

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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6 v.) No. 21-1450
7 UNITED STATES,)
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10
11 Washington, D.C.
12 Tuesday, January 17, 2023

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

17
18 APPEARANCES:

19
20 LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of
21 the Petitioner.

22 ERIC J. FEIGIN, Deputy Solicitor General, Department
23 of Justice, Washington, D.C.; on behalf of the
24 Respondent.

25

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P R O C E E D I N G S

(11:08 a.m.)

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

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE PETITIONER

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

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

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

1 sovereign.

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

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

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

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

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

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

13 I welcome questions.

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

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

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

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

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

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

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

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

22 MS. BLATT: Oh.

23 JUSTICE THOMAS: -- matter
24 jurisdiction.

25 MS. BLATT: Sure. Our immunity claim

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

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

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

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

1 else, the federal government. And, yes, so
2 absolutely, immunity is waivable.

3 JUSTICE THOMAS: Yeah.

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

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

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

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

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

1 The text is that the only grant of jurisdiction
2 for the exceptions is in 1330.

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

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

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

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

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

10 JUSTICE SOTOMAYOR: Ms. Blatt --

11 MS. BLATT: Sure.

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

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

25 So now I come down to your common law

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

6 MS. BLATT: Mm-hmm.

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

11 MS. BLATT: Well, let me --

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

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

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

25 Assuming that I disagree with you on

1 the two aspects of the question presented, that
2 it's not jurisdictional --

3 MS. BLATT: Yeah. So --

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

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

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

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

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

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

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

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

24 JUSTICE SOTOMAYOR: Ms. Blatt, please
25 stop. It's not a question of not caring. It's

1 a question of defining what the common law
2 immunity is.

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

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

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

24 It appears or some of the allegation
25 is that it also engages in social services

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

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

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

8 JUSTICE SOTOMAYOR: But --

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

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

18 MS. BLATT: So, to get there, you
19 would have to say -- you'd have to say there's
20 subject matter jurisdiction over sovereigns'
21 instrumentalities and agencies, so we're wrong
22 on 13231, the FSIA doesn't apply, and then,
23 yes, you would say common law immunity is not
24 uniformly in the hands of the prosecutor.

25 And if I --

1 JUSTICE SOTOMAYOR: Well, they concede
2 part of that.

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

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

19 MS. BLATT: If you reject --

20 JUSTICE GORSUCH: Yes, yes, yes, yes.

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

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

1 (Laughter.)

2 MS. BLATT: Sorry.

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

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

8 MS. BLATT: Oh.

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

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

16 JUSTICE KAVANAUGH: Or is it
17 inappropriate?

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

22 JUSTICE KAVANAUGH: Correct.

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

25 (Laughter.)

1 MS. BLATT: The reason you shouldn't
2 do that, because, if there's just this common
3 law immunity for the first time in the history
4 of the world and on the planet, time
5 immemorial, you're saying that it's conceivable
6 a foreign state can be indicted --

7 JUSTICE KAVANAUGH: Well --

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

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

21 MS. BLATT: It is the --

22 JUSTICE KAVANAUGH: That's huge.

23 MS. BLATT: It's huge that -- there's
24 actually -- there's unreviewable authority of
25 the executive branch's prosecution decision

1 when it's acting pursuant to a congressional
2 authority. And so you first have to think that
3 Congress gave jurisdiction for a federal court
4 to convict a sovereign. It has nothing to do
5 with the executive branch.

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

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

10 JUSTICE JACKSON: Yes.

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

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

1 Justice Thomas, we typically think of
2 something -- immunity as something that can be
3 waived.

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

12 MS. BLATT: Mm-hmm.

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

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

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

1 domestic servant or a diplomat.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Schooner Exchange was a jurisdictional case.

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

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

16 JUSTICE JACKSON: In a very particular
17 context.

18 MS. BLATT: Exactly.

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

1 with the executive branch, and so they wanted
2 to codify rules in the civil context for when a
3 foreign country was going to be immune.

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

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

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

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

1 very specific procedures on how you would ever
2 go about entertaining jurisdiction over a
3 foreign sovereign or its instrumentalities.

