

SUPREME COURT OF THE UNITED STATES

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.)
- - - - -

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6 v.) No. 21-1450
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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

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	LISA S. BLATT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ERIC J. FEIGIN, ESQ.	
7	On behalf of the Respondent	48
8	REBUTTAL ARGUMENT OF:	
9	LISA S. BLATT, ESQ.	
10	On behalf of the Petitioner	100
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
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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 money

1 laundering scheme, where the specific purpose
2 is to hide it, and we'd have to go through
3 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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Official - Subject to Final Review

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6:3 13:3,4,14 18:23 22:3 32:16 33:19 45:15 46:4 47:1 98:13 absolutely [5] 7:23 8:1 14:8 22:1 31:20 accept [4] 10:11 25:5 30:7 77:15 accepted [1] 67:17 accusation [1] 42:18 accuses [1] 15:6 acknowledge [3] 50:15 71:17 95:6 Act [15] 6:7 7:2 9:4,5 10:20 11:19 13:11 19:22 29:21 31:16 51:8,15 54:7,12 103:23 acting [4] 17:25 91:21 101:20 102:10 action [8] 52:2 56:1,2 58:19 75:17 81:11 86:20 98:20 actions [26] 23:22 34:24 35:6,7 52:15 53:15 54:6,8 64:4,6 67:24 74:15,16 78:10 81:16 82:24 83:4 84:13,18 93:12,25 98:2 99:18,23,25 102:10 activities [8] 5:2 9:11 13:20,21,25 31:3 38:15 93:19 activity [13] 8:21 10:8 36:22 51:25 63:23 69:17 89:3,22 90:14 96:9 97:20,23 103:18 acts [7] 13:16 15:7 32:1 54:20 73:24 98:2,3 actual [4] 8:14 23:1 70:4 102:4 actually [16] 9:14 17:23 21:9,12 26:20 39:13 41:14 51:5 53:25 54:5 55:2 76:20 86:21 95:11 102:5 103:20 address [1] 97:8 addressed [1] 68:11 adjudicate [2] 44:24 67:24 adjudicator [1] 37:14 Administration [3] 41:1 60:22 86:22 admiralty [3] 3:12 11:18 19:19 admittedly [2] 66:13 82:9 adversary [1] 47:14 Advisor [1] 87:6 affairs [4] 51:24 77:21 79:23,24</p>	<p>affected [1] 62:4 affiliate [2] 15:9 26:20 affirm [1] 90:13 affirmative [1] 7:17 Africa [1] 28:9 agencies [7] 13:9,11,15 14:20 62:9 66:10 86:13 ago [1] 68:12 agree [9] 15:15 18:24 20:18 39:25 61:17 71:2,3 72:19 75:25 agreed [2] 8:4 96:8 agreement [2] 78:12 86:4 agreements [1] 85:20 ahead [2] 14:9 78:2 ahistorical [1] 41:7 aid [1] 20:13 air [2] 49:24 55:22 AKA [1] 1:4 alien [2] 19:17,18 Alito [20] 31:8 62:12 74:22 75:10, 14,20,23 76:5 77:6,18,22 78:6,15, 19,25 79:3 80:9 82:4 84:24 85:12 allegation [1] 13:23 allegations [1] 13:25 alleges [1] 102:12 allow [3] 30:17 85:10 92:4 allowed [1] 34:13 allows [2] 38:9 99:21 alone [1] 4:16 already [6] 4:23 7:22 40:10 75:7 94:24 97:15 although [7] 6:1 54:22 63:22 74:14 76:18 101:20 103:12 amenability [1] 24:15 America [1] 20:8 American [1] 67:16 Americans [1] 23:20 amicus [2] 49:2 62:18 among [1] 3:15 amount [1] 92:4 Amtrak [2] 103:8,10 analysis [2] 14:15 69:8 analytically [3] 5:15,15 50:10 ands [1] 32:17 Ankara [1] 70:12 another [11] 5:21 6:14 20:10 28:12 60:2 67:24 74:8 80:8 82:20 88:20 95:18 answer [6] 10:16 14:4 38:21 59:3, 9 97:6 answering [2] 9:16 100:5 answers [2] 84:23 90:22 antitrust [1] 44:18 anybody [1] 58:7 anyway [1] 37:2 apart [1] 28:5 apparently [2] 20:21 76:18 appeal [1] 76:6 APPEARANCES [1] 1:18 appears [2] 13:4,23 applauds [1] 4:15 applied [3] 25:6 51:8 96:9 applies [10] 30:16 31:4 44:6 54:13 63:22 71:24 77:9 89:22 90:15 96:</p>	<p>16 apply [22] 3:15 5:2 7:3 9:12 14:21 16:14 29:15 30:10 43:15 44:3 47:2 48:18 53:1 60:23 65:17 71:13, 15 72:1 76:14 89:19 97:17,24 applying [3] 38:18 56:20 96:19 appreciate [2] 56:12 70:25 approach [1] 90:4 appropriate [4] 15:17 16:11 69:12 82:24 approval [3] 57:13,20 58:10 approve [1] 80:4 Arabia [1] 100:24 area [1] 40:1 aren't [4] 8:7 27:20 49:14 99:18 argue [2] 20:4 78:4 arguing [1] 4:16 argument [37] 1:15 2:2,5,8 3:4,7 5:16 6:11,14 7:7,21,21,22 8:11 21:5 22:14,21 23:1,11 29:17 30:3,7 31:15 32:22 36:19,20 43:14 48:1 53:13 54:24 68:13 72:13 83:17 100:17 101:12,16 104:1 arguments [14] 6:11 15:21 25:5,7 29:8 36:15 43:13 44:25 49:21 55:8 56:9,16 68:5 97:3 arm [5] 25:25 42:16 62:19 101:13, 17 around [2] 28:11 64:16 aside [6] 30:8 54:2 55:6 60:8 75:6 98:22 aspect [1] 10:22 aspects [2] 11:25 57:24 assembly [1] 70:10 assert [1] 18:24 asserting [1] 95:17 assertions [1] 36:17 assets [2] 70:16 92:13 Assistant [2] 88:11,13 associated [1] 25:10 assume [8] 10:11,15 21:4 27:25 42:22 57:25 87:3 90:1 assumes [1] 11:3 Assuming [1] 11:24 assumption [2] 49:24 83:24 assumptions [1] 14:15 assurances [1] 84:17 assured [1] 23:21 attach [1] 70:16 attorney [12] 40:21 59:1,11,12,13, 19,20 61:8 74:24 87:4 88:12,14 Attorney's [2] 58:5,9 Attorneys' [4] 57:8 60:14 62:1 87:25 attributed [1] 99:19 attributes [1] 32:14 attributing [1] 35:15 authority [15] 9:23 17:18,23 18:1 23:5 27:18 32:1 58:12 64:18,20 81:10 85:16 89:5 91:8 101:9 authorize [1] 39:22 authorized [4] 12:6 21:10 89:1 100:23 authorizes [1] 3:17</p>
---	---	---	---

Official - Subject to Final Review

<p>automatically ^[1] 54:11 available ^[5] 19:7 52:2 77:1,2,3 avoid ^[3] 88:22 96:23,25 away ^[1] 22:5 axis ^[3] 38:2,2,4</p> <hr/> <p style="text-align: center;">B</p> <p>back ^[2] 11:14 14:13 18:18 19:15 27:24 33:4 40:11 43:23 44:22 63: 10 66:20,23 67:3 69:24 72:14 74: 22 78:15 79:2 89:7 96:6 103:2 backdrop ^[3] 33:14 50:2 91:13 bad ^[1] 90:2 bailed ^[1] 95:15 balance ^[1] 21:7 Banco ^[1] 63:2 Bank ^[24] 4:6 13:19,20,20 14:2 15: 5,8 20:9 41:15,22 50:7 63:2 69:24 70:8 73:11,12,17 91:10,15,16 92: 18 93:18 101:20,20 bank's ^[1] 103:13 BANKASI ^[2] 1:3 3:5 banking ^[2] 48:22 70:13 banks ^[2] 41:23 48:13 bar ^[1] 84:18 BARRETT ^[27] 18:7,10 19:12 22:4 27:23 28:20,24 29:1,5 30:1 43:6,7, 10,12 44:8,12,19 45:4,11 91:2,3 92:6 93:21 94:7,10 95:20,24 Barrett's ^[2] 32:21 100:5 barring ^[1] 74:17 bars ^[3] 4:7 8:11 84:13 based ^[1] 48:14 basis ^[3] 49:17 50:21 53:18 batten ^[1] 76:24 battles ^[1] 47:7 bear ^[1] 82:1 become ^[1] 48:8 becoming ^[1] 85:21 began ^[1] 99:12 begs ^[1] 13:16 behalf ^[10] 1:20,23 2:4,7,10 3:8 48: 2 62:7 100:18 102:13 behind ^[2] 40:11 62:9 beholden ^[1] 95:5 believe ^[5] 57:10 59:8,13 64:15 92: 21 below ^[4] 31:2 54:24 69:11 90:13 benchmark ^[1] 4:22 Berizzi ^[1] 22:23 best ^[1] 47:19 between ^[11] 20:19 39:13 62:15 64:17,23 65:2 67:1,5 68:6 97:22 102:24 beyond ^[3] 79:5,12 91:20 Biden ^[3] 20:6,18 86:17 big ^[2] 17:19 24:20 bigger ^[1] 90:3 billions ^[1] 48:12 bind ^[1] 79:8 binding ^[2] 80:22 81:9 bindingly ^[1] 37:15 bit ^[5] 13:17 53:12 57:6 101:10 102: 7</p>	<p>bizarre ^[1] 17:11 blanking ^[1] 77:23 BLATT ^[100] 1:20 2:3,9 3:6,7,9 5: 14,19,24 6:22,25 7:20 8:3,10,22 10:9,10 11:5,10,13 12:2,5,11,18, 21,23 14:6,8,17 15:2,18,20 16:1,7, 13,17,22,25 17:7,20,22 19:11,14 21:8 22:17 23:17 24:7 25:4,13,21, 24 26:10 27:23 28:7,14,22 29:4, 19 30:4,11,23 31:1,18 32:4,8,11, 20 33:13 34:25 35:8 36:12,25 37: 3 38:23 39:20 40:6,14 41:6,17,25 42:10 43:2,7 44:2,11,14 45:2,6 46: 2,6,15,17 52:23 67:19 88:18 91:4 93:22 100:16,17,19 blinking ^[2] 84:2,9 block ^[1] 77:11 blows ^[1] 31:4 blue ^[1] 29:21 borderline ^[1] 9:21 Both ^[8] 11:2 22:22 55:17 64:15 83:18 84:10 90:13 100:7 bought ^[1] 26:15 bound ^[1] 103:25 box ^[1] 87:22 branch ^[15] 10:2 18:4 23:25 37:11 41:2 47:7,9,18 49:7 66:5 74:20 80: 1,1 81:6 89:5 branch's ^[1] 17:24 Brazil ^[1] 95:2 brief ^[10] 21:22 29:21 39:3 48:15 49:2 62:18 65:5 70:5 101:23,24 briefs ^[2] 51:7 64:15 bring ^[5] 47:9 53:3 57:13 65:10 82: 24 bringing ^[1] 84:21 brings ^[2] 58:9 74:24 Britain ^[1] 40:23 British ^[2] 64:11 103:2 broad ^[7] 6:11 9:8 12:12 24:24 33: 24 43:17 55:16 broader ^[4] 8:17 52:5 65:7 98:1 broadly ^[2] 8:12 29:7 Brothers ^[1] 22:23 brought ^[9] 19:10 35:7 54:21 58: 18 61:6 75:17 86:21 94:25 98:21 Brown ^[1] 55:23 bucking ^[1] 50:25 bunch ^[1] 27:18 burden ^[2] 66:12,13 Bush ^[1] 77:24 business ^[1] 73:24 but ^[1] 32:17 buy ^[1] 46:19 buying ^[1] 95:16 bypass ^[1] 23:12</p> <hr/> <p style="text-align: center;">C</p> <p>call ^[1] 39:10 called ^[1] 48:24 came ^[5] 1:14 33:22 38:25 51:19 60:22 cancel ^[1] 6:16 canceled ^[1] 10:1</p>	<p>cancellation ^[1] 9:8 cannot ^[1] 5:2 capable ^[1] 49:7 care ^[3] 9:14 12:14 66:1 careful ^[2] 53:20,23 carefully ^[3] 49:10,11 94:12 caring ^[1] 12:24 Carnatic ^[1] 64:14 carried ^[1] 102:13 carve ^[1] 22:11 Case ^[64] 3:4 4:3 7:15 11:15 13:18 18:14,15 20:20 21:23 22:6,16,24, 25 28:16 31:25 32:11 37:6,16 47: 16 49:2,11 50:23 51:4 54:15 55: 18,22 57:1,13,17 58:14,15,23 60: 25 61:9 62:3 63:7 64:7,8,14,14 65: 9 67:7,19 69:24 70:7 72:12 73:11, 12,22 74:25 77:24 79:5,13 88:6, 24 89:11 91:19 95:2 99:3 103:7, 10,10 104:4,5 cases ^[46] 4:13,14 5:3,4,9 6:1 8:18 9:13,14 12:13 26:24 27:1,19 29:9, 15,23 30:10 31:13,17 32:12,18 33: 2,6,22 34:2,7 38:3 46:18 49:12,25 52:3,18 53:2 56:20 65:24 66:2,12 67:6,17 74:9 82:23 85:7 88:8 94: 24 95:11 98:24 cataclysm ^[2] 48:24,25 cataclysmic ^[1] 9:21 category ^[1] 39:19 centered ^[1] 83:24 century ^[2] 22:22,24 certainly ^[2] 85:13 88:9 certainty ^[1] 23:21 certiorari ^[1] 16:18 CFR ^[1] 41:18 chain ^[8] 88:2,3,3 change ^[1] 92:1 changed ^[2] 21:12 100:25 changing ^[2] 65:19,23 charge ^[1] 42:25 charged ^[1] 53:8 checked ^[2] 103:15,16 CHIEF ^[32] 3:3,9 11:15 25:4,19,22 26:5 31:6 32:19 36:7 43:5 45:12 47:22 48:3 50:4 62:11,13,22 63: 14,18 69:25 78:21,23,24 82:25 86: 8 91:1 96:3 100:2,13,16 104:3 China ^[1] 53:4 Chinese ^[1] 54:19 Chinese-owned ^[2] 82:18,21 choice ^[1] 4:23 choose ^[1] 26:6 Circuit ^[9] 11:2,8 14:14 16:12 28: 16 54:23 68:10 69:7 72:15 Circuit's ^[1] 90:4 circumstance ^[2] 76:15 96:10 circumstances ^[7] 23:24 30:6,25 53:25 72:11 76:15 77:3 cite ^[2] 31:21 39:2 cited ^[2] 64:15 70:5 cites ^[1] 101:24 cities ^[1] 45:7 city ^[5] 9:22 31:5 58:6 63:2 100:24</p>	<p>civil ^[35] 4:11,13 5:4 6:3 8:9,13,18 9:6,17 10:20,22,22 12:13 24:1,9, 18 29:9,15 33:2,3,5,11 34:1 35:6 37:19 39:4 46:18 49:13 55:14,18 56:1,6 70:6 92:21,23 claim ^[5] 6:20,25 18:18 82:10,11 claiming ^[1] 71:20 claims ^[4] 24:15 33:10 35:21 44: 24 clause ^[7] 27:5 77:8 79:9,19 80:23 85:1,11 clear ^[15] 3:14 18:10 35:2 49:19 52: 7 54:22 55:1,12 67:21 70:1,7 74:8 85:3 98:25 101:24 cleared ^[1] 22:5 clearinghouse ^[1] 48:8 clearly ^[10] 27:12 33:2,11 73:10 74: 4,16 78:17 81:25 85:19 86:5 clever ^[1] 44:20 codify ^[2] 24:1 33:15 codifying ^[1] 45:25 Cokes ^[1] 38:12 collects ^[1] 13:22 colloquy ^[1] 91:4 come ^[6] 10:24 53:5 76:9 78:15 79: 18 103:21 Comercio ^[1] 63:3 comes ^[2] 25:7 79:17 coming ^[2] 42:6 88:23 commercial ^[26] 4:20 5:1,8 8:20 9: 11 10:7 25:8 31:3 36:22 38:1,5,8, 14 43:21 60:9 63:23,25 69:17 89: 3,21 90:14 93:19 96:9 97:20,22 103:18 committed ^[3] 15:4,12 42:16 committing ^[1] 15:7 common ^[56] 4:16,21 7:3,11 10:24 11:4 12:4,25 14:22 15:16 17:1 31: 14 34:21 36:5,13,23 38:4 43:22 44:4,5 45:15 46:5,23 49:17,20,22 50:2 52:16 58:17 60:7 64:11,25 65:12,12,14,20,23 66:9,16 68:15 69:10,14 71:12,13 75:22 80:18 96: 13,16,25 97:8,19,23,25 101:11 102:16,16 Commonwealth ^[1] 75:18 company ^[3] 26:15 63:12 64:18 comparable ^[1] 28:8 compare ^[3] 64:13 70:3,18 compelling ^[1] 43:13 complaint ^[2] 9:16 14:1 complete ^[1] 56:18 completely ^[4] 31:17 46:22 96:23 99:1 complicated ^[1] 54:17 comply ^[1] 59:23 component ^[1] 75:1 comprehensively ^[1] 35:12 comprising ^[1] 98:3 concealing ^[1] 82:14 concede ^[2] 14:25 69:8 conceivable ^[1] 17:4 concepts ^[1] 21:24 conceptualize ^[1] 39:18</p>
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Official - Subject to Final Review

<p>concern ^[1] 88:6</p> <p>concerned ^[9] 21:21 23:19 56:1 71:7 79:16 81:25 84:3 86:1 93:24</p> <p>conclusive ^[1] 81:5</p> <p>condition ^[1] 92:15</p> <p>conditions ^[1] 19:5</p> <p>confer ^[1] 8:14</p> <p>conferring ^[2] 45:22,22</p> <p>conflated ^[1] 5:22</p> <p>confused ^[2] 80:19,20</p> <p>Congress ^[67] 4:12,24 9:13,25 10:6,7 12:6,14 18:2 19:24 20:2 21:3,9,12 23:4,13,19 24:4,13,17,22,23 26:10 27:3,8,11,14 33:20,23 34:6,11,12,19 35:12,15,16 39:17,17,21,22,23,24 40:3,4,9,16 42:22 45:19,24 46:22 51:14 54:4 56:4 65:16,18,19 66:11 79:16 81:24 83:6 84:3 85:25 88:25 89:7,13 100:22 101:6</p> <p>Congress's ^[2] 26:12 56:7</p> <p>congressional ^[3] 17:25 27:18 101:8</p> <p>consequences ^[6] 30:14,15 53:20,22 93:9,22</p> <p>consequentialist ^[1] 43:13</p> <p>consider ^[6] 20:17 21:1 69:7,11 71:15 94:13</p> <p>consideration ^[2] 15:16 68:13</p> <p>considerations ^[1] 21:7</p> <p>considered ^[7] 23:23 49:10,11 52:20 82:22 94:5 95:8</p> <p>consistent ^[1] 74:12</p> <p>consistently ^[1] 66:14</p> <p>constitutes ^[2] 60:9,10</p> <p>Constitution ^[9] 17:14 40:3 77:9 79:20 80:12,14 85:1,6,9</p> <p>constitutional ^[2] 21:17 85:15</p> <p>construe ^[1] 11:17</p> <p>consult ^[1] 88:5</p> <p>consultation ^[1] 62:3</p> <p>contains ^[1] 88:13</p> <p>contemplate ^[1] 78:13</p> <p>contemplated ^[4] 21:12 22:1 40:18 51:14</p> <p>contemplates ^[1] 73:21</p> <p>contend ^[1] 96:12</p> <p>contested ^[1] 68:9</p> <p>contesting ^[3] 54:25 68:2 71:17</p> <p>context ^[7] 6:3 23:16,18 24:1 29:9 92:25 102:23</p> <p>contextual ^[4] 55:8 56:9,16 57:2</p> <p>contextually ^[1] 51:13</p> <p>Continue ^[1] 56:24</p> <p>continuous ^[1] 9:4</p> <p>contracting ^[1] 64:20</p> <p>contradicts ^[1] 4:21</p> <p>contrary ^[5] 5:5 77:17 81:11 97:15 99:1</p> <p>control ^[7] 25:16,23 26:16 35:19 37:11 70:8 94:15</p> <p>controlled ^[4] 28:3,5 75:3 94:18</p> <p>convict ^[5] 3:18 12:7 18:3 20:3 100:23</p>	<p>convicted ^[4] 12:19 37:23 39:15 40:19</p> <p>conviction ^[1] 21:14</p> <p>cooperate ^[1] 92:8</p> <p>copy ^[2] 31:16,16</p> <p>core ^[1] 71:12</p> <p>corporation ^[13] 48:7 54:20 67:2 72:12 73:20,21,22,25 75:2 82:18,21 92:1 103:4</p> <p>corporations ^[21] 20:8 36:22 38:20 48:19 51:10 52:15 63:8 66:8 68:7 70:1 72:4 82:14 91:22 93:11,13 94:1,22 95:13 99:16,22,24</p> <p>correct ^[12] 7:20 8:23 14:8 16:21 31:18,20 32:10 60:25 86:14,15 89:23 90:9</p> <p>corresponding ^[1] 53:10</p> <p>couldn't ^[5] 50:9 64:19 67:23 83:7 95:17</p> <p>counsel ^[10] 15:13 23:2 47:23 48:24 52:17,19 57:4 87:6 100:14 104:4</p> <p>countries ^[1] 9:22</p> <p>countries ^[7] 18:23 27:25 31:12,14 41:8 49:1 93:25</p> <p>country ^[21] 9:23,25,25 13:8 20:3 21:15 24:2 26:15,19 27:10 28:12,12,22 39:4,14 50:6 57:9 67:25 86:4 91:12 95:18</p> <p>country's ^[2] 28:18 71:5</p> <p>county ^[1] 31:5</p> <p>couple ^[15] 29:20 50:11,19 52:5 70:5 72:17 80:7 82:16 83:5 86:10,11 91:19 92:11 94:2 98:16</p> <p>course ^[2] 63:24 66:10</p> <p>COURT ^[78] 1:1,15 3:10 5:17 6:1,13 7:13 11:15 16:20 17:11 18:2 19:6,22 20:2 21:10 22:7 24:21 26:11 30:22 31:5,24 36:4 44:6,16 46:24,25 47:3,4,5 48:4 49:18 50:20,21,24 52:1 53:8,15,15 61:24 62:24 63:4,7 64:8 66:17 67:7 69:11 71:14 73:8,21 74:5,7,9 75:24,24 76:3,8,22 77:2,4,15 79:13,21 80:25 81:3,20 83:4,12,20 84:24 85:10 90:11 96:24 97:14 98:22 99:5,9 101:17 103:12</p> <p>Court's ^[3] 17:17 69:23 75:7</p> <p>courts ^[42] 3:17 4:10 5:10 6:9 7:12 12:6 24:22 27:12 28:17 30:16,19 35:22 40:17 42:24 43:18 49:6,6 54:11 55:15 61:25 64:2,12 67:16,23 71:8 73:25 76:7 77:4 81:1,2,4,20 83:10 84:21 85:13 90:13 98:9 100:23 101:4 103:1,24,24</p> <p>cover ^[2] 31:13 51:11</p> <p>covered ^[1] 73:10</p> <p>covers ^[1] 51:10</p> <p>COVID ^[1] 53:4</p> <p>created ^[6] 4:12 25:14 26:3,18 56:4 73:12</p> <p>creative ^[1] 53:5</p> <p>crime ^[7] 15:5,12 19:24 42:16,25 48:9 53:8</p>	<p>Crimes ^[3] 51:8 52:10 82:15</p> <p>criminal ^[66] 3:20 4:7,14,17 5:2,8 6:16 7:5,9 9:12 11:7 13:5 15:7 21:13 22:2 24:5 30:2,10 31:13,17,22 32:17 33:3,19,22 34:8,24 35:7 37:16,19 38:18 39:9,15 41:3 42:1,20 43:17 45:16,16 46:4 47:2 53:1 54:6,8 55:14,18 56:1,20 58:19 67:17,23 74:25 75:17 82:24 83:12 84:18 92:3,12 93:25 96:1,14,19 97:17 98:14,20 102:18</p> <p>criminally ^[1] 31:25</p> <p>cry ^[1] 10:4</p> <p>crystal-clear ^[1] 69:23</p> <p>Cuba ^[5] 63:3 69:24 103:7,10,13</p> <p>Cuban ^[6] 73:11,12,13,14,15,16</p> <p>culminating ^[1] 77:1</p> <p>customary ^[9] 48:17 50:16 65:14 79:7 80:22 81:8,12 85:17 99:2</p> <p>cut ^[4] 49:14 56:12 83:17,19</p> <p>cuts ^[1] 57:5</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C ^[3] 1:11,20,23</p> <p>damages ^[1] 99:21</p> <p>danger ^[1] 60:11</p> <p>dangerous ^[1] 5:6</p> <p>date ^[2] 66:20,23</p> <p>dates ^[2] 63:9 67:2</p> <p>day ^[2] 42:23 53:16</p> <p>de ^[1] 63:3</p> <p>deal ^[7] 11:7 42:24 83:8 84:8 95:9,13 101:9</p> <p>dealt ^[1] 38:3</p> <p>debates ^[1] 21:17</p> <p>debts ^[2] 103:11,13</p> <p>decades ^[1] 82:8</p> <p>decide ^[13] 7:9,13 11:12 27:16 37:9 42:20 47:13,19 49:12 50:24 79:13 94:19 99:10</p> <p>decided ^[4] 47:14 89:15,18 97:15</p> <p>deciding ^[1] 72:11</p> <p>decision ^[7] 11:2 17:24 44:15 56:7 61:15 76:8 90:13</p> <p>declaration ^[3] 23:4 101:25,25</p> <p>declarations ^[1] 70:6</p> <p>decline ^[1] 74:11</p> <p>declines ^[1] 74:11</p> <p>deeply ^[1] 71:9</p> <p>defend ^[1] 70:14</p> <p>defendant ^[1] 57:14</p> <p>defendants ^[1] 22:12</p> <p>defense ^[3] 7:17 19:9 38:11</p> <p>defer ^[1] 50:24</p> <p>deference ^[7] 40:8 67:10 72:20 73:7 99:1,9,10</p> <p>deferred ^[1] 26:11</p> <p>deferring ^[1] 36:16</p> <p>defers ^[2] 37:15,15</p> <p>define ^[1] 4:24</p> <p>defines ^[1] 4:4</p> <p>defining ^[1] 12:25</p> <p>definitely ^[1] 15:22</p> <p>definition ^[4] 3:25 25:13 63:25 65:</p>	<p>7</p> <p>definitively ^[1] 62:25</p> <p>Del ^[1] 63:3</p> <p>deliberations ^[1] 61:5</p> <p>denigrate ^[1] 58:7</p> <p>deny ^[1] 65:9</p> <p>Department ^[9] 1:22 15:11 26:21 35:18 38:11 61:13 62:5,6 102:4</p> <p>Department's ^[1] 37:8</p> <p>departments ^[2] 62:5 86:12</p> <p>deprives ^[1] 44:1</p> <p>depriving ^[1] 44:23</p> <p>Deputy ^[1] 1:22</p> <p>derogation ^[1] 58:17</p> <p>described ^[1] 87:1</p> <p>describing ^[1] 3:12</p> <p>designate ^[1] 63:6</p> <p>designated ^[2] 25:15 27:3</p> <p>designates ^[1] 26:12</p> <p>designation ^[1] 26:2</p> <p>destabilizing ^[1] 93:8</p> <p>detail ^[1] 65:6</p> <p>details ^[1] 87:12</p> <p>deter ^[2] 93:10,12</p> <p>determination ^[4] 63:19 77:21 96:18 98:11</p> <p>determinations ^[1] 40:1</p> <p>determine ^[1] 103:22</p> <p>detour ^[1] 88:11</p> <p>develop ^[3] 7:12 64:2 102:16</p> <p>developed ^[4] 6:3,5 37:25 38:1</p> <p>developing ^[2] 38:7 99:4</p> <p>dictated ^[1] 14:2</p> <p>difference ^[2] 50:10 67:1</p> <p>differences ^[1] 97:22</p> <p>different ^[3] 21:24 28:19 83:5</p> <p>difficult ^[2] 88:23 92:25</p> <p>difficulty ^[1] 6:19</p> <p>dignity ^[1] 39:6</p> <p>dike ^[1] 43:24</p> <p>diplomat ^[1] 19:25</p> <p>diplomats ^[2] 19:23 42:24</p> <p>direct ^[1] 80:15</p> <p>directed ^[1] 66:4</p> <p>direction ^[1] 51:2</p> <p>directions ^[1] 83:19</p> <p>directs ^[1] 13:19</p> <p>disagree ^[3] 92:2,17 93:17</p> <p>disagree ^[5] 11:24 16:5 18:12 29:2 30:1</p> <p>disagreeing ^[1] 14:16</p> <p>disaster ^[2] 35:3,6</p> <p>disavow ^[1] 50:12</p> <p>discipline ^[1] 84:25</p> <p>discuss ^[1] 87:12</p> <p>discussed ^[1] 42:4</p> <p>discussion ^[1] 52:23</p> <p>discussions ^[1] 20:21</p> <p>disinterested ^[1] 49:1</p> <p>dismiss ^[2] 58:12 59:12</p> <p>dismissal ^[2] 54:14 78:14</p> <p>dismissed ^[1] 59:18</p> <p>displace ^[1] 97:18</p> <p>displaces ^[1] 96:16</p>
---	--	---	--

Official - Subject to Final Review

<p>dispositive [4] 47:13 98:11,18,19 dispute [4] 3:19 33:18 52:6 76:17 disputes [1] 103:8 distinction [6] 39:13 62:14 64:22 67:5 98:23 102:23 distinctions [1] 50:20 distinguish [2] 25:7 64:17 district [10] 5:17 12:6 19:6 20:2 28: 16 60:24,25 70:6 74:24 101:16 dividing [1] 60:8 doctrine [3] 28:5 37:25 51:24 doing [15] 13:15 14:2 17:15,16 29: 14 33:11 41:25 42:12 49:8 66:15 82:8,10,12 92:18 93:18 DOJ [1] 58:11 dollars [1] 48:12 domestic [3] 19:25 62:25 68:16 done [5] 23:11 34:14 35:8 52:9 83: 11 doubt [1] 24:17 down [7] 10:24 24:24 29:20 41:22, 23 76:24 84:19 drama [2] 57:7,7 dramatic [1] 65:21 draw [2] 50:20 98:23 drawing [1] 62:14 drop [1] 60:23 drops [1] 48:15 due [4] 37:13,17 40:8 47:11</p> <hr/> <p style="text-align: center;">E</p> <p>each [1] 92:24 earlier [7] 39:17 62:16 67:18 76:16 82:18 86:11 98:24 East [3] 63:12 64:18 67:6 easy [1] 84:7 economic [2] 54:20 82:19 effect [1] 92:16 effort [1] 20:22 either [5] 8:4 39:10 46:19 69:5 82: 6 elected [2] 20:15 74:24 elections [1] 48:9 embargoed [1] 48:12 embarrass [1] 41:1 embassy [1] 34:16 embezzlement [1] 52:10 embodied [1] 67:8 emergency [3] 53:18 76:11,25 empirical [1] 43:19 empirically [1] 44:7 enable [2] 92:17 94:20 enacted [2] 54:7 65:19 encompass [1] 55:17 end [4] 53:16,16 96:11 99:13 endeavor [1] 50:18 enforce [1] 47:3 enforceable [1] 39:5 engage [3] 38:14 41:9 83:12 engaged [1] 36:22 engages [1] 13:24 engaging [2] 82:19 93:20 enjoy [1] 28:3 enough [6] 14:5,11 27:2 32:14 69:</p>	<p>19 78:9 ensure [2] 51:24 66:1 ensuring [1] 80:2 entering [1] 78:12 enterprise [1] 25:8 entertain [1] 55:16 entertaining [1] 25:1 entirely [3] 54:22 55:1 89:8 entities [9] 23:20 43:21 48:20 63:9 70:2 83:13 99:18 102:24 103:19 entity [4] 102:1,5 103:8,16 environmental [1] 45:8 envisioning [1] 54:11 equality [1] 3:14 equally [1] 83:9 equivalent [1] 76:21 Erdogan [1] 42:5 ERIC [3] 1:22 2:6 48:1 espionage [2] 54:20 82:19 ESQ [3] 2:3,6,9 ESQUIRE [1] 1:20 essence [1] 89:1 essentially [3] 48:15 92:17 98:18 established [3] 50:22 51:1 73:23 evading [1] 48:11 even [35] 17:14,15 21:22 25:9,25 30:22 31:2 32:24 34:13 35:13 36: 3 37:18 39:5 40:4 42:23 44:13 54: 9,13,16,21 64:11 66:8 70:14 72: 18,21 73:19 78:8,8 85:21 95:4,22 98:22 99:24 101:5 103:3 everyone [1] 84:7 everything [4] 22:4 31:2 33:25 57: 3 evidence [1] 67:14 Ex [1] 74:7 exact [1] 75:8 Exactly [5] 23:17 49:25 52:4 77:24 94:16 example [9] 56:3 58:18 64:6,17 69: 17 78:11 85:3,19 95:15 examples [1] 88:8 except [4] 24:7 45:23 46:13 103:2 exception [10] 5:2 8:20 9:12 63: 23 69:17 89:22 90:14 96:9 97:20, 23 exceptions [10] 5:4 9:1,7 10:8 29: 15,24 33:5 46:1,7,19 Exchange [11] 3:11 4:2 5:25 11: 14 18:13 21:23 22:25 67:19 69:25 70:12 74:13 exclude [1] 31:17 exclusive [1] 79:23 exclusively [3] 31:14 63:6 64:9 excuse [2] 20:11 56:2 executive [43] 4:15,17 5:11 7:7 10: 2,4 17:24 18:4,22 23:25 36:17 37: 6,10 41:2 42:19,22 47:7,9,17 50: 13,25 61:14 66:5,12 67:10 72:20 74:17 77:16 78:12 79:25 80:1 81: 6 82:23 85:20 86:4,12 89:5,12 91: 11 98:10,25 99:3 101:3 executive's [1] 91:6 executives [1] 91:10</p>	<p>exempt [1] 13:9 exercise [3] 17:13,17 74:11 exercised [3] 70:8 73:5 79:25 exercises [1] 59:5 exercising [1] 99:16 exhausted [1] 16:3 exist [1] 6:17 existed [3] 24:19 46:5 102:17 exists [2] 51:24 88:25 expect [4] 45:19 61:21 74:19,20 expertise [2] 21:6,8 explain [1] 91:7 explicitly [1] 31:13 Export-Import [2] 4:6 20:9 exports [1] 102:14 express [1] 101:8 expressly [2] 10:1 101:6 extend [1] 85:19 extent [3] 52:20 81:7 94:21 Exterior [1] 63:3 extradite [1] 91:24 extrajudicial [1] 41:9 extraordinary [1] 48:6 extreme [3] 30:15 41:16,17</p> <hr/> <p style="text-align: center;">F</p> <p>face [7] 6:7,15 9:17 11:16 22:22 23:9 30:16 fact [5] 31:11 63:10,16 64:22 66:3 factor [1] 57:2 factually [1] 68:9 fall [1] 28:4 falling [1] 29:23 false [1] 42:19 fashion [1] 65:21 favor [3] 54:1 83:19 89:16 FDIC [1] 26:25 features [1] 73:19 federal [33] 3:17 4:10 6:9 7:25 18: 2 21:10 26:1,13 27:1,12 30:22 38: 17,18 40:17 41:3 44:5 48:8 49:9 51:22 53:7,17 60:1 63:4 77:8 78: 10 79:22 80:4 81:2 82:3 85:1,15 88:5 100:23 Federalist [1] 21:16 FedEx [1] 34:16 feel [1] 27:10 FEIGIN [113] 1:22 2:6 47:24 48:1,3 50:5,8,11 52:4,18 53:21 55:4,21 56:10,17,21,22,25 57:10,15,21 58: 3,13,22 59:1,5,7,13,18,23 60:5,12, 18 61:1,4,16,22 62:2,21,24 63:21 65:3,17,22 67:12 68:1,18,22 69:2, 13 70:18,21,24 71:16,23 72:1,3,7, 16,24 73:2 75:5,12,16,21 76:2,10 77:13,20 78:3,8,17 79:2,10 80:24 82:7 83:14,18 84:7 85:2,18,24 86: 3,15,18,20 87:11,17,20 89:14,18, 21,24 90:6,11,18,21,24 91:17 92: 10 94:2,9,16 95:21,25 96:15,21 97:9,12 98:6,15 100:8,15 few [2] 36:10 91:18 fight [1] 11:23 fighter [1] 20:10</p>	<p>fighting [2] 11:22 15:14 figure [4] 28:16 35:25 42:11 101:5 file [2] 58:22 75:22 filed [1] 70:6 final [3] 47:5 76:7,8 Finally [2] 5:1 9:20 Finance [1] 15:10 financed [1] 73:14 fine [3] 75:25 90:15 97:19 finer [1] 92:22 finger [1] 43:24 finish [2] 55:25 60:13 firing [1] 59:18 first [19] 6:11 9:4 17:2 18:1 19:24 20:2 29:25 37:1,3 40:20 46:8 54: 13 58:13 63:2 79:10 91:18 92:11 95:6 102:18 fit [1] 88:24 five [2] 38:25,25 fixes [1] 44:17 flagging [1] 64:8 flesh [1] 72:15 fleshed [1] 64:1 focus [1] 22:12 focused [2] 22:15 24:4 follow [3] 10:12 55:20 71:11 follow-ups [1] 86:11 followed [1] 57:16 following [3] 29:23 57:23 58:1 follows [1] 72:10 Footnote [2] 31:21 37:7 force [2] 3:16 92:1 foreign [72] 3:13 4:4,9,24 5:7 6:6, 13 7:2,10 9:2,5 10:19 12:7,13,18 15:6 17:5 18:22 20:3,11 22:2 23: 20 24:2 25:2 26:15,17,19 27:9,19 30:21 37:21 38:19 39:5,14 40:8 42:5,13,23 45:17 48:7,18 51:23 52:8,14 53:11 54:2,7,12 64:6 65:8 66:22 72:3,12 74:17,25 75:1,3,7, 11 76:21 77:21 79:23,24 80:15 81: 4,17 91:21 93:25 100:6,9 101:7 103:4 forfeiture [1] 92:13 forgive [1] 88:3 form [2] 25:12 73:9 formal [4] 57:22 58:1 60:16,18 formula [1] 61:18 forward [2] 34:2 44:10 found [1] 90:14 founding [15] 12:8 19:15 21:11 63: 10,11 64:16 66:21 67:3,14,22 71: 4,19,22 82:12 101:1 four [1] 66:18 fourth [1] 67:9 framework [1] 88:21 frankly [3] 67:8 93:12 97:16 fraud [2] 24:15 35:21 free [1] 53:2 freedom [1] 20:9 frees [2] 38:8,8 French [3] 31:24 64:7 67:7 frolic [1] 88:10 front [1] 34:6</p>
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Official - Subject to Final Review

<p>FSI ^[1] 10:23 FSIA ^[5] 4:3,7 6:15 8:4,5,6 9:3 11:4,7 14:21 16:6,13 21:5 22:20 23:13 25:21 29:6,20,21,25 31:4,12 33:15 35:2 43:15 44:1,3,21 50:1 54:25 63:23 64:22,25 65:7,19 66:4 67:8 69:8,13 76:13 81:3,25 83:7,25 89:6,19 96:7,15,19 97:7,16,24 99:20 FSIAs ^[1] 28:8 full ^[1] 87:1 function ^[1] 48:22 functions ^[5] 48:21 67:6 69:16 73:4 99:17 Fund ^[8] 55:1 101:23 102:1,2,3,3,4,6 fundamental ^[3] 21:17 24:9 71:2 funneling ^[1] 48:11 further ^[3] 10:18 13:13 74:6</p>	<p>48:7,19 52:14 54:19 72:4 82:14 93:11 94:22 99:15,22 governments ^[2] 38:13 93:13 grant ^[4] 8:25 12:12 29:10 30:2 granted ^[3] 24:24 78:18 101:6 grants ^[4] 5:3 24:10 43:17 46:17 gravamen ^[1] 98:4 great ^[1] 95:13 greater ^[1] 3:15 ground ^[2] 7:11 68:19 Group ^[1] 55:22 grow ^[1] 88:4 guardrails ^[1] 4:12 guess ^[14] 38:9 45:17 47:4 71:1,3 73:5 84:16,16,20 96:7 97:4 101:3 103:2,23 guidance ^[2] 69:1 103:1 guy's ^[1] 40:22</p>	<p>Hopefully ^[1] 28:19 hostile ^[2] 91:21 92:7 hot ^[1] 81:17 hour ^[1] 68:12 House ^[1] 87:6 however ^[1] 94:12 huge ^[4] 17:21,22 23:13 39:12 hundred ^[1] 73:13 hundreds ^[1] 38:23 hypothetical ^[1] 15:14 hypothetically ^[1] 93:16</p>	<p>indictment ^[5] 15:3 42:14 101:19,21 102:12 indicts ^[1] 101:19 indifferent ^[1] 35:17 indistinguishable ^[1] 62:19 individual ^[2] 60:1 88:11 individuals ^[4] 91:9,15,18,19 inexplicable ^[1] 9:19 inference ^[3] 80:12,14 83:10 inferences ^[1] 83:5 inflate ^[1] 102:14 information ^[1] 82:22 informative ^[1] 63:24 informs ^[1] 49:25 initiate ^[1] 60:3 initiating ^[2] 93:25 94:13 instance ^[2] 5:22 99:6 instances ^[1] 52:9 instead ^[2] 34:16 83:24 instructive ^[1] 81:14 instrumentalities ^[24] 3:25 4:5,5,25 13:10,12,15 14:20 20:5,7,12 25:2 27:2 38:3 41:11 43:21,25 62:16 64:23 65:20 95:10,12 102:9,25 instrumentality ^[14] 4:3,21 7:6 25:14 26:1,13,17 34:10 38:2 55:2 73:1,6 76:20 102:19 insult ^[1] 60:2 insulting ^[1] 42:1 interest ^[2] 51:23 80:21 interesting ^[1] 79:4 interfering ^[1] 48:9 interlocutory ^[1] 53:18 internal ^[2] 61:5 87:12 international ^[25] 3:22 4:22 21:18 28:1 31:24 33:16,17 39:7 48:17 50:16 63:5 65:14 68:16 69:9 71:10,14 79:7 80:22 81:8,12 85:17 99:2,4 102:15,22 interpretation ^[1] 50:1 interrupt ^[2] 59:17 70:20 invent ^[1] 49:8 inventing ^[1] 49:18 involve ^[2] 38:13 87:4 involved ^[7] 13:21 20:23 34:22 62:4 64:8 92:5,13 involvement ^[1] 34:24 involves ^[1] 82:21 involving ^[1] 27:1 Iran ^[2] 20:22 41:18 isn't ^[11] 14:12 59:3 63:25 69:11 72:9 80:20 83:6 88:9,9 98:12 99:13 isolation ^[1] 56:19 Israel ^[2] 28:9 100:23 issue ^[5] 14:13 69:20 95:11 96:13 102:6 issued ^[1] 23:13 issues ^[1] 20:17 it'll ^[1] 103:23 itself ^[14] 37:9 38:10 50:7 55:2,11,12 56:13 62:20 91:12 96:25 98:21 99:20,23 102:12</p>
G			
<p>gander ^[1] 95:8 Garamendi ^[4] 52:3 78:13 85:4 86:6 gathered ^[1] 29:4 gave ^[4] 10:19 18:2 23:4 42:22 gazillion ^[1] 15:7 General ^[18] 1:22 3:11 11:17 27:21 40:17,21,25 59:2,11,14 68:14,16 69:9 70:9 71:13 81:15 87:4 102:2 generality ^[1] 17:10 generally ^[2] 51:11 91:25 gets ^[8] 19:10 27:16 42:20 47:9 61:24 63:1,6 102:11 getting ^[3] 20:23 58:10 94:11 give ^[7] 22:19 40:7 81:1,4 97:25,25 98:10 given ^[10] 14:13 40:16 41:7 53:19,23 62:3 84:5 91:7,10 97:13 gives ^[1] 13:2 giving ^[2] 60:3 103:1 GM ^[2] 95:16,17 goose ^[1] 95:7 GORSUCH ^[38] 15:13,19 16:2 28:21,25 30:5,19,24 36:8 52:17,19 55:3,5 56:8,11 67:12 68:8,20,23 69:4 70:17,19,22,25 71:21,25 72:2,5,8 83:2,3,16 84:6,9 85:5,23 86:2,7 Gorsuch's ^[1] 88:18 got ^[8] 6:2 11:1 16:3 19:22 22:24 56:14 86:2 100:11 governing ^[1] 33:9 government ^[44] 7:25 13:2,11,18,19 14:1 15:4 23:1,2 26:3 27:16 29:12 33:18 34:7 37:21,25 38:6,18 39:5 42:15 49:10 51:22 58:16 61:5 62:20 73:14,15,16,23 74:21 78:10 79:22 80:4 88:6 91:8,14,21 92:7 95:15 99:19 101:2,12,19 103:21 government's ^[4] 4:20 35:23 104:1,1 government-owned ^[1] 38:20</p>	<p>H haling ^[1] 71:8 HALK ^[2] 1:3 3:4 HALKBANK ^[3] 1:4 62:18 101:12 hamstrung ^[1] 8:8 handle ^[1] 66:6 handling ^[1] 66:13 hands ^[2] 14:23 40:11 happen ^[6] 26:8 35:19 74:23 75:4,6 81:18 happened ^[7] 28:15 31:3 81:22 82:5,6 85:22 93:15 harm ^[1] 90:5 hatches ^[1] 76:24 head ^[1] 15:6 hear ^[3] 3:3 20:5 49:3 hearing ^[1] 49:3 hearsay ^[1] 60:21 heavily ^[1] 32:22 held ^[4] 3:11 62:25 63:4 64:5 help ^[1] 56:14 helpful ^[1] 63:24 hide ^[1] 93:2 high ^[2] 37:4,9 highest ^[2] 20:19 31:24 historical ^[2] 51:6 79:14 historically ^[1] 83:11 history ^[8] 4:22 17:2 32:15 52:10 67:10 71:6,19 102:21 hit ^[2] 15:3 46:8 Hoffman ^[3] 32:11 37:6 98:17 hog ^[1] 101:14 hold ^[2] 53:1 96:22 holding ^[5] 5:25 6:2 31:2 44:22 84:18 holds ^[1] 43:23 Honor ^[44] 51:6 52:5 55:21 56:17 57:16,21 58:3 59:8 60:12 61:1,4,16,22 62:2 65:3 68:1,18 71:16 72:16 75:5,17 76:2,10 77:13 78:5 79:10 80:24 82:7 83:14 85:2,18 86:16,18 87:11,18 89:14 90:6,19 91:17 92:10 94:3,18 96:21 98:15 hook ^[1] 30:13 hope ^[1] 58:6</p>	<p>I IA ^[1] 10:23 idea ^[3] 49:19,22 50:13 identified ^[2] 25:9 65:13 identify ^[1] 23:24 ifs ^[1] 32:17 imagine ^[1] 91:21 immemorial ^[1] 17:4 immune ^[3] 4:9 6:8 24:2 Immunities ^[6] 6:7 7:2 9:5 10:20 54:7,12 immunity ^[103] 4:17,18,19 5:8,9,16,23 6:4,4,20,25 7:4,9,10,15,15,21 8:1,14 10:1,7,14,17,25 11:4 12:4,22 13:1,4,5,14 14:22 15:16 17:2,7 18:23 19:1,5,9 21:21 22:3,5,16,19 23:12,24 24:5,11,24 27:5,24 28:2,5 29:11 32:17 33:4,5,19,24 34:21 35:2,13 36:5,14,18,23 37:25 38:7 43:22 44:4,5 45:15,22,23 46:5,13 47:1,15,17 49:8,18,20,23 50:2,22 52:16,22 56:5 58:18,23 66:6 67:20 69:10 71:12 75:22 83:22 89:2,3 96:10,13,16 98:14 101:15 immunity-conferring ^[1] 8:15 impact ^[1] 52:21 implausible ^[1] 5:6 implications ^[3] 21:2 65:8 66:1 implicit ^[1] 49:23 important ^[4] 26:2 37:8 80:21 91:5 impose ^[2] 92:9,22 imposed ^[2] 80:11 92:14 impressed ^[1] 41:7 impression ^[1] 87:21 inappropriate ^[1] 16:16 include ^[4] 4:4,24 27:21 84:1 included ^[1] 54:8 including ^[4] 27:19 48:9 78:11 93:6 inconceivable ^[1] 20:1 incongruity ^[1] 53:13 incorrect ^[1] 96:22 incorrectly ^[1] 97:16 incredibly ^[1] 92:25 independent ^[3] 3:15 6:10 16:17 independently ^[2] 4:7 99:10 India ^[4] 63:12 64:18 67:6 103:3 indications ^[2] 87:3 89:7 indict ^[2] 61:9 101:14 indicted ^[2] 17:5 50:6</p>	

Official - Subject to Final Review

<p style="text-align: center;">J</p> <p>JACKSON [21] 18:5,9 21:19 23:15, 18 45:13,14 46:3,11,16 47:20 72: 9,22,25 96:4,5,17 97:4,10 98:5,7</p> <p>jail [1] 37:21</p> <p>Janet [1] 15:11</p> <p>January [1] 1:12</p> <p>joined [1] 49:2</p> <p>judge-made [1] 41:2</p> <p>judgment [6] 26:12 50:14 62:23 63:1 82:23 102:3</p> <p>judgments [1] 49:9</p> <p>judicial [2] 23:3 73:9</p> <p>judiciary [5] 11:19 19:21 37:11 47: 12 51:15</p> <p>juridical [7] 48:20 63:9 70:2 99:17 102:1 103:8,15</p> <p>juridically [1] 103:9</p> <p>juries [3] 24:14 35:9,20</p> <p>jurisdiction [59] 3:12 4:8,10 5:3, 18,20,23 6:2,8,9,12,16,24 7:1,19, 23 8:12,14,25 9:7,9,24 10:14,16 11:17 14:19 16:19 18:2,14,15,17 19:20,22 20:3 21:20 22:8,18,21 23:9 24:11 25:1 27:13 28:4,6 29: 23 30:3,20 38:19 40:17 43:17 44: 1,23 46:10,18 55:15 74:1,10,14 101:6</p> <p>jurisdictional [11] 5:25 11:17,18 12:1 19:17 22:14,25 30:8 33:1 67: 20 74:4</p> <p>jurisdictional-stripping [1] 8:16</p> <p>jurors [1] 42:11</p> <p>jury [2] 39:15 42:13</p> <p>Justice [267] 1:23 3:3,9 5:14,21 6: 18,23 7:14 8:2,7,19 10:9,11,13 11: 6,11,15,21 12:3,9,16,20,23 14:7, 10,25 15:13,19,23 16:2,5,8,15,21 17:6,8,21 18:5,7,9,10,18,25 19:12 20:14 21:19 22:3 23:15,18 25:3,4, 19,22 26:5 27:23 28:20,21,24,25 29:1,5 30:1,5,19,24 31:6,6,8,9,10 32:3,5,9,19,19,20,21 34:19,25 35: 5,18 36:6,7,9,10,13 37:1 38:16 39:16,21 40:13,24 41:12,24 42:2 43:1,3,5,5,7,10,12 44:8,12,19 45:4, 11,12,12,14 46:3,8,11,16 47:8,20, 22 48:4 50:4,5,9,12 51:17,18 52: 17,19 55:3,5 56:8,11,21,23 57:6, 11,18,25 58:4,21,25 59:3,6,9,16, 21,24 60:6,17,20 61:2,10,12,12,17, 23 62:11,12,13,22 63:13,14,16,18 64:21 65:15,18 67:12 68:8,11,20, 23 69:4 70:1,17,19,22,25 71:21,25 72:2,5,8,9,22,25 74:22 75:10,14, 20,23 76:5 77:6,18,22 78:6,15,19, 21,21,23,24,25 79:3 80:9 82:4,25, 25 83:2,3,16 84:6,9,24 85:5,12,23 86:2,7,8,8,10,17,19,23,24 87:14 88:15,18 89:17,20,23 90:1,10,16, 20,22,25 91:1,1,3,3 92:6 93:21 94: 7,10 95:20,24 96:3,3,5,6,17 97:4,6, 10,13,14 98:5,7 100:2,2,4,5,11,13,</p>	<p>16 104:3</p> <p style="text-align: center;">K</p> <p>Kagan [11] 32:19,20 34:19,25 35:5 36:6 63:13,16 64:21 65:15,18</p> <p>KAVANAUGH [50] 15:23 16:5,8, 15,21 17:6,8,21 20:14 25:3 36:9, 10,13 37:1 38:16 39:16,21 40:13, 24 41:12,24 42:2 43:1,3 51:18 59: 3,9,16 86:9,10,17,19,23 87:14 88: 15 89:17,20,23 90:1,10,16,20,22, 25 91:3 97:6,13 100:3,4,11</p> <p>Kavanaugh's [3] 47:8 96:6 97:14</p> <p>kill [1] 41:8</p> <p>killing [1] 41:9</p> <p>kind [21] 18:17 19:7 24:19 25:25 27:24 34:1 43:23 49:3 51:25 52:2 54:23 64:24 66:18 72:20 73:20,23 77:15 88:1 90:5 91:5 99:2</p> <p>kinds [10] 49:24 64:5 65:25 66:19 84:13,22 92:2 93:12,14,18</p> <p>Kingdom [2] 58:19 75:19</p> <p>Kiowa [1] 22:23</p> <p>knows [1] 53:4</p> <p style="text-align: center;">L</p> <p>lacks [1] 17:7</p> <p>laid [1] 24:24</p> <p>landmark [1] 23:14</p> <p>language [10] 18:7,8 21:11 22:9 24:8 29:10 55:10,13,17 56:14</p> <p>large [1] 56:5</p> <p>last [7] 18:15 52:23 55:7 88:15 98: 7 103:15,16</p> <p>later [1] 6:2</p> <p>Laughter [7] 15:25 16:24 28:13 43:9,11 79:1 87:19</p> <p>laundering [2] 92:5 93:1</p> <p>law [92] 3:22 4:16,18,22 7:3,11 10: 24 11:4 12:4,25 14:22 15:16 17:2 19:8 21:18 28:1 31:14,24 33:16, 17 34:21 36:1,5,13,23 38:4 39:7 43:22 44:4,5 45:15 46:5,23 47:13 48:17 49:17,20,22 50:2,16 51:2 52:16 58:18 60:7 63:4,5 64:12,25 65:12,13,14,14,20,23 66:16 68:14, 15,16,25 69:10,14 71:12,13,13,14 73:12 75:8,22 77:8,10 79:8 80:18, 22 81:8,12 85:17 95:5 96:13,16, 25 97:8,19,23,25 98:14 99:2,4 101:11 102:16,17,22 103:5</p> <p>laws [6] 3:12 22:10 70:13 77:9 85: 15 102:23</p> <p>lawsuit [2] 60:23 61:20</p> <p>lawsuits [1] 53:3</p> <p>lead [1] 83:5</p> <p>leads [1] 94:16</p> <p>leaning [2] 30:12 32:22</p> <p>least [4] 38:17 49:7 66:23 89:2</p> <p>leave [4] 24:22 59:25 66:11 87:20</p> <p>leaves [1] 9:18</p> <p>Lebron/Amtrak [1] 26:25</p> <p>led [1] 93:20</p> <p>left [7] 24:13 30:6 40:19,23 46:22,</p>	<p>23 87:21</p> <p>legal [2] 50:20 102:5</p> <p>legislate [1] 81:11</p> <p>legitimate [1] 99:5</p> <p>less [1] 84:20</p> <p>Letter [4] 37:4,10 77:16,25</p> <p>letters [1] 66:7</p> <p>letting [1] 42:13</p> <p>level [4] 17:10 85:21 90:3 97:11</p> <p>levels [1] 20:19</p> <p>liability [1] 22:2</p> <p>liable [2] 103:11,13</p> <p>liberty [1] 37:20</p> <p>license [1] 49:15</p> <p>lied [1] 62:6</p> <p>light [4] 61:6 71:5 84:2,10</p> <p>lightly [2] 90:19 94:4</p> <p>likewise [2] 67:2 89:22</p> <p>limit [1] 24:8</p> <p>limited [4] 8:17 12:12 60:7 68:19</p> <p>limits [1] 89:12</p> <p>line [2] 60:8 65:2</p> <p>LISA [5] 1:20 2:3,9 3:7 100:17</p> <p>list [1] 67:13</p> <p>listen [1] 62:1</p> <p>literally [1] 85:22</p> <p>litigation [3] 10:22,23 54:18</p> <p>little [4] 13:17 39:8 50:3 71:1</p> <p>locate [1] 98:2</p> <p>location [1] 57:2</p> <p>long [4] 28:17 36:16,21 67:9</p> <p>look [17] 33:7 34:5 45:21 55:23,25 63:20 66:3 70:4 73:11 74:5 82:16 88:20 89:9 94:22 97:7,19 102:21</p> <p>looking [11] 29:6,7,9 30:9 33:2 46: 21 56:13 69:1,1 96:24,25</p> <p>lose [1] 40:5</p> <p>lot [5] 13:2 23:23 32:12,15 35:6</p> <p>lots [3] 38:14 41:11 103:19</p> <p>lying [1] 48:13</p> <p style="text-align: center;">M</p> <p>made [6] 4:23 19:24 42:24 44:25 52:24 101:16</p> <p>mails [1] 103:16</p> <p>main [6] 8:10 33:3 36:15 61:9,12 68:4</p> <p>majORITY [3] 25:12 26:9 70:9</p> <p>Malta [1] 32:1</p> <p>mangled [1] 69:25</p> <p>Manhattan [1] 42:11</p> <p>many [8] 6:1 18:16,16,16 31:11,16 35:1 95:10</p> <p>Maritime [1] 32:1</p> <p>Marshall [1] 11:16</p> <p>massive [4] 37:22 41:18,21,21</p> <p>matter [20] 1:14 5:20,23 6:23 7:1, 18 10:14 14:19 17:13 18:13 19:8, 9 21:20,21 22:3 28:1 43:20 63:4 90:7 101:18</p> <p>matters [1] 97:17</p> <p>maxi [1] 28:8</p> <p>mean [40] 4:12 5:24 6:6,10 11:14 16:22 18:11,14,16,20 20:25 25:20</p>	<p>28:10 32:25 35:9,23 37:4 38:13 41:6,13 42:2,7 44:16,20 46:19,24, 25 56:12 58:6 64:24 71:22 73:8 75:6 76:17 77:14 81:13 87:20,22 91:7 100:24</p> <p>meanings [1] 18:16</p> <p>means [3] 26:16 58:5 84:12</p> <p>meant [2] 40:19 95:22</p> <p>Medellin [3] 78:5,6 81:13</p> <p>mention [1] 92:12</p> <p>mentions [1] 101:22</p> <p>metaphors [1] 88:4</p> <p>Mexico [4] 32:7 45:8 53:3 98:17</p> <p>Meyer [1] 26:25</p> <p>might [22] 6:17 34:13,14 35:16 51: 3,12 53:5 58:16 66:8 75:21 76:15 81:8,13 83:6 84:11 88:6 91:5 94: 13 95:11 97:25 98:24 99:9</p> <p>million [2] 27:1 38:24</p> <p>mind [1] 58:5</p> <p>mindful [1] 98:8</p> <p>mini [2] 28:7,8</p> <p>minister [3] 15:10 42:6 73:16</p> <p>Ministry [2] 15:10 26:21</p> <p>misconstrue [1] 23:2</p> <p>misinterpreting [1] 16:10</p> <p>missing [1] 91:20</p> <p>mixing [1] 88:4</p> <p>Mm-hmm [8] 11:5 19:11 32:8 36: 25 46:2 89:17,20 90:10</p> <p>modestly [1] 49:6</p> <p>moment [1] 30:9</p> <p>money [2] 92:5,25</p> <p>Moodalay [1] 64:14</p> <p>most [3] 11:2 24:9 103:17</p> <p>move [1] 66:15</p> <p>Ms [95] 3:6,9 5:14,19,24 6:22,25 7: 20 8:3,10,22 10:9,10 11:5,10,13 12:2,5,11,18,21,23 14:6,8,17 15:2, 18,20 16:1,7,13,17,22,25 17:7,20, 22 19:11,14 21:8 22:17 23:17 24: 7 25:4,13,21,24 26:10 27:23 28:7, 14,22 29:4,19 30:4,11,23 31:1,18 32:4,8,11,20 33:13 34:25 35:8 36: 12,25 37:3 38:23 39:20 40:6,14 41:6,17,25 42:10 43:2,7 44:2,11, 14 45:2,6 46:2,6,15,17 52:23 67: 19 88:17 91:4 93:22 100:16,19 64:12 68:10 73:20 98:9</p> <p>muddle [2] 28:17 36:3</p> <p>municipalities [1] 94:15</p> <p>municipality [1] 52:25</p> <p>muscular [1] 47:1</p> <p>myself [1] 78:4</p> <p style="text-align: center;">N</p> <p>Nabob [1] 64:13</p> <p>name [6] 13:7 40:22 58:8 69:24 70: 15 77:23</p> <p>named [1] 101:21</p> <p>naming [1] 13:6</p> <p>nation [3] 48:12 60:2 71:11</p> <p>national [7] 17:13,18 20:16 38:11</p>
--	--	--	--

Official - Subject to Final Review

<p>39:25 63:2 87:5 nations [1] 3:15 near [1] 99:11 necessarily [2] 89:2 95:5 necessary [1] 49:12 necessitate [1] 54:14 need [8] 57:19 66:5 69:2,4 72:17 79:13 88:1 98:2 needed [1] 85:4 needs [1] 74:5 negotiations [1] 20:19 never [11] 7:4 19:10 28:14 34:8 35:7 81:22 82:5 85:22 94:18 101:16 102:17 new [4] 49:8 60:24,25 71:11 news [2] 42:3 60:21 next [2] 3:4 38:16 nine [1] 23:6 non-immunity [1] 98:10 non-sovereign [7] 48:21 64:4 67:5 69:16 73:4 98:1 99:16 none [1] 48:18 Nope [1] 31:1 norm [1] 8:8 normal [3] 55:18 64:19 87:8 normally [6] 7:14,17 53:7 55:11, 17 102:21 note [1] 65:5 nothing [8] 18:3 27:15 41:1,13 48:15 82:5 99:15 100:25 notice [1] 3:14 notion [3] 35:13 41:10 98:13 nowhere [1] 99:11 nuclear [2] 48:10 82:21 nudge [1] 51:2 Number [8] 50:20 52:6 57:12 72:18 77:14 78:10 80:2,5 numerous [1] 94:4</p> <hr/> <p style="text-align: center;">O</p> <p>objection [1] 102:19 obvious [1] 52:16 obviously [4] 15:20 16:23 51:9 63:11 occur [2] 51:25 52:1 occurs [1] 87:2 odd [2] 35:12,14 oddity [1] 53:12 offense [2] 92:14 98:4 offenses [1] 22:10 offensive [2] 39:6,7 Office [3] 58:5,9 88:12 Offices [4] 57:8 60:14 62:1 87:25 official [1] 53:7 officials [5] 52:8 54:2 66:23 75:7 81:4 often [1] 38:19 Okay [26] 14:10 16:3 23:10 28:18 36:6,12 38:16 39:16 43:1,2 45:11 47:6 56:10 57:5 58:8 68:22 70:24 72:8 75:5 78:21 86:7,24 88:15 90:20 98:5 100:10 Once [2] 27:14 35:2 one [45] 7:12 9:3 18:20 20:9 22:1,</p>	<p>17 23:6 25:11 29:1 31:19 34:11 35:10 36:16,19 37:15 38:4 42:23 43:8,12 45:4 50:21 51:6,12 52:6 55:7 62:8 64:6 66:22 67:19,22 68:3, 4 72:18 74:8 80:8 82:17,20 83:6 88:9,9 91:22 98:7 100:19 103:6,7 one's [1] 83:11 ones [1] 31:21 only [23] 5:4 7:7 8:13,25 9:17 10:20, 21 13:18 24:19,23 29:15 30:13 31:23 33:2,5,11 34:1 44:21 46:17 49:1 53:14 88:13 101:20 OPEC [1] 44:17 open [1] 31:4 opening [2] 24:13 27:12 opens [1] 8:13 operated [2] 15:9 32:9 operation [1] 95:14 operative [1] 57:3 opinion [5] 22:22 23:5,8 75:25 78:1 opposed [3] 50:7 51:1 91:15 opposing [2] 48:24 57:4 opposite [1] 88:16 option [1] 40:2 options [2] 13:3 77:14 oral [5] 1:15 2:2,5 3:7 48:1 order [5] 58:11 59:11 92:22 96:23, 23 ordering [1] 59:15 organically [1] 26:18 original [2] 19:22 51:8 other [30] 14:4 26:3 27:25 28:22 31:11 36:15,20 42:1 47:10 57:2,5 62:4 65:24 74:20 78:10 86:4 88:5 89:10,11 92:9,11,20 93:4,11,12,23 94:24 101:22 103:3,6 others [2] 26:7 71:8 otherwise [6] 6:17 19:6 27:6 34:11 58:24 89:4 ought [1] 81:4 out [24] 6:16 10:2 13:9 22:4,11 28:16 35:25 36:4 42:12 45:18 55:14 60:22 61:18 64:1 68:11 72:15 89:6 91:4,14,23 93:23 95:15 101:5 102:13 outcry [1] 49:3 outlandish [1] 3:16 outside [1] 95:14 over [13] 14:19 19:22 20:7 25:1 30:22 32:14 39:2,4 50:3 70:8 98:1 101:7 102:19 overall [1] 79:20 overrides [1] 49:9 own [7] 8:5 26:9 60:11 63:22 70:15, 16 101:5 owned [4] 15:9 32:7 73:13 75:2 ownership [2] 25:16,23 owns [2] 13:18 25:11</p> <hr/> <p style="text-align: center;">P</p> <p>p.m [1] 104:5 PAGE [5] 2:2 39:3 73:18,21 101:23</p>	<p>pages [5] 24:16,17 29:20 41:19 74:6 Pangang [2] 54:18 82:17 Papers [1] 21:16 Para [1] 63:3 paragraph [1] 11:3 paragraphs [1] 11:1 Park [1] 38:11 parse [1] 55:13 part [8] 7:18 9:3 15:1 20:21,21 40:15, 16 94:10 parte [1] 74:7 particular [9] 22:6,12 23:15 51:2 66:17 69:20 71:19 83:21 93:18 particularly [6] 64:1 66:14,14 79:16 81:9 98:19 pass [1] 16:20 passed [4] 9:3 23:13 33:23 34:23 past [4] 38:17 71:19 77:19 83:4 penalties [2] 41:21 92:2 penalty [1] 92:4 people [4] 31:16 41:9 75:14 91:23 per [1] 22:24 perceived [1] 51:3 percent [6] 25:8,17,22 26:23 73:13 95:16 perfectly [3] 74:12 77:3 99:5 performing [1] 48:21 perhaps [6] 21:22 51:1 53:4,16 68:12 87:23 period [1] 84:13 permission [2] 61:9,13 permitted [1] 32:6 person's [2] 20:9,10 personal [2] 7:16 18:17 persons [3] 27:20 51:9,9 perspective [1] 88:17 pertain [1] 99:7 Peru [1] 74:7 pervades [2] 49:20 97:2 Petitioner [13] 1:5,21 2:4,10 3:8 48:5 49:21 51:7 54:10 70:3 92:18 94:23 100:18 Petitioner's [1] 68:4 Petrobras [1] 95:1 picking [1] 65:1 picks [1] 88:18 picture [1] 90:3 place [4] 53:14 54:13 56:7 95:6 places [2] 15:3 28:9 plain [3] 46:9,12 55:10 planet [1] 17:3 planning [1] 87:18 plausible [1] 83:10 playing [1] 99:3 please [5] 3:10 11:23 12:23 28:25 48:4 Plus [4] 4:20 19:19 21:1 37:13 point [22] 16:6 27:25 29:3 36:14 52:4,12,24 54:1 55:7 60:13 72:6, 21,22,24 73:2,7 74:3 85:10 94:17, 23 96:6 102:11 pointed [2] 68:11 91:4 pointing [1] 22:4</p>	<p>points [9] 31:19 33:14 50:11 51:7 52:5 92:11 93:22 94:2 98:16 policy [6] 40:8 49:9 60:16,19 65:8 81:17 political [1] 37:22 portions [1] 88:5 ports [1] 74:18 positing [1] 32:25 position [3] 32:24 53:22 98:9 possibility [2] 71:9 94:5 possible [6] 21:25 34:13 63:11 65:8 66:20 94:14 possibly [2] 9:12 40:18 Postal [2] 103:14,17 potential [3] 92:13,20 94:25 potentially [8] 56:19 65:25 73:8 81:5 83:19 92:2,15 93:19 power [6] 23:7,23 42:22 60:3 68:24 89:13 powerless [1] 5:11 powers [3] 37:13 79:23,24 practical [1] 90:7 practice [4] 4:22 33:16 55:20 102:21 pre [1] 101:2 precedent [2] 54:23 95:2 precedents [2] 69:23 79:14 precise [1] 98:3 preclude [1] 68:17 precluded [1] 54:23 predate [1] 64:16 predecessor [3] 19:19 51:15 71:5 predicate [1] 96:18 preempt [2] 86:5,6 preempted [2] 35:25 77:8 preemption [3] 36:2 51:24 83:23 preexisting [1] 64:25 prefer [1] 87:11 premise [1] 97:14 premises [2] 11:23,23 prepared [1] 95:9 presentation [1] 97:2 presented [1] 11:25 President [26] 17:12 20:6,6,15,17, 18 21:1 27:9,10 28:18 35:18,19 41:14 42:5 59:10,14 61:18,19 73:17 74:19 77:24 80:15 86:13,17 87:7 89:4 President's [2] 39:25 77:20 press [1] 17:8 pressure [1] 60:23 presumably [3] 34:17 43:16 76:11 presumption [1] 27:21 presumptively [3] 63:8 70:2 99:19 presupposing [1] 76:12 pretty [6] 17:11 18:8 29:16 30:15 55:16 67:21 prevailed [1] 81:19 prevent [2] 20:22 26:14 previous [1] 86:21 prices [1] 44:17 principal [1] 66:3</p>
--	--	--	--

Official - Subject to Final Review

<p>principally ^[1] 79:25</p> <p>principle ^[8] 21:18 41:3 50:17 63:9 67:21 68:2 79:7 81:15</p> <p>principles ^[3] 66:18 68:14,17</p> <p>prior ^[3] 60:22 67:3 71:21</p> <p>private ^[2] 66:7 70:13</p> <p>probably ^[1] 87:7</p> <p>probation ^[1] 92:15</p> <p>problem ^[12] 10:15 37:13,14 66:4 79:15 81:21 83:6 84:4,15 85:21 90:8 93:4</p> <p>problematic ^[2] 37:18,19</p> <p>problems ^[3] 10:13 37:13 90:17</p> <p>procedures ^[5] 24:25 33:21 35:11 76:11 83:25</p> <p>proceed ^[1] 9:15</p> <p>proceeded ^[1] 14:14</p> <p>proceeding ^[1] 95:3</p> <p>process ^[15] 37:14,17 47:11 57:15,16,19,22 58:2 61:7 62:3 86:25 87:1,2,8,15</p> <p>processes ^[1] 87:13</p> <p>produces ^[1] 5:5</p> <p>professors ^[1] 72:18</p> <p>profits ^[1] 73:15</p> <p>prohibit ^[3] 17:14,16,17</p> <p>prohibited ^[1] 39:22</p> <p>propose ^[1] 93:6</p> <p>prosecute ^[16] 5:10 9:24 19:24 27:17 30:17 31:25 35:24 38:10 40:23 43:20 45:7 52:8,14 83:21 91:9,11</p> <p>prosecuted ^[2] 95:23,24</p> <p>prosecuting ^[2] 50:17 54:19</p> <p>prosecution ^[23] 7:5 9:23 13:5 17:24 19:10 21:13 24:6 27:16 34:9 41:4,8 51:19,21 62:10 68:17 77:7,12 78:14 86:6 93:20 94:14 96:1 98:20</p> <p>prosecutions ^[13] 18:21 24:18 42:21 45:16 47:2,10 53:17 66:19,22 82:17 83:13 84:22 89:1</p> <p>prosecutor ^[3] 4:19 14:23 53:5</p> <p>prosecutors ^[2] 44:20 60:1</p> <p>prospects ^[1] 84:21</p> <p>protect ^[4] 12:13 20:15 102:8,9</p> <p>protection ^[1] 24:16</p> <p>protections ^[1] 35:11</p> <p>provide ^[1] 52:22</p> <p>provided ^[2] 45:23 46:13</p> <p>provides ^[1] 4:8</p> <p>provision ^[19] 8:15,16 9:4 19:17 24:8,10 29:25 33:2,4 41:18 44:22 53:24 54:3,9 56:19 84:2,11 85:6,9</p> <p>provisions ^[6] 8:5 9:15 31:12 46:20 57:4 92:3</p> <p>publicly ^[1] 70:11</p> <p>punitive ^[1] 99:21</p> <p>purchase ^[1] 82:2</p> <p>purpose ^[2] 8:24 93:1</p> <p>purposes ^[1] 54:25</p> <p>pursuant ^[1] 17:25</p> <p>put ^[7] 21:3 30:8 37:21 42:13 46:6,11 55:5</p> <p>Putting ^[3] 54:2 60:7 75:6</p>	<p style="text-align: center;">Q</p> <p>qua ^[9] 9:25 50:17 62:15 65:12 67:15 71:24 99:25 101:15 102:8</p> <p>qualified ^[1] 18:11</p> <p>question ^[33] 7:13 10:13,17,25 11:12,25 12:4,17,24,25 13:16 15:24 16:9,10,18 22:7 37:24 47:13 51:19 61:11 69:7 71:1 72:10 73:5 74:10,23 79:4 80:21 82:1 88:16 89:15 90:23 98:8</p> <p>questions ^[10] 5:13 36:11 54:17 60:15 88:17,19,22 94:11 100:5,9</p> <p>quick ^[2] 69:21 74:3</p> <p>quickly ^[1] 96:6</p> <p>quit ^[1] 77:25</p> <p>quite ^[12] 32:22 35:11 48:25 49:6 51:6 52:7 59:14 65:4 74:8 83:23 85:3 98:6</p> <p style="text-align: center;">R</p> <p>radically ^[1] 5:5</p> <p>raise ^[1] 55:6</p> <p>ramifications ^[2] 37:22 79:5</p> <p>ran ^[2] 15:8 50:3</p> <p>Randolph ^[1] 40:21</p> <p>random ^[2] 45:9,10</p> <p>rare ^[1] 52:11</p> <p>rare ^[5] 49:12 50:23 58:14,15 82:23</p> <p>rarely ^[2] 18:24 65:11</p> <p>rather ^[2] 7:16 35:18</p> <p>reach ^[2] 3:13 91:20</p> <p>read ^[6] 23:5,8,8 46:3 56:19 67:20</p> <p>Reading ^[7] 4:11 5:5 18:12 21:23 40:3,6 46:9</p> <p>real ^[1] 23:21</p> <p>really ^[19] 42:21 45:9,10 50:25 52:24 60:9 65:13 69:18,18 71:6 72:13,15 84:3 85:21 95:12 99:6,8,13 100:21</p> <p>realm ^[3] 96:14,19 98:14</p> <p>reason ^[5] 9:10 16:25 18:21 33:20 81:18</p> <p>reasonable ^[1] 47:8</p> <p>reasoning ^[1] 11:8</p> <p>reasons ^[7] 3:13 7:12 8:24 10:19 19:7 72:18 90:8</p> <p>REBUTTAL ^[2] 2:8 100:17</p> <p>receives ^[1] 75:24</p> <p>recent ^[2] 82:16 95:1</p> <p>reciprocity ^[2] 4:23 102:22</p> <p>recognize ^[2] 65:24 76:23</p> <p>recognized ^[3] 49:7 79:22 99:5</p> <p>referencing ^[1] 46:4</p> <p>referred ^[1] 82:17</p> <p>refers ^[2] 56:5 74:15</p> <p>reflect ^[1] 81:7</p> <p>refuse ^[2] 59:23 76:22</p> <p>registration ^[1] 64:9</p> <p>regulators ^[1] 48:13</p> <p>Regulatory ^[2] 55:22 70:13</p> <p>reign ^[1] 98:1</p> <p>reiterate ^[2] 79:11 87:23</p>	<p>reject ^[2] 15:18,21</p> <p>rejected ^[1] 7:22</p> <p>rejects ^[2] 6:14 64:22</p> <p>relate ^[1] 32:2</p> <p>relatively ^[1] 71:11</p> <p>reliance ^[1] 48:16</p> <p>relief ^[1] 76:25</p> <p>relieved ^[1] 84:16</p> <p>rely ^[1] 32:15</p> <p>rem ^[1] 74:9</p> <p>remains ^[1] 10:25</p> <p>remand ^[6] 15:15,22 16:11 68:13,19 69:12</p> <p>remedies ^[4] 92:20,21 93:5,6</p> <p>remedy ^[1] 92:12</p> <p>remember ^[1] 9:2</p> <p>removal ^[10] 9:17 34:13 35:21 53:9,11,24 54:3,9 84:1,11</p> <p>remove ^[1] 30:22</p> <p>repeat ^[1] 85:8</p> <p>repeated ^[1] 49:14</p> <p>repeatedly ^[1] 79:21</p> <p>repercussions ^[1] 71:10</p> <p>reply ^[2] 39:3 48:15</p> <p>reports ^[2] 42:4 60:21</p> <p>representing ^[4] 40:25 62:8 86:12,13</p> <p>Republic ^[1] 98:17</p> <p>resolution ^[1] 90:2</p> <p>resolve ^[1] 81:20</p> <p>resolved ^[1] 95:1</p> <p>respect ^[6] 14:2 36:17 65:20 69:15 81:5,5</p> <p>respectful ^[1] 34:15</p> <p>respond ^[1] 41:5</p> <p>Respondent ^[4] 1:8,24 2:7 48:2</p> <p>response ^[1] 32:21</p> <p>restrictions ^[1] 21:4</p> <p>restrictive ^[3] 6:4 38:7 69:14</p> <p>result ^[2] 4:15 93:23</p> <p>results ^[2] 5:6 9:20</p> <p>retaliate ^[1] 28:23</p> <p>retaliation ^[1] 3:23</p> <p>retaliatory ^[1] 93:22</p> <p>return ^[1] 101:2</p> <p>review ^[5] 47:5 52:2 53:14 73:10 76:3</p> <p>rise ^[1] 82:13</p> <p>rising ^[1] 85:20</p> <p>risk ^[1] 3:23</p> <p>road ^[1] 84:19</p> <p>ROBERTS ^[26] 3:3 25:4,19,22 26:5 31:6 32:19 36:7 43:5 45:12 47:22 62:11,13,22 63:14,18 78:21,24 82:25 86:8 91:1 96:3 100:2,13,16 104:3</p> <p>role ^[1] 99:3</p> <p>rotates ^[1] 91:23</p> <p>rule ^[10] 3:14 4:21 39:23 48:6,14 49:8,18 64:25 74:4 80:10</p> <p>ruled ^[1] 44:2</p> <p>rules ^[1] 24:1</p> <p>run ^[2] 88:1,2</p> <p>runs ^[2] 11:3,4</p>	<p>Russia-Ukraine ^[1] 20:24</p> <p>Russian ^[1] 103:24</p> <p style="text-align: center;">S</p> <p>Sabbatino ^[1] 99:6</p> <p>safer ^[1] 76:14</p> <p>Samantar ^[7] 22:23 52:7 54:4 79:15 80:25 81:23 85:25</p> <p>same ^[9] 3:24 11:19 19:21 33:10 38:21 75:8 76:3 98:3,6</p> <p>sanction ^[3] 41:18,20,23</p> <p>sanctions ^[5] 48:11 49:13,15 92:9,23</p> <p>sanguine ^[1] 84:20</p> <p>satellite ^[1] 88:12</p> <p>satisfy ^[1] 69:16</p> <p>Saudi ^[1] 100:24</p> <p>say-so ^[1] 27:14</p> <p>saying ^[23] 6:12,14 10:6 16:19 17:4 18:19 19:3 22:24 26:6 27:11,19 39:4 40:11 44:10 45:1 47:18 52:21 60:6 61:20 65:15 70:15 93:14 100:22</p> <p>says ^[25] 6:7 9:6 11:16 13:3 15:4,7 16:18 28:18 29:13,22 30:16 31:25 37:6,7,10 39:24 41:1 42:15 46:10,12 55:14 75:24 84:12 101:25 103:10</p> <p>scheme ^[2] 88:25 93:1</p> <p>Schooner ^[9] 3:11 4:2 5:25 11:14 18:13 21:23 22:25 67:19 74:13</p> <p>second ^[16] 9:10 11:1,8 14:14 16:12 28:16 37:24 51:5 52:12 54:22 66:25 68:10 69:7 72:14 90:4 94:17</p> <p>secondary ^[1] 48:16</p> <p>Secretary ^[1] 87:5</p> <p>secrets ^[1] 48:10</p> <p>Section ^[16] 3:17 4:8 5:1,3,9 6:15 8:11,13 9:6 19:16,21 29:22 30:12 40:7 51:14 99:20</p> <p>sections ^[1] 33:8</p> <p>security ^[6] 17:13,18 20:16 40:1 87:5 102:3</p> <p>see ^[6] 6:18 18:21 24:3 34:3 54:17 102:6</p> <p>seeing ^[1] 10:14</p> <p>seek ^[2] 61:13 92:3</p> <p>seem ^[2] 71:2 79:3</p> <p>seemingly ^[1] 5:22</p> <p>seems ^[17] 13:9,13 14:5,10 18:12,20 20:1 21:14 22:9 24:12 27:23 29:10 35:11,14 39:7 83:9 84:10</p> <p>seen ^[4] 13:17 20:13 45:6,7</p> <p>self-dealing ^[1] 37:16</p> <p>sell ^[2] 38:12 70:10</p> <p>send ^[3] 14:13 34:16 72:14</p> <p>sense ^[1] 81:19</p> <p>sent ^[2] 73:15 77:25</p> <p>sentence ^[1] 45:22</p> <p>separate ^[6] 48:20 63:8 70:2 99:17 103:9,15</p> <p>separateness ^[3] 68:6 69:21 76:23</p>
--	---	---	--

Official - Subject to Final Review

<p>separation ^[1] 37:12 series ^[1] 14:15 serious ^[3] 42:18 82:15 84:15 seriously ^[2] 49:16 65:10 servant ^[1] 19:25 servants ^[2] 19:23 42:25 service ^[5] 9:16 34:15 38:12 103:14,17 services ^[1] 13:24 set ^[2] 67:23 75:2 shall ^[3] 4:9 6:8 55:15 share ^[1] 25:11 shareholder ^[1] 70:9 shareholders ^[1] 70:10 shares ^[2] 26:9 70:11 sharp ^[1] 65:1 ship ^[3] 4:3 32:14 74:9 ships ^[2] 64:8,9 shouldn't ^[5] 16:25 22:15 42:11 55:19 72:14 show ^[2] 61:7 66:19 shut ^[2] 41:22,23 side ^[9] 14:4 36:15 37:15 46:7,12 47:11 72:19 80:3 89:10 simply ^[2] 19:3 90:12 since ^[5] 21:10 82:9,11,12 101:1 single ^[3] 45:21 57:2 62:8 situation ^[4] 19:4 26:14 87:2 99:8 sledgehammers ^[1] 93:5 slightly ^[1] 98:1 social ^[2] 13:24 102:2 Solicitor ^[2] 1:22 40:24 solution ^[1] 90:9 somebody ^[1] 32:10 someone ^[2] 73:3 103:24 someone's ^[1] 37:20 somewhat ^[1] 81:14 Sorry ^[13] 16:1 26:21 30:21 36:11 43:4 50:3 56:23,25 59:6,16 70:19 73:2 95:21 sort ^[7] 28:15 34:4 78:13 83:25 96:18 101:4,10 SOTOMAYOR ^[41] 10:9,11 11:6,11,21 12:3,9,16,20,23 14:7,10,25 31:9,10 32:3,5,9 51:17 56:21,23 57:6,11,18,25 58:4,21,25 59:6,21,24 60:6,17,20 61:2,12,17,23 68:11 83:1 86:24 source ^[1] 65:6 sources ^[2] 48:16 70:4 South ^[1] 28:9 Southern ^[3] 60:24,25 70:6 sovereign ^[60] 3:24 4:1,6 6:6 7:2,5,10,24 8:6 9:5 10:20 13:16,21,22 14:1,5,11 18:3 25:2,10,11,15 27:4,22 28:2 30:18 32:14 34:9 35:13 38:10,13 42:1,14 51:12 52:15 53:11 54:7,12 60:10 62:15,15 64:4,6,10 65:21 67:5,15,15,24 73:4 74:16 98:21 99:23,25 100:1 101:17 102:10,18,20 103:23 sovereign's ^[1] 70:16 sovereigns ^[22] 3:13,20 4:13 5:11 6:13 12:14,18 25:6 27:19,20 30:</p>	<p>21 40:19 64:23 68:7 69:10 101:7,9,14,15 102:8,9,24 sovereigns' ^[1] 14:19 sovereignty ^[1] 32:2 Spain ^[1] 3:18 speaks ^[3] 8:12 22:10 61:19 special ^[5] 4:12 24:15 28:19 88:11,13 specific ^[3] 24:25 31:22 93:1 specifically ^[1] 94:6 spells ^[1] 74:14 spoke ^[1] 24:23 spoken ^[3] 24:23 40:9,12 spokes ^[1] 88:4 sponsoring ^[1] 20:22 spot ^[1] 75:8 sprung ^[1] 71:18 stab ^[2] 69:21 100:20 stage ^[1] 71:15 stand ^[3] 62:7,9 68:12 start ^[6] 10:5 11:14 55:11,25 56:3 80:3 started ^[1] 97:1 starts ^[2] 29:22 33:1 state ^[70] 4:10 5:10 6:9 7:24 13:6,7 15:6 17:5 22:2 26:1 30:16,17,19 31:5 32:2 35:22,22,22 36:4 37:7 42:17 44:6 47:2,4,5 50:17,18 51:18,19 52:3 53:5,8,15,17 55:4 60:2 61:14,25 62:6,19 63:1,6 67:2,22 72:14 74:25 75:1,3,11 76:7,9,21,21,22 77:4,7,11 80:11,16 81:19 83:4,10,13,20,21 84:21 85:13 86:6 87:5 101:13 state-owned ^[1] 36:21 statement ^[3] 3:14 10:6 51:23 statements ^[1] 36:18 STATES ^[65] 1:1,7,16 3:5 4:4,9,24 5:7,10 9:22 12:7 17:12 20:16,20 22:11 28:2 35:23,24 38:9 42:6 43:14,16,18,20 44:13,23 45:17 51:20 52:8,24 53:2 59:19,19 62:8 65:21 66:9,10 71:13,24,24 74:2 77:10,11 79:8 80:2,16,23 81:9,10,15 84:17 92:17,19 93:24 94:11,12,15 95:14,19 96:2 100:6,7,9 103:9,17 States' ^[1] 103:11 stating ^[1] 77:16 status ^[2] 70:9 80:10 statute ^[21] 10:2 11:19 17:15 19:18,18 23:3,14 24:3,10,16 26:13 32:25 33:24 34:22,23 55:11,12,24,24 96:11 101:1 statute's ^[1] 55:13 statutes ^[4] 11:18 27:21 30:8 56:5 statutory ^[1] 88:25 stealing ^[1] 48:10 step ^[4] 10:18 13:13 24:20 49:13 steps ^[1] 17:19 still ^[5] 7:3 10:16 45:17 84:23 96:12 stock ^[2] 70:12 95:16 stop ^[3] 5:12 12:24 55:12 straight ^[1] 22:19</p>	<p>stranger ^[1] 32:24 stripped ^[1] 5:8 strong ^[2] 50:16 54:1 structure ^[6] 8:24 9:10 30:13 46:14,21 79:20 struggling ^[1] 45:17 stuck ^[3] 10:5 56:15 57:6 stuff ^[3] 20:12 38:12 41:11 subject ^[15] 5:19,23 6:21 7:1,18 10:14 14:19 18:13 24:14 33:25 70:12 73:7,9 74:1 76:3 submit ^[1] 51:22 submitted ^[2] 104:4,6 subpoena ^[3] 34:7 39:4,13 subpoenas ^[3] 38:19,25 39:9 substantive ^[1] 19:8 sudden ^[2] 9:24 29:14 sue ^[2] 27:4 63:12 sued ^[6] 27:4 64:19 70:14 71:7 80:16 95:17 suggest ^[4] 42:4 64:24 81:2 83:22 suggested ^[7] 80:7,25 81:3 89:3 97:1 98:24 99:12 suggesting ^[1] 76:16 suggestion ^[5] 58:23 66:6 75:22 83:22 97:7 suggestive ^[1] 84:12 suggests ^[5] 24:4 33:10 45:24 81:24 98:17 suing ^[1] 23:20 suit ^[10] 32:6 56:6 58:9,12 59:11,12,15 67:15 95:19,22 suited ^[1] 59:15 suits ^[6] 60:4 66:7,8,9,9 91:5 support ^[1] 36:18 suppose ^[3] 58:14,15 81:2 supposed ^[1] 68:25 supposing ^[1] 89:15 Supremacy ^[6] 77:8 79:9,19 80:23 85:1,11 SUPREME ^[8] 1:1,15 11:15 44:16 61:24 64:7 67:7 76:8 switch ^[1] 29:14 switches ^[2] 33:3,4 Sylvania ^[2] 58:20 75:19 systemic ^[1] 90:16</p> <hr/> <p style="text-align: center;">T</p> <p>table ^[1] 40:2 talked ^[2] 67:18 85:12 talks ^[1] 74:13 tandem ^[1] 46:20 Tate ^[2] 37:4,10 taxes ^[1] 13:22 tells ^[1] 41:19 tension ^[1] 98:12 term ^[1] 56:6 terrorism ^[2] 20:13,23 terrorist ^[1] 20:10 tertiary ^[1] 7:21 Texas ^[1] 77:25 text ^[6] 4:11 8:24,25 30:12 46:9,12 textual ^[1] 30:13 textually ^[1] 8:16</p>	<p>Thacker ^[1] 26:25 thanks ^[1] 78:1 themselves ^[1] 5:7 theory ^[2] 50:13 77:7 there's ^[51] 6:12 7:3,23 9:6 10:8,15 13:3,14 14:18 16:18 17:1,22,23 22:5,23 23:6 26:6 27:15,17 32:16,16 33:18,23 34:8 36:20 37:7,12,17,22 38:23 39:12 44:14 45:15 47:1,11,17 49:15,17,23 52:6 57:8 60:18 72:19 73:6 76:6,7,8 89:6 99:14,15 101:8 Therefore ^[2] 79:15 85:24 they'll ^[1] 70:14 they've ^[1] 40:11 thinking ^[6] 24:5,18 54:5 78:4 89:10 90:2 third ^[1] 67:4 THOMAS ^[17] 5:14,21 6:18,23 7:14 8:2,7,19 18:19,25 31:7 46:8 50:5,9,12 78:22,23 Thomas's ^[1] 10:13 though ^[9] 17:14,15 27:24 31:2 52:21 67:13 84:10 85:22 101:6 thoughts ^[1] 69:6 thousands ^[1] 38:24 three ^[4] 8:23 33:8 49:1,21 threshold ^[1] 82:1 threw ^[1] 4:13 tied ^[1] 40:10 Timbuktu ^[2] 58:7,8 Title ^[5] 6:17 16:19 56:4,7 57:3 today ^[4] 3:22 67:8 68:5 98:24 today's ^[1] 51:16 together ^[1] 33:9 tomorrow ^[1] 70:11 tool ^[5] 41:13,16,16,17 91:5 toolkit ^[1] 91:6 tools ^[5] 80:2,6 83:8 84:24 92:9 tort ^[2] 19:18,18 totally ^[1] 84:16 trace ^[1] 92:24 traded ^[1] 70:11 tradition ^[2] 36:16,21 transaction ^[3] 92:24 93:3,3 transactions ^[1] 14:3 trap ^[1] 8:19 Treasury ^[5] 15:12 26:20,22 62:5 102:4 treaties ^[1] 80:3 treaty ^[1] 39:10 treaty-making ^[1] 64:17 trend ^[1] 51:1 trial ^[5] 42:14 76:6,22,25 102:18 trials ^[1] 3:20 Tribe ^[1] 22:24 tribunal ^[1] 63:20 tried ^[6] 28:12 43:20 44:13,24 51:20 52:24 trouble ^[2] 40:15 64:12 true ^[3] 3:24 82:4,8 Trump ^[1] 20:18 trusts ^[1] 77:4 try ^[2] 53:2 88:24</p>
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Official - Subject to Final Review

<p>trying ^[11] 26:14 33:15 49:5 51:1,3 60:23 65:24 93:13 96:7 97:5,5</p> <p>Tuesday ^[1] 1:12</p> <p>Turkey ^[5] 20:20 50:6 101:13,19, 24</p> <p>Turkey's ^[1] 42:5</p> <p>Turkish ^[1] 55:1</p> <p>TURKIYE ^[8] 1:3 3:4 15:4 31:3 42:15 62:17 93:7 102:13</p> <p>Turkiye's ^[1] 70:5</p> <p>turn ^[1] 60:15</p> <p>turning ^[1] 61:11</p> <p>two ^[15] 5:5 6:10 11:1,25 31:18,23 33:14 34:7 36:15,24 37:4 38:2 40:10 65:2 92:4</p> <p>typically ^[1] 18:25</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S. ^[18] 3:19 4:5 20:11 26:15 57:8 58:5,8 59:11 60:13 61:8 62:1 74:18 81:16 87:25 88:12,13 100:6 103:6</p> <p>U.S.-owned ^[1] 94:1</p> <p>U.S.C ^[2] 6:12 92:22</p> <p>ultimately ^[1] 77:1</p> <p>unbridled ^[1] 60:3</p> <p>Under ^[35] 5:19 6:12,17 8:6 16:19 25:21 35:25 36:4 40:6 46:18 47:8 48:6 58:11 65:12 68:25 69:23 72:11 75:7 77:6 79:8,15 80:23 81:3, 23 84:25,25 85:3,25 86:5 88:20 92:3,20 96:11 101:11 102:23</p> <p>undercuts ^[1] 11:7</p> <p>underdog ^[1] 71:6</p> <p>understand ^[21] 5:15 15:14 22:13 23:19 55:7 56:8 58:17 62:4 68:8 71:3 72:5,6 80:13,17 84:23 85:7, 23 91:13 94:7 96:7 97:5</p> <p>understanding ^[4] 6:20 51:20 71:4 100:8</p> <p>understands ^[1] 18:22</p> <p>understood ^[4] 51:11 62:14 87:25 97:13</p> <p>undertake ^[1] 95:3</p> <p>undertook ^[1] 94:3</p> <p>uniformly ^[1] 14:23</p> <p>unilateral ^[1] 7:8</p> <p>unimaginable ^[1] 83:20</p> <p>UNITED ^[26] 1:1,7,16 3:5 17:12 20:16,20 22:11 28:2 42:6 55:22 59:19,19 62:7 74:1 77:10,11 92:17, 19 93:23 94:12 95:14,19 96:2 103:9,11</p> <p>universe ^[1] 33:10</p> <p>unless ^[2] 13:8 23:4</p> <p>unprecedented ^[4] 3:22 48:6,14 49:4</p> <p>unprepared ^[1] 77:15</p> <p>unreasonable ^[1] 56:18</p> <p>unregulated ^[1] 46:22</p> <p>unreviewable ^[1] 17:23</p> <p>unthinkable ^[2] 3:21 21:14</p> <p>until ^[2] 6:4 76:7</p> <p>up ^[36] 8:13 10:12 22:19 27:12 35:</p>	<p>2 38:25 39:10 40:20,23 43:4 47:16 51:19 53:5 54:16,21 57:12 58:7 60:13 65:1 67:7,23 71:18 75:2 78:11 79:17,18 88:2,2,18,23 92:4 93:6 101:4,18 102:20 103:21</p> <p>using ^[1] 48:13</p> <p>usual ^[1] 55:20</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vagrancies ^[1] 59:25</p> <p>various ^[1] 92:18</p> <p>Vatican ^[1] 100:24</p> <p>Venezuela ^[1] 103:23</p> <p>venue ^[1] 9:16</p> <p>versus ^[4] 3:5 26:25 55:14 72:13</p> <p>vessel ^[1] 32:6</p> <p>vests ^[1] 79:22</p> <p>view ^[8] 35:24 47:9 54:14 95:5,18, 25 97:15 98:11</p> <p>views ^[2] 37:8 81:6</p> <p>violate ^[1] 3:21</p> <p>violating ^[2] 85:14,17</p> <p>violation ^[2] 37:17 44:18</p> <p>violations ^[5] 41:19,20,23 45:8,16</p> <p>violator ^[1] 49:15</p> <p>Virginia ^[1] 75:18</p> <p>vitiate ^[1] 41:3</p> <p>Voice ^[2] 20:8 40:4</p> <p>vote ^[3] 27:8 39:18,23</p> <p>Vowell ^[1] 71:22</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waivable ^[4] 4:18 5:20 7:24 8:1</p> <p>waive ^[4] 5:16 7:15 8:6 101:15</p> <p>waived ^[4] 10:1,7 19:2 101:12</p> <p>waiver ^[6] 5:18 8:5 9:9 10:21,21 102:11</p> <p>waives ^[2] 5:9 27:5</p> <p>waiving ^[1] 74:13</p> <p>wanted ^[5] 23:25 59:17 66:11 68:19 98:23</p> <p>wants ^[3] 46:25 47:10 89:5</p> <p>war ^[3] 10:5 23:4 93:7</p> <p>warranted ^[1] 99:11</p> <p>warships ^[1] 74:18</p> <p>Washington ^[3] 1:11,20,23</p> <p>water ^[1] 81:17</p> <p>watermark ^[2] 37:5,9</p> <p>way ^[12] 21:22 25:6 27:10 39:18 57:5 76:4 84:7 88:20 89:9 93:23 98:3, 6</p> <p>ways ^[2] 18:17 84:10</p> <p>weak ^[1] 71:11</p> <p>Wealth ^[4] 55:1 101:23 102:1,6</p> <p>week ^[1] 42:7</p> <p>weight ^[2] 81:1 98:9</p> <p>weird ^[1] 47:12</p> <p>welcome ^[2] 5:13 79:2</p> <p>well-developed ^[1] 7:11</p> <p>well-recognized ^[2] 67:1,4</p> <p>whatever ^[12] 16:23 22:6,6 37:5 40:22 45:24 47:10 57:11 58:21 75:15 76:25 95:2</p> <p>Whereupon ^[1] 104:5</p>	<p>whether ^[18] 12:15 14:12 23:22 32:23 44:5 54:12 60:1,15 68:14 72:12 73:3,3,3 74:10 76:17,19 80:22 96:8</p> <p>White ^[1] 87:6</p> <p>who's ^[4] 20:15 61:25 72:23 103:22</p> <p>whole ^[4] 55:24,25 92:1 101:14</p> <p>whom ^[1] 57:20</p> <p>wild ^[1] 43:14</p> <p>will ^[16] 3:3 14:4 28:17,22 37:8 62:1 68:23 88:3,4 94:20,23 101:4,5, 16 102:17 103:7</p> <p>Williamson ^[1] 55:23</p> <p>wish ^[1] 95:3</p> <p>withdraws ^[1] 91:23</p> <p>within ^[3] 29:24 88:24 92:19</p> <p>without ^[5] 58:9 61:9 74:14 94:6 100:22</p> <p>wolves ^[1] 4:13</p> <p>wonder ^[1] 53:19</p> <p>wondering ^[4] 32:23 43:19 44:21 52:20</p> <p>word ^[3] 4:11 18:15 35:17</p> <p>wording ^[1] 100:25</p> <p>words ^[2] 26:4 89:11</p> <p>work ^[6] 21:5 30:3 33:9 36:4 46:20 91:15</p> <p>world ^[3] 17:3 28:10 54:10</p> <p>worried ^[3] 39:8 71:9 80:20</p> <p>worries ^[1] 27:7</p> <p>worry ^[1] 79:17</p> <p>woven ^[1] 6:20</p> <p>wrapped ^[1] 54:16</p> <p>written ^[5] 57:22 58:1 60:16,19 87:1</p> <p>wrongful ^[1] 99:24</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>years ^[3] 28:11 38:17 82:11</p> <p>Yellen ^[1] 15:11</p> <p>Yep ^[1] 39:20</p> <p>York ^[2] 60:24,25</p> <p>Youngstown ^[2] 39:19 88:21</p> <p>yourself ^[1] 8:20</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zero ^[1] 36:14</p>
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