a circumstance,  
16 as I was suggesting earlier, where there is  
17 some dispute as to whether -- I mean, as,  
18 apparently, there is here, although I don't  
19 think there should be -- as to whether  
20 something actually is an instrumentality of a  
21 foreign state or equivalent to the state.

22 The state trial court could refuse to  
23 to recognize that separateness and just say,  
24 you know, batten down the hatches, we're going  
25 to trial. And whatever emergency relief would

1 be available ultimately culminating in this  
2 Court that would be available there would be  
3 perfectly available in these circumstances.  
4 And this Court usually trusts state courts to  
5 get these things right.

6 JUSTICE ALITO: Well, under what  
7 theory would this state prosecution be  
8 preempted by federal law? The Supremacy Clause  
9 applies to the Constitution and the laws of the  
10 United States. So what is the law of the  
11 United States that would block the state  
12 prosecution?

13 MR. FEIGIN: Well, Your Honor, I think  
14 we'd have a number of options. I mean, if the  
15 Court were unprepared to accept some kind of  
16 letter from the executive stating that this is  
17 contrary --

18 JUSTICE ALITO: We had that in the  
19 past.

20 MR. FEIGIN: -- to the President's  
21 foreign affairs determination --

22 JUSTICE ALITO: Yeah, we had that. I  
23 can't -- I'm -- I'm blanking on the name of the  
24 case, but we had exactly that. President Bush  
25 sent a letter and said quit, and they -- Texas

1 said, well, thanks for your opinion, but we're  
2 going ahead.

3 MR. FEIGIN: I -- I -- I don't want to  
4 argue against myself. I think you're thinking  
5 of Medellin, Your Honor.

6 JUSTICE ALITO: Yeah. Medellin,  
7 right.

8 MR. FEIGIN: But even -- even if  
9 that -- that were not enough, there are a  
10 number of other actions the federal government  
11 could take, up to and including, for example,  
12 entering into an executive agreement of the  
13 sort in Garamendi that would contemplate  
14 dismissal of the prosecution --

15 JUSTICE ALITO: I -- I'll come back to  
16 this --

17 MR. FEIGIN: -- which would clearly be  
18 granted.

19 JUSTICE ALITO: -- when -- when I have  
20 my --

21 CHIEF JUSTICE ROBERTS: Okay. Justice  
22 Thomas?

23 JUSTICE THOMAS: No, Chief.

24 CHIEF JUSTICE ROBERTS: There you go.

25 JUSTICE ALITO: All right. So --

1 (Laughter.)

2 MR. FEIGIN: Welcome back. Thank you.

3 JUSTICE ALITO: -- this does seem to  
4 me to get into a very interesting question that  
5 has ramifications beyond this case. So what is  
6 it -- would you say that there are some -- that  
7 it is a principle of customary international  
8 law that would bind the states under the  
9 Supremacy Clause?

10 MR. FEIGIN: Well, Your Honor, first  
11 of all, let -- let me just reiterate what you  
12 just said, which is this is well beyond this  
13 case. The Court doesn't need to decide it.  
14 There are no historical precedents for this.  
15 Therefore, under Samantar, it was not a problem  
16 Congress was particularly concerned with, and  
17 we can worry about it when and if it comes up.

18 If it were to come up, I think we  
19 would say that the Supremacy Clause and just  
20 the structure of the Constitution overall, as  
21 this Court has, you know, repeatedly  
22 recognized, vests the federal government with  
23 exclusive foreign affairs powers.

24 The foreign affairs powers are  
25 principally exercised through the executive



1 branch, and if the -- the executive branch has  
2 a number of tools for ensuring that the states  
3 don't start making side treaties or do things  
4 that the federal government does not approve  
5 of, and I think there would be a number of  
6 tools that could be used here.

7 I've suggested a couple of them.

8 Another one of them --

9 JUSTICE ALITO: Well, I just want to  
10 know the status of this rule that's being  
11 imposed on the state. So it's a -- it's an  
12 inference from the Constitution. I can  
13 understand that. That's what you want us to  
14 say. It is an inference from the Constitution  
15 that the President can direct that foreign  
16 states be sued, but a state can't do that. I  
17 -- I understand that.

18 But, when you talk about common law,  
19 then I -- I'm more confused. Well, I'm not  
20 confused. I'm -- I'm worried because isn't it  
21 an interest -- a very important question  
22 whether customary international law is binding  
23 on the states under the Supremacy Clause?

24 MR. FEIGIN: Well, Your Honor, I think  
25 the Court suggested in *Samantar* that they

1 should -- that courts should give weight to  
2 suggest -- I suppose those were federal courts  
3 under the FSIA, but the Court suggested that  
4 for foreign officials, courts ought to give  
5 some respect or potentially conclusive respect  
6 to the views of the executive branch, which  
7 would -- and to the extent that those reflect  
8 customary international law, I think that might  
9 well be binding on the states, particularly  
10 because the states don't have any authority to  
11 legislate or take action that would be contrary  
12 to customary international law.

13 I -- I mean, I think Medellin might be  
14 somewhat instructive here, but I think it's  
15 just a more general principle that states  
16 should not be taking actions that get the U.S.  
17 into foreign hot policy water. And I think, if  
18 that ever were to happen and for some reason it  
19 did not -- no sense prevailed in the state  
20 courts, this Court would be able to resolve  
21 that problem.

22 But it has never happened, which,  
23 again, under Samantar, is something that  
24 suggests that it was not something Congress was  
25 concerned with in the FSIA. It clearly doesn't

1 bear on the threshold 3231 question, and it  
2 doesn't have any purchase here, where it's the  
3 federal --

4 JUSTICE ALITO: Well, it's true it's  
5 never happened, but nothing like this has  
6 happened either.

7 MR. FEIGIN: Your Honor, that's not  
8 true. We've been doing this for decades.  
9 Admittedly, it's -- it's since the '80s. I'm  
10 not going to claim that we've been doing this  
11 since -- for 7,000 years or claim that we've  
12 been doing this since the founding, because we  
13 haven't. But that's because of a rise of  
14 government-owned corporations concealing some  
15 very serious crimes.

16 If you look at a couple of our recent  
17 prosecutions, the Pangang one I referred to  
18 earlier is a Chinese-owned corporation that is  
19 engaging in economic espionage.

20 We have another one against a  
21 Chinese-owned corporation that involves nuclear  
22 information, and the -- it's the considered  
23 judgment of the executive that in rare cases it  
24 is appropriate to bring criminal actions.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 Justice Gorsuch?

3 JUSTICE GORSUCH: Yeah. So the  
4 absence of state court actions in the past  
5 could lead to a couple of different inferences.  
6 One might be it isn't a problem, so Congress  
7 couldn't have thought about it in the FSIA and  
8 we -- we have tools to deal with it.

9 But it seems to me an equally  
10 plausible inference is state courts haven't  
11 done this historically because no one's ever  
12 thought any court could engage in criminal  
13 prosecutions of -- of state entities.

14 MR. FEIGIN: Well, Your Honor, to the  
15 --

16 JUSTICE GORSUCH: So, on that, does  
17 that argument cut?

18 MR. FEIGIN: Well, I think both  
19 directions could potentially cut in our favor.  
20 If it was unimaginable that a state court in  
21 particular could ever prosecute a state, that  
22 would suggest that any suggestion of immunity  
23 or preemption would be quite well taken.

24 If the assumption instead centered on  
25 the FSIA and what sort of procedures it should

1 include, I think the absence of a removal  
2 provision is a blinking light here because, if  
3 the -- if Congress were really concerned that  
4 this could ever be a problem, it would have  
5 given --

6 JUSTICE GORSUCH: Yeah, it's --

7 MR. FEIGIN: -- everyone an easy way  
8 to deal with it.

9 JUSTICE GORSUCH: -- it's a blinking  
10 light both ways, though, it seems to me. The  
11 absence of a removal provision might be  
12 suggestive that 1604 means what it says and it  
13 just bars these kinds of actions, period.

14 And I -- I -- I know you -- you -- you  
15 don't think it's a -- a serious problem, but I  
16 guess I -- I guess I'm not totally relieved by  
17 your assurances that states won't take a  
18 holding that 1604 doesn't bar criminal actions  
19 if we were to go down that road.

20 I -- I guess I'm less sanguine about  
21 the prospects of state courts not bringing  
22 these kinds of prosecutions, and I'm -- I'm --  
23 I'm still not sure I understand your answers to  
24 Justice Alito about what tools this Court would  
25 have to discipline that under -- under the

1 federal Constitution and the Supremacy Clause.

2 MR. FEIGIN: Well, again, Your Honor,  
3 I think it's quite clear under, for example,  
4 Garamendi that if there were -- if we needed --

5 JUSTICE GORSUCH: But what -- what  
6 provision of the Constitution? I -- I  
7 understand your -- your -- your -- your cases.  
8 You've said them. I don't want to repeat that.

9 But what provision of the Constitution  
10 would you point to that would allow this Court  
11 through the Supremacy Clause, which, again, as  
12 Justice Alito talked about, is, well, we  
13 certainly have the right to tell state courts  
14 that they are violating the -- the  
15 constitutional or federal laws, but what -- on  
16 what authority could we tell them that they're  
17 violating customary international law?

18 MR. FEIGIN: Well, Your Honor, I think  
19 very clearly this would extend to, for example,  
20 executive agreements. And if this were rising  
21 to the level of really becoming a problem, even  
22 though it has literally never happened --

23 JUSTICE GORSUCH: I understand.

24 MR. FEIGIN: -- and is, therefore,  
25 under Samantar, not something that Congress was

1 going to be concerned with here --

2 JUSTICE GORSUCH: I got that.

3 MR. FEIGIN: -- we could make an  
4 executive agreement with the other country that  
5 would preempt -- that would clearly, under  
6 Garamendi, preempt the state prosecution.

7 JUSTICE GORSUCH: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh?

10 JUSTICE KAVANAUGH: A couple -- a  
11 couple follow-ups. You said earlier you were  
12 representing all the executive departments and  
13 agencies. You're representing the President  
14 too, correct?

15 MR. FEIGIN: That's correct, Your  
16 Honor.

17 JUSTICE KAVANAUGH: President Biden?

18 MR. FEIGIN: Yes, Your Honor.

19 JUSTICE KAVANAUGH: Yes.

20 MR. FEIGIN: And this action was  
21 actually brought by the previous  
22 administration.

23 JUSTICE KAVANAUGH: Right.

24 Okay. Justice Sotomayor was asking  
25 you about the process, and I don't think you

1 described it in full, the process not written  
2 but the process that occurs in a situation like  
3 this, which I assume, and all indications are,  
4 would involve the Attorney General and the  
5 Secretary of State and the National Security  
6 Advisor and the White House Counsel and  
7 probably the President too.

8 But is that the normal process for  
9 something like this, or do you not want to talk  
10 about that?

11 MR. FEIGIN: Your Honor, I'd prefer  
12 not to discuss the details of internal  
13 processes.

14 JUSTICE KAVANAUGH: What were you  
15 going to say about the process? Because you  
16 were going to say something.

17 MR. FEIGIN: I think I said all I was  
18 planning to say, Your Honor.

19 (Laughter.)

20 MR. FEIGIN: I didn't mean to leave  
21 the impression that I left something in -- in  
22 -- in the box. But, I mean, just -- just to  
23 reiterate, I think it is well -- perhaps what I  
24 was not able to say is I think it is well  
25 understood in the U.S. Attorneys' Offices it's



1 not -- that they would need to run this kind of  
2 thing up the chain, and when it's run up the  
3 chain, the chain will, if you'll forgive the  
4 mixing of metaphors, grow some spokes and will  
5 consult with the other portions of the federal  
6 government that might have concern with a case  
7 like this.

8           We don't have examples of cases, and  
9 -- and this isn't one of -- certainly isn't one  
10 of them in which something is just a frolic and  
11 detour by some individual, a Special Assistant  
12 U.S. Attorney in some satellite office that  
13 only contains that Special Assistant U.S.  
14 Attorney.

15           JUSTICE KAVANAUGH: Okay. Last  
16 question. This is going to take the opposite  
17 perspective of the questions I was asking Ms.  
18 Blatt and picks up on Justice Gorsuch's  
19 questions.

20           So another way to look at this under  
21 the Youngstown is -- framework is to think,  
22 well, we should -- to avoid all these questions  
23 that have been coming up that are difficult, we  
24 should try to fit this case within the  
25 statutory scheme that exists and that Congress,

1 in essence, has authorized prosecutions or at  
2 least said no immunity necessarily when it's  
3 commercial activity, has suggested immunity  
4 otherwise, and that if the President -- if the  
5 executive branch wants more authority than what  
6 they could get out of the FSIA, there's  
7 indications that they can go back to Congress.

8 Now maybe that's the entirely wrong  
9 way to look at it, but that's what I was  
10 thinking on the other side of how to think  
11 about this case, in other words, some -- some  
12 limits on the executive, but if you want more  
13 power, go to Congress.

14 MR. FEIGIN: So, if Your Honor is  
15 supposing that the 3231 question is decided in  
16 our favor --

17 JUSTICE KAVANAUGH: Mm-hmm.

18 MR. FEIGIN: -- and has decided that  
19 the FSIA does apply --

20 JUSTICE KAVANAUGH: Mm-hmm.

21 MR. FEIGIN: -- but the commercial  
22 activity exception likewise applies --

23 JUSTICE KAVANAUGH: Correct.

24 MR. FEIGIN: -- I think 1330 is -- it  
25 can't just be -- I won't --

1 JUSTICE KAVANAUGH: Assume all that.  
2 Why is that not a bad resolution, just thinking  
3 about this at a bigger picture level? The  
4 Second Circuit's approach there was, you know,  
5 kind of no harm.

6 MR. FEIGIN: Well, Your Honor, I don't  
7 know that as a practical matter we'd have a  
8 problem with that. For the reasons I've said,  
9 I don't think that's the correct solution.

10 JUSTICE KAVANAUGH: Mm-hmm.

11 MR. FEIGIN: But, if the Court were to  
12 do that, I think that would -- and simply  
13 affirm the decision below, in which both courts  
14 found that the commercial activity exception  
15 applies, I think we'd be fine with that.

16 JUSTICE KAVANAUGH: No systemic  
17 problems from that?

18 MR. FEIGIN: Well, as I've said, Your  
19 Honor, we don't take these things lightly --

20 JUSTICE KAVANAUGH: Okay.

21 MR. FEIGIN: -- and so --

22 JUSTICE KAVANAUGH: That answers the  
23 question.

24 MR. FEIGIN: Yeah.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett?

3 JUSTICE BARRETT: Justice Kavanaugh  
4 pointed out in his colloquy with Ms. Blatt that  
5 these kind of suits might be an important tool  
6 in the executive's toolkit.

7 Could you explain why -- I mean, given  
8 that the government has the authority to  
9 prosecute the individuals, like, you know, the  
10 executives at the bank, you know, given that  
11 the executive is not going to prosecute the  
12 country itself, you say, so what is -- I -- I  
13 just want to understand the backdrop. What  
14 does the government get out of going after the  
15 bank as opposed to all the individuals who work  
16 in the bank?

17 MR. FEIGIN: Sure, Your Honor. A -- a  
18 few things. First of all, the individuals, as  
19 a couple of the individuals are in this case,  
20 may be beyond our reach or missing. You could  
21 imagine a hostile foreign government acting  
22 through one of its corporations that just  
23 rotates people in and out and withdraws them  
24 and won't extradite them for us.

25 More generally, what this does is

1 force a change in the corporation as a whole or  
2 potentially disable it. The kinds of penalties  
3 we can seek under the criminal provisions would  
4 allow a penalty of up to two times the amount  
5 involved in the money laundering and --

6 JUSTICE BARRETT: But, if it's a  
7 hostile government, why are they going to  
8 cooperate with any of that, and why can't you  
9 just impose sanctions or -- or use other tools?

10 MR. FEIGIN: Well, Your Honor, a  
11 couple of points. First of all, the other  
12 criminal remedy I was going to mention is  
13 potential forfeiture of all the assets involved  
14 in the offense. And if that were imposed  
15 potentially as a condition of probation or  
16 something to that effect, then that would  
17 enable the United States to essentially disable  
18 the Petitioner bank from doing various things  
19 within the United States.

20 As for other potential remedies, under  
21 the civil remedies, which I believe are 50  
22 U.S.C. 1703, in order to impose fines for that  
23 or -- or civil sanctions for that, we'd have to  
24 trace each transaction, which is going to be  
25 incredibly difficult in the context of a

1 money-laundering scheme, where the specific  
2 purpose is to hide it, and we'd have to go  
3 through transaction by transaction.

4           And the other problem is some of these  
5 remedies are sledgehammers. Some of the  
6 remedies they propose, up to and including  
7 going to war with Turkiye, are -- are not  
8 things that -- would have very destabilizing  
9 consequences.

10           And what we want to do is to deter  
11 other government-owned corporations from these  
12 kinds of actions, deter, frankly, other  
13 governments from trying to use corporations to  
14 do these kinds of things. I'm not saying that  
15 that's what happened here, but just  
16 hypothetically.

17           And also just to disable this  
18 particular bank from doing the kinds of  
19 commercial activities potentially that it was  
20 engaging in that led to this prosecution.

21           JUSTICE BARRETT: What about the  
22 retaliatory consequences that Ms. Blatt points  
23 out could result in the other way? The United  
24 States is not concerned about those, about  
25 foreign countries initiating criminal actions

1 against U.S.-owned corporations?

2 MR. FEIGIN: A couple of points on  
3 that, Your Honor. It's not like we undertook  
4 this lightly. As I've said numerous times, we  
5 have considered that possibility. You know,  
6 without specifically --

7 JUSTICE BARRETT: Well, I understand  
8 that, but I think --

9 MR. FEIGIN: Yeah.

10 JUSTICE BARRETT: -- part of the  
11 questions that you've been getting about states  
12 is that, however carefully the United States  
13 might consider it before initiating such a  
14 prosecution, it may or may not be possible to  
15 control what states and municipalities do.

16 MR. FEIGIN: And that leads to exactly  
17 the second point I was going to make, Your  
18 Honor, which is we never controlled what they  
19 were going to do. Now, if they decide -- I --  
20 I don't know the -- they -- this will enable  
21 them -- to the extent that we have  
22 government-owned corporations that look like  
23 Petitioner here, they will be able to point to  
24 this and other cases that we've already  
25 brought, potential -- and some of which are --

1 have been resolved, like the recent Petrobras  
2 case in Brazil, as precedent for whatever  
3 proceeding they wish to undertake.

4 But even before that, they weren't  
5 necessarily beholden to our view of the law in  
6 the first place. But, you know, we acknowledge  
7 that what's good for the goose is good for the  
8 gander. We've considered that, and we're  
9 prepared to -- to deal with it.

10 Many of the instrumentalities that  
11 might be at issue in those cases, or, actually,  
12 they wouldn't really be instrumentalities,  
13 they'd be corporations, don't do a great deal  
14 of operation outside the United States. You  
15 know, for example, if the government bailed out  
16 GM by buying 75 percent of its stock, we  
17 wouldn't be asserting that GM couldn't be sued  
18 in another country. We wouldn't view that as a  
19 suit against the United States.

20 JUSTICE BARRETT: Thank you.

21 MR. FEIGIN: Or -- I'm sorry. I -- I  
22 said "suit." What I meant even was  
23 "prosecuted" --

24 JUSTICE BARRETT: Prosecuted.

25 MR. FEIGIN: -- and we wouldn't view



1 that as a criminal prosecution against the  
2 United States.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Jackson?

5 JUSTICE JACKSON: Yes. Can I just go  
6 back quickly to Justice Kavanaugh's point about  
7 the FSIA. I guess I'm trying to understand  
8 whether if we -- if we agreed that the  
9 commercial activity exception applied in this  
10 circumstance such that there is no immunity  
11 under that statute, would that be the end of  
12 it, or would we still go on or have to contend  
13 with the issue of common law immunity in the  
14 criminal realm?

15 MR. FEIGIN: I think the FSIA, where  
16 it applies, displaces common law immunity.

17 JUSTICE JACKSON: So we'd have to have  
18 the sort of predicate determination that the  
19 FSIA is applying in the criminal realm to -- to  
20 -- to --

21 MR. FEIGIN: Yes, Your Honor, I think  
22 that would be incorrect to -- to hold. Like, I  
23 think, in order -- in order to completely avoid  
24 looking -- I -- I don't know that the Court can  
25 avoid looking at the common law itself because,

1 again, as I suggested when I started my  
2 presentation here, that pervades all of their  
3 arguments because --

4 JUSTICE JACKSON: Right. So I guess  
5 I'm just trying to -- I'm trying to understand  
6 your answer to Justice Kavanaugh and the  
7 suggestion that we could just look at the FSIA  
8 and not address the common law.

9 MR. FEIGIN: So I was --

10 JUSTICE JACKSON: Wouldn't we have to  
11 at some level?

12 MR. FEIGIN: -- I was taking as a  
13 given Justice Kavanaugh -- what I understood to  
14 be Justice Kavanaugh's premise that the Court  
15 had already decided, contrary to our view and I  
16 think, frankly, incorrectly, that the FSIA does  
17 apply to criminal matters.

18 If it does, then it would displace the  
19 common law and it would be fine just to look at  
20 the commercial activity exception.

21 I -- I do -- I think there are maybe  
22 some differences between the commercial  
23 activity exception and the common law, and,  
24 again, we don't think the FSIA does apply and  
25 may give us -- the common law might give a

1 slightly broader reign over non-sovereign  
2 actions. We may not need to locate the acts in  
3 the precise same way, the acts comprising the  
4 gravamen of the offense --

5 JUSTICE JACKSON: Okay. Can I just --

6 MR. FEIGIN: -- in quite the same way.

7 JUSTICE JACKSON: -- ask you one last  
8 question, mindful of the time. So what is your  
9 position as to how much weight courts have to  
10 give to an executive non-immunity  
11 determination? Is it dispositive in your view?  
12 It -- and if so, why isn't that in tension with  
13 this notion of there being some absolute  
14 immunity in the -- the criminal law realm?

15 MR. FEIGIN: Well, Your Honor, a --  
16 a -- a couple of points on that. I think  
17 Republic of Mexico against Hoffman suggests  
18 that it would essentially be dispositive. I  
19 think it would particularly be dispositive in  
20 a -- an action such as a criminal prosecution  
21 brought by the sovereign itself.

22 But even aside from that, if the Court  
23 wanted to draw a distinction, as I think I  
24 suggested earlier today, there might be cases  
25 where it is so clear that what the executive is

1 asking for deference for is completely contrary  
2 to customary international law that the kind of  
3 role that the executive is playing in this case  
4 in developing international law, which the  
5 Court recognized is perfectly legitimate in  
6 Sabbatino, for instance, wouldn't really  
7 pertain.

8           And you would really have a situation  
9 in which deference -- a court might  
10 independently decide that deference is not  
11 warranted. But we're nowhere near that here  
12 because, as I suggested -- as I began and --  
13 and may end, there really isn't anything here.  
14 There's no there there.

15           There's nothing about government-owned  
16 corporations that are exercising non-sovereign  
17 functions, which are separate juridical  
18 entities, and their actions aren't  
19 presumptively attributed to the government.  
20 That's why the FSIA itself in Section 1606  
21 allows punitive damages against  
22 government-owned corporations but not against  
23 the sovereign itself because the actions of the  
24 corporations can be wrongful, even if we don't  
25 think the actions of the sovereign qua

1 sovereign can.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Kavanaugh?

4 JUSTICE KAVANAUGH: When you were  
5 answering Justice Barrett's questions just now,  
6 were you talking about foreign states or U.S.  
7 states? I was -- or both? Or do you know?

8 MR. FEIGIN: I -- I was understanding  
9 her questions to be about foreign states.  
10 Okay.

11 JUSTICE KAVANAUGH: Got it. Thank  
12 you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 MR. FEIGIN: Thank you.

16 CHIEF JUSTICE ROBERTS: Ms. Blatt.

17 REBUTTAL ARGUMENT OF LISA S. BLATT  
18 ON BEHALF OF THE PETITIONER

19 MS. BLATT: I'm just going to take one  
20 more stab at 3231.

21 I -- I really thought it should have  
22 gone without saying that Congress has not  
23 authorized federal courts to convict Israel,  
24 Saudi Arabia, or the Vatican City. I mean,  
25 nothing has changed in the wording of the

1 statute since the founding, and all the  
2 government has is to return us to pre -- I  
3 guess after -- before 1976, that the executive  
4 will sort of make this up as it goes and courts  
5 will have to figure this out on their own, even  
6 though Congress expressly granted jurisdiction  
7 over foreign sovereigns in 1332 and 1875. So  
8 there's always been express congressional  
9 authority to deal with sovereigns.

10 So -- and on this bit about sort of  
11 let's just do it all under the common law, the  
12 government waived any argument that Halkbank is  
13 not an arm of the State of Turkey. It went  
14 whole hog. It said, we can indict sovereigns  
15 qua sovereigns and we can waive immunity at  
16 will. It never made any argument in district  
17 court that we weren't a sovereign arm.

18 And no matter what he said up here,  
19 his indictment indicts the government of Turkey  
20 acting through its bank, although only the bank  
21 is named in the indictment.

22 The other thing he mentions on this  
23 wealth fund, on page 5 of our brief and the  
24 Turkey brief, it makes clear -- it cites a -- a  
25 declaration and that declaration says the

1 wealth fund is not a juridical entity. It is  
2 like the -- the general fund, the Social  
3 Security fund, the judgment fund. It's an  
4 actual fund of the Treasury Department. So it  
5 actually just has no legal entity. So I don't  
6 see how the wealth fund is at issue.

7           On this bit about, well, it's -- I  
8 think he said, we'll protect sovereigns qua  
9 sovereigns and we'll protect instrumentalities  
10 acting with sovereign actions. And I -- I  
11 think that gets into the waiver point. It's --  
12 the indictment itself alleges that this was  
13 carried out on behalf of -- of -- of Turkiye to  
14 inflate their exports.

15           And, again, on the international about  
16 common law, if you're going to develop a common  
17 law that's never existed because this will be  
18 the first criminal trial of any sovereign  
19 instrumentality over its objection or  
20 sovereign, you're going to make it up and you  
21 would normally look at history, practice,  
22 international law, reciprocity, and the  
23 distinction under all laws in any context  
24 between sovereigns, their entities, and their  
25 instrumentalities.

1           You're giving courts no guidance  
2           except for, I guess, go back to the British  
3           India something or other. That wasn't even a  
4           foreign corporation.

5           So -- and always through the law,  
6           in -- in the U.S. also -- the one other thing I  
7           will say about this Cuba case, that -- no one  
8           disputes that a juridical entity, Amtrak, is  
9           juridically separate from the United States.  
10          And that case, the Cuba case, says Amtrak can't  
11          be liable for the United States' debts,  
12          although the Court went on and said we're going  
13          to make Cuba liable for the bank's debts.

14          But the -- the -- the Postal Service  
15          last time I checked was a separate juridical  
16          entity. Last time I checked, it mails things  
17          abroad. In most states, the Postal Service is  
18          a commercial activity.

19          And so there are lots of entities that  
20          actually do things abroad, and so for the  
21          government to come up here and say: Well, I --  
22          I don't know who's going to determine it's a  
23          sovereign act. I guess it'll be Venezuela  
24          courts or Russian courts or someone like that,  
25          but they're not going to be bound by the



1 government's -- the government's argument here.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel. The case is submitted.

5 (Whereupon, at 12:44 p.m., the case  
6 was submitted.)

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