4 JUSTICE KAVANAUGH: If we are --

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

14 MS. BLATT: Yes. Our definition of an
15 instrumentality is it has to be created and
16 designated as such by the sovereign and
17 ownership and control. So you wouldn't have --
18 51 percent doesn't get you there. The -- but
19 --

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

22 MS. BLATT: -- under the FSIA, it
23 does.

24 CHIEF JUSTICE ROBERTS: -- 51 percent
25 to control and -- and ownership and all that.

1 MS. BLATT: Because I think for just,
2 you know, anything kind of even arm of the
3 state or federal instrumentality, it's
4 important to have the designation by the -- the
5 government. And -- and created -- in other
6 words, I don't think --

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

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

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

1 But cases like, you know,
2 Lebron/Amtrak, Thacker, FDIC versus Meyer,
3 you've had a million cases involving federal
4 instrumentalities, and it's always been enough
5 that Congress designated it as such, and it is
6 a sovereign but for the "sue and be sued"
7 clause, which waives the immunity it would
8 otherwise have.

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

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

25 JUSTICE BARRETT: Ms. Blatt, it seems,

1 though, kind of going back to this immunity
2 point, in other countries -- I assume that this
3 is a matter of international law -- the
4 sovereign immunity, say, that the United States
5 may enjoy, that it's not controlled by
6 jurisdiction there, so why would it all fall
7 apart if it's controlled by immunity doctrine
8 and not jurisdiction here?

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

15 (Laughter.)

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

22 JUSTICE BARRETT: Well, let me --

23 JUSTICE GORSUCH: For that --

24 MS. BLATT: -- no other country will
25 retaliate.

1 JUSTICE BARRETT: Oh, just --

2 JUSTICE GORSUCH: Please.

3 JUSTICE BARRETT: -- just one more.

4 Let's -- let's say that I disagree with you on
5 the 3231 point --

6 MS. BLATT: Yeah, I gathered.

7 JUSTICE BARRETT: -- and so we are
8 talking about the FSIA. And I'm looking at
9 1604, which broadly, if you're just looking at
10 1604, you know, they have these arguments about
11 context of civil cases, but just looking at
12 1604, you know, that language seems to grant
13 immunity here.

14 But then, you know, the government
15 says that when you get to 1605, that all of a
16 sudden, you're doing this switch, oh, no, no,
17 now the exceptions only apply in civil cases.
18 I think, you know, that's a pretty good
19 argument. What do you have to say to that?

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

1 1607. So the first provision of the FSIA --

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

5 MS. BLATT: Not as well.

6 JUSTICE GORSUCH: What do you have
7 left in those circumstances? Let -- let --
8 let's say we -- we accept your 1604 argument.
9 Put aside the jurisdictional statutes for the
10 moment.

11 Just looking at 1605, why wouldn't it
12 apply in criminal cases too?

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

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

25 MS. BLATT: No.

1 JUSTICE GORSUCH: -- in those
2 circumstances?

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

8 CHIEF JUSTICE ROBERTS: Justice
9 Thomas, anything?

10 Justice Alito?

11 Justice Sotomayor?

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

17 So you're making the argument that
18 many people copy our act, but they don't copy
19 it completely. They exclude criminal cases.

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

25 And, two, the only thing we know about

1 international law is that French highest court
2 case that says you can't criminally prosecute a
3 -- the -- the Malta maritime authority for acts
4 that relate to the sovereignty of the state.

5 JUSTICE SOTOMAYOR: Well, we --

6 MS. BLATT: And that's --

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

10 MS. BLATT: Mm-hmm.

11 JUSTICE SOTOMAYOR: -- but operated by
12 somebody else, correct?

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

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: Ms. Blatt, you said in
23 response to Justice Barrett's 1604/1605
24 argument that you were leaning quite heavily on
25 1330. But I'm wondering whether 1330 makes

1 your position even stranger.

2 I mean, you're positing a statute that
3 starts at 1330 with the jurisdictional
4 provision clearly only looking to civil cases,
5 then switches to civil and criminal on the main
6 immunity provision, and then switches back when
7 you get to exceptions to immunity to only civil
8 cases.

9 And I would think that you look at
10 those three sections and you think they should
11 all work together, they're all governing the
12 same universe of claims, and that suggests that
13 1604 is doing only civil, just as 1330 clearly
14 is and as you say 1605 is.

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

22 So Congress had no reason to do
23 anything at all about procedures or anything
24 else when it came to criminal cases because
25 there's no such thing. So Congress passed a

1 very broad immunity statute, and then
2 everything else it has to say about the subject
3 is civil because those are the only kind of
4 cases that could go forward.

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

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

21 JUSTICE KAGAN: Well, maybe Congress
22 thought -- would they have said something if
23 they thought that there was common law
24 immunity, so that a statute didn't have to get
25 involved, then they wouldn't have passed a

1 statute with any involvement of criminal
2 actions?

3 MS. BLATT: Oh, no, Justice Kagan. We
4 know -- you've said this so many times -- that
5 the FSIA was to clear all this immunity up once
6 and for all because it was a disaster. It was
7 --

8 JUSTICE KAGAN: Well, but what was a
9 disaster was a lot of civil actions. As you
10 say, the criminal actions were never brought.

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

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

23 There would be juries, there would be
24 fraud claims, there would be no removal if this
25 -- if state -- if state courts -- if state --

1 states can -- I mean, I think the government's
2 view is that states could prosecute and you'll
3 have to figure out how it's preempted under I
4 don't know what law they're going to -- I'm
5 sure you'll ask them about preemption, but I
6 don't even know how they would muddle through
7 how this would work out in state court under
8 common law immunity.

9 JUSTICE KAGAN: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch, anything?

12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: I do have a few
14 questions, sorry.

15 MS. BLATT: That's okay.

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

23 And the other argument is that there's
24 a long tradition they say where state-owned
25 corporations engaged in commercial activity

1 don't have that common law immunity.

2 So if you could take those two --

3 MS. BLATT: Mm-hmm.

4 JUSTICE KAVANAUGH: -- first. I have
5 more after that, but anyway.

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

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

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

1 being convicted.

2 On your second question about how the
3 immunity doctrine developed, the government is
4 just wrong. It developed on the commercial
5 axis, not instrumentality axis. They have two
6 cases that dealt with instrumentalities, but
7 the axis in the common law is one of
8 commercial.

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

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

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

24 Same, what -- what's your answer to
25 that?

1 MS. BLATT: So there's been hundreds
2 of thousands if not a million and they --
3 subpoenas and they came up with five. Five.
4 That's not much.

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

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

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

23 MS. BLATT: Yep.

24 JUSTICE KAVANAUGH: So Congress
25 doesn't authorize, Congress hasn't prohibited,

1 but Congress does have a vote. If we rule
2 against you and Congress says no, that -- we
3 don't agree with the President's national
4 security determinations in this area and we're
5 going to take this option off the table, my
6 reading of the Constitution is Congress could
7 do that. So Congress has a voice even if you
8 lose.

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

13 And, again, you've already tied two
14 hands behind my back saying 1331, they've
15 spoken.

16 JUSTICE KAVANAUGH: Right.

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

1 they left it up to him to prosecute Britain.

2 JUSTICE KAVANAUGH: The solicitor
3 general again representing the administration
4 says nothing could embarrass the executive
5 branch more than a judge-made principle that
6 would vitiate a criminal federal prosecution.

7 Do you want to respond to that?

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

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

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

1 So what are they doing in criminal other than
2 insulting the sovereign?

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

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

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

1 crime to charge their servants.

2 JUSTICE KAVANAUGH: Okay. That's it.

3 MS. BLATT: Okay.

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

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

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

10 (Laughter.)

11 JUSTICE BARRETT: Not yet.

12 (Laughter.)

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

17 But, presumably, you know, states have
18 broad grants of criminal jurisdiction in their
19 courts. Is it -- you know, have states -- I'm
20 just wondering if you know as an empirical
21 matter. Have states tried to prosecute
22 commercial entities or instrumentalities?
23 And -- and, if so, is it common law immunity
24 that holds it back, or is this kind of the
25 finger in the dike so that, you know, the --

1 the instrumentalities can say oh, no, you know,
2 the FSIA deprives you of jurisdiction?

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

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

12 MS. BLATT: Oh. No.

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

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

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

1 made these arguments, and -- and you're just
2 saying that you think not --

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

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

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

12 JUSTICE BARRETT: Okay. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Jackson?

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

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

1 codifying here, it thought there were
2 exceptions to it.

3 MS. BLATT: Mm-hmm.

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

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

12 JUSTICE JACKSON: But I can't put it
13 to the side because the plain text of 1604 says
14 you get immunity except as provided in 1605 and
15 1607. So, if that's the structure of --

16 MS. BLATT: Well, 1330 --

17 JUSTICE JACKSON: Yeah.

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

25 I mean, if you -- if this Court is --

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

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

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

21 JUSTICE JACKSON: All right. Thank
22 you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Feigin.

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. That said, we do
15 acknowledge that there is a strong customary
16 international law principle against prosecuting
17 a state qua state. We would not endeavor to do
18 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.
24 Blatt, the point was made that states really
25 haven't tried this, maybe a municipality here

1 or there. But, if we hold that 1604 doesn't
2 apply to criminal cases, then states would be
3 free to try to bring lawsuits against Mexico
4 for this or that, or perhaps China because of
5 COVID, or who knows what a creative state
6 prosecutor might come up 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. And the only
14 place for review of these state court actions
15 would be in this Court at the end of the day,
16 perhaps at the end of those federal -- those
17 state prosecutions or on some emergency
18 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, 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 is 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, but just on its plain language, we
10 normally start with the statute itself.

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

8 JUSTICE GORSUCH: I understand the
9 contextual arguments.

10 MR. FEIGIN: Yeah, okay.

11 JUSTICE GORSUCH: I do. And I
12 appreciate them and I don't mean to cut you off
13 but just looking at 1604 itself, have you got
14 anything to help us on -- on the language there
15 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 you -- 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 what I can
23 tell you is the following: Some of the aspects
24 --

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,
6 and I hope it's not a city, I don't mean to
7 denigrate anybody, Timbuktu -- I'm making up a
8 name, okay -- in Timbuktu some U.S. Attorney's
9 Office brings such a suit without getting
10 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 JUSTICE KAVANAUGH: Isn't your answer
2 a yes?

3 JUSTICE SOTOMAYOR: I'm sorry.

4 MR. FEIGIN: No -- no, Your Honor.

5 JUSTICE KAVANAUGH: Your answer is not
6 yes to could the President or the attorney
7 general order the suit, U.S. attorney dismiss
8 the suit?

9 MR. FEIGIN: I believe the attorney
10 general and the President would be quite well
11 suited to ordering that suit --

12 JUSTICE KAVANAUGH: Sorry to
13 interrupt. I just wanted to --

14 MR. FEIGIN: -- dismissed and firing
15 the United States attorney, if the United
16 States attorney were --

17 JUSTICE SOTOMAYOR: Well, that -- that
18 --

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

20 JUSTICE SOTOMAYOR: I don't know how I
21 would want to leave to the vagrancies of
22 individual prosecutors whether it's federal or
23 state the right to insult another nation by
24 giving them this unbridled power to initiate
25 suit.

1 MR. FEIGIN: Well --

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

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

13 JUSTICE SOTOMAYOR: Now what do I --

14 MR. FEIGIN: -- there's not a formal
15 written policy --

16 JUSTICE SOTOMAYOR: What do I do with
17 the hearsay news reports that came out that the
18 prior administration was trying to apply
19 pressure to drop this lawsuit on the Southern
20 District of New York? This is a Southern
21 District of New York case, correct?

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

23 JUSTICE SOTOMAYOR: And so what do I
24 do with that?

25 MR. FEIGIN: Your Honor, I -- I think

1 those are internal government deliberations.
2 Some of them have been brought to light, but I
3 think what they do show is there was a process.

4 The U.S. attorney did not just go
5 through and indict the case without permission
6 from main Justice.

7 But turning to the question of --

8 JUSTICE SOTOMAYOR: But the main
9 Justice, does it go seek permission from the
10 Department of State? Because who is the
11 executive to make this decision?

12 MR. FEIGIN: Your Honor --

13 JUSTICE SOTOMAYOR: We all agree it's
14 the President, but there is no formula out
15 there to tell us who speaks for the President.
16 Is it -- you're saying in this lawsuit it's
17 you, and I would expect that.

18 MR. FEIGIN: Your Honor --

19 JUSTICE SOTOMAYOR: But I'm talking
20 about before it gets to the Supreme Court,
21 who's going to speak so that state courts and
22 U.S. Attorneys' Offices will listen?

23 MR. FEIGIN: Your Honor, the -- the
24 consultation process in this case, I am given
25 to understand, involved the other affected

1 departments, like the Treasury Department that
2 was lied to and the Department of State.

3 I stand here on behalf of the United
4 States representing every single one of those
5 agencies. They all stand behind this
6 prosecution.

7 JUSTICE ALITO: What if a --

8 CHIEF JUSTICE ROBERTS: I understood
9 you to be drawing a distinction between this
10 sovereign qua sovereign and instrumentalities
11 earlier.

12 What do you do with what Turkiye said
13 in its amicus brief, which is that Halk Bank is
14 an arm of the state undistinguishable from the
15 government itself?

16 MR. FEIGIN: Well --

17 CHIEF JUSTICE ROBERTS: Do they get to
18 have a say in that or who makes that judgment?

19 MR. FEIGIN: This Court has
20 definitively held that it is not the domestic
21 state that gets to make this judgment. That's
22 in the First National City Bank against Banco
23 Para Del Comercio Exterior de Cuba, where this
24 Court held it was a matter of federal law or
25 international law, but it's not something the

1 state exclusively gets to designate.

2 The Court also said in that case that
3 corporations are presumptively separate
4 juridical entities and that principle dates
5 back to the founding, in fact, before the
6 founding where it was obviously possible to sue
7 the East India Company.

8 JUSTICE KAGAN: But what do we --

9 CHIEF JUSTICE ROBERTS: Well where do
10 you --

11 JUSTICE KAGAN: -- do with that --

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

15 MR. FEIGIN: So I think the -- there,
16 although we don't think it applies on its own,
17 the commercial activity exception that the FSIA
18 has is helpful and informative but, of course,
19 the definition of commercial there isn't
20 particularly well fleshed out. And it's just
21 something that courts have had to develop, but
22 here we're talking about just what are
23 sovereign and what are non-sovereign actions,
24 the kinds of things that have been held to be
25 sovereign actions, for example, the one foreign

1 case they have on this, the French Supreme
2 Court case involved the flagging of ships and
3 registration of ships, which is exclusively
4 something a sovereign could do, but it's not
5 something that I think even the British common
6 law courts had too much trouble with.

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

15 JUSTICE KAGAN: But what do we do with
16 the fact that the FSIA rejects the distinction
17 between sovereigns and their instrumentalities?
18 I mean, that would suggest a kind of
19 preexisting common law rule that the FSIA was
20 picking up from that there was no sharp line
21 between the two?

22 MR. FEIGIN: Well, no, Your Honor, I
23 don't think that's -- that's quite right,
24 because as we note in our brief, and we have a
25 source that goes into this in more detail, the

1 FSIA definition is broader because there are
2 possible foreign policy implications with a
3 case like this. And we don't deny them.
4 That's why we take them so seriously and bring
5 them so rarely.

6 But under the common law, qua common
7 law, they really haven't identified anything in
8 customary international law or common law --

9 JUSTICE KAGAN: But you're saying that
10 Congress --

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

12 JUSTICE KAGAN: -- when Congress
13 enacted the FSIA, Congress was changing the
14 common law with respect to instrumentalities of
15 sovereign states in that dramatic a fashion?

16 MR. FEIGIN: I don't think it was
17 changing the common law. I think what it was
18 trying to do was recognize that other cases
19 could potentially have these kinds of
20 implications and ensure that it was taking care
21 of those cases too.

22 In fact, if you look at the principal
23 problem at which the FSIA was directed, it was
24 the need for the executive branch to have to
25 handle all -- the suggestion of immunity

1 letters in all of these private suits. I think
2 suits against corporations might even be more
3 common than suits against states or suits
4 against agencies of states. And, of course,
5 Congress would not have wanted to leave the
6 executive with that burden in those cases, and,
7 admittedly, it wasn't handling that burden
8 particularly well or particularly consistently.
9 But it didn't by there -- by doing so move
10 where the common law was and always has been.

11 And, in particular, this Court -- I
12 think there are four principles that kind of
13 show that these kinds of prosecutions are
14 possible, all of which date back to the
15 founding.

16 One is prosecutions against foreign
17 officials, which date back at least to the
18 1790s.

19 The second would be the
20 well-recognized difference between a
21 corporation and the state, which likewise dates
22 back prior to the founding.

23 The third would be the well-recognized
24 distinction between sovereign and non-sovereign
25 functions, which goes from the East India cases

1 up to the French Supreme Court case and is,
2 frankly, embodied in the FSIA today.

3 And the fourth would be the long
4 history of deference to the executive. The --
5 the --

6 JUSTICE GORSUCH: Mr. Feigin, what we
7 don't have in that list, though, is any
8 evidence at the time of the founding that a
9 suit against a sovereign qua sovereign would be
10 something that these -- our American courts
11 would have accepted as -- in criminal cases.

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

20 MR. FEIGIN: So, Your Honor, we're not
21 contesting that principle, and I think what you
22 do here -- and this -- this goes to what --
23 what I take to be one of Petitioner's main
24 arguments today. What I would say about that
25 are that there is a separateness between

1 corporations and sovereigns and --

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

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

14 JUSTICE GORSUCH: It's not what we
15 want to do --

16 MR. FEIGIN: Okay.

17 JUSTICE GORSUCH: -- or what we will
18 do or what we have the power to do. It's what
19 we are supposed to do under the law that I'm
20 looking -- looking for guidance on.

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

23 JUSTICE GORSUCH: It's not what I need
24 to do either. It's what we -- what we should
25 do I'm asking for your thoughts on. And if the

1 Second Circuit didn't consider this question,
2 if it was an FSIA analysis, and if you concede
3 that there is some general or international
4 common law immunity for sovereigns that the
5 court didn't consider below, is -- isn't a
6 remand appropriate?

7 MR. FEIGIN: Well, I think the FSIA is
8 more restrictive than common law in this
9 respect because I think there could be
10 non-sovereign functions that don't satisfy, for
11 example, the commercial activity exception. So
12 I think that should really -- should really be
13 enough.

14 But, on the particular issue of
15 separateness, if you'd let me take a quick stab
16 at telling you why this is a -- this is
17 crystal-clear under this Court's precedents, if
18 we go back to the Cuba bank case whose name I'm
19 sure I mangled in my exchange with the Chief
20 Justice, it makes clear that corporations are
21 presumptively separate juridical entities.

22 And if you compare the Petitioner here
23 and you look at the actual sources that are
24 cited in Turkiye's brief, which are a couple of
25 declarations filed in a civil Southern District

1 case, what they make clear is that the -- the
2 control over the bank is exercised through the
3 majority shareholder status and the General
4 Assembly of shareholders. They could sell
5 those shares tomorrow. It's publicly traded on
6 the Ankara stock exchange. They're subject to
7 private banking and regulatory laws. And they
8 can even be sued and they'll defend in their
9 own name. I don't think anyone is saying you
10 could attach the sovereign's own assets.

11 JUSTICE GORSUCH: I -- I -- I --

12 MR. FEIGIN: If you compare --

13 JUSTICE GORSUCH: I'm sorry to
14 interrupt --

15 MR. FEIGIN: Yeah.

16 JUSTICE GORSUCH: -- but we do have
17 that before us --

18 MR. FEIGIN: Okay.

19 JUSTICE GORSUCH: -- and I appreciate
20 that. But I guess my question is a little more
21 fundamental, which is you seem to agree -- and
22 I guess I just want to understand if you
23 agree -- that at the founding, understanding of
24 the predecessor of 3231, in light of this
25 country's history, it really is the underdog

1 and being more concerned about being sued
2 abroad than haling others into our courts and
3 -- and worried deeply about the possibility, if
4 we did, what international repercussions would
5 follow for a relatively weak new nation, that
6 there is some core common law immunity that
7 does apply to states, common law, general law,
8 international law, that -- that some court has
9 to apply and consider at some stage.

10 MR. FEIGIN: Your Honor, we do
11 acknowledge that -- and we're not contesting
12 that it -- it was -- it sprung up at some
13 particular time in history past the founding,
14 or we're not claiming --

15 JUSTICE GORSUCH: Or prior to the
16 founding. I mean, Vowell --

17 MR. FEIGIN: Yeah, we -- we -- that
18 applies to states qua states.

19 JUSTICE GORSUCH: Yeah.

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

21 JUSTICE GORSUCH: Here.

22 MR. FEIGIN: -- to foreign
23 government-owned corporations.

24 JUSTICE GORSUCH: I -- I understand --
25 I understand that point.

1 MR. FEIGIN: And -- yeah.

2 JUSTICE GORSUCH: Okay. Thank you.

3 JUSTICE JACKSON: And isn't the
4 question that follows from that, so who should
5 be deciding under these circumstances in this
6 case whether we have a foreign corporation
7 versus their argument that this really is the
8 state? Shouldn't we send it back to the Second
9 Circuit to really flesh that out?

10 MR. FEIGIN: Well, Your Honor, I -- I
11 don't think you need to do that for a couple of
12 reasons. Number one, even the professors on
13 their side agree that there's always been
14 deference to the executive on that kind of
15 point. But, even --

16 JUSTICE JACKSON: On the point of
17 who's --

18 MR. FEIGIN: On the point --

19 JUSTICE JACKSON: -- an
20 instrumentality?

21 MR. FEIGIN: Sorry. On the point of
22 whether someone is -- whether a -- whether
23 sovereign or non-sovereign functions are being
24 exercised. I guess, on the question of who is
25 an instrumentality, I think there's always been

1 deference on that point too, subject to
2 potentially -- I mean, I can't tell this Court
3 that that's not subject to any form of judicial
4 review, but, here, it's clearly covered by the
5 Cuban bank case because, if you look at that,
6 the bank in that case was created by Cuban law,
7 it was a hundred percent owned by the Cuban
8 government, it was financed by the Cuban
9 government, it sent its profits to the Cuban
10 government, and a Cuban minister was the
11 president of the bank.

12 You don't -- it's on page 614. You
13 don't even have all of those features here, and
14 this is a corporation much like the kind of
15 corporation the Court contemplates at page 624
16 of that case, which is a corporation that's
17 established so the government can do some kind
18 of business, and when it does, when it acts
19 through a corporation in our courts, it is
20 subject to the jurisdiction of the United
21 States.

22 And let me just make a quick point on
23 why this is clearly not a jurisdictional rule.
24 I don't think the Court needs to look any
25 further than pages 758 and 759, I think it is,

1 of Ex parte Peru, in which the Court makes
2 quite clear -- and this is another one of these
3 in rem ship cases -- that the court has
4 jurisdiction, it's just a question of whether
5 it declines or doesn't decline to exercise it.

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

16 JUSTICE ALITO: Can I take you back to
17 the question of what would happen if, let's
18 say, an elected district attorney brings a
19 criminal case against a foreign state or
20 against a component of a foreign state or
21 against a corporation that is set up, owned and
22 controlled by the foreign state? What would
23 happen then?

24 MR. FEIGIN: Okay, Your Honor. I
25 mean, putting aside that that could happen with

1 foreign officials already under this Court's
2 law and we would be in the exact same spot, but
3 --

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

6 MR. FEIGIN: So say the -- say we're
7 against --

8 JUSTICE ALITO: -- it's the people
9 against whatever.

10 MR. FEIGIN: If -- if -- again, Your
11 Honor, if they brought a criminal action that
12 said like Commonwealth of Virginia against the
13 Kingdom of Sylvania --

14 JUSTICE ALITO: Yeah.

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

17 JUSTICE ALITO: All right. And so the
18 court receives that and the court says well,
19 fine, that's your opinion, but we don't agree.
20 Then what?

21 MR. FEIGIN: Well, Your Honor, that's
22 subject to review in this Court just the same
23 way --

24 JUSTICE ALITO: After the -- after the
25 -- there's been a trial and an appeal through

1 the state courts, until there's a final -- when
2 there's a final decision from the supreme court
3 of the state, then it could come here?

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

16 The state trial court could refuse to
17 to recognize that separateness and just say,
18 you know, batten down the hatches, we're going
19 to trial. And whatever emergency relief would
20 be available ultimately culminating in this
21 Court, there would be available there, would be
22 perfectly available in these circumstances.
23 And this Court usually trusts state courts to
24 get these things right.

25 JUSTICE ALITO: Well, under what

1 theory would this state prosecution be
2 preempted by federal law? The supremacy clause
3 applies to the Constitution and the laws of the
4 United States. So what is the law of the
5 United States that would block the state
6 prosecution?

7 MR. FEIGIN: Well, Your Honor, I think
8 we'd have a number of options. I mean, if the
9 Court were unprepared to accept some kind of
10 letter from the executive stating that this is
11 contrary --

12 JUSTICE ALITO: We had that in the
13 past.

14 MR. FEIGIN: -- to the President's
15 foreign affairs determination --

16 JUSTICE ALITO: Yeah, we had that. I
17 can't -- I'm -- I'm blanking on the name of the
18 case, but we had exactly that. President Bush
19 sent a letter and said quit, and they -- Texas
20 said, well, thanks for your opinion, but we're
21 going ahead.

22 MR. FEIGIN: I -- I -- I don't want to
23 argue against myself. I think you're thinking
24 of Medellin, Your Honor.

25 JUSTICE ALITO: Yeah. Medellin,

1 right.

2 MR. FEIGIN: But even -- even if
3 that -- that were not enough, there are a
4 number of other actions the federal government
5 could take, up to and including, for example,
6 entering into an executive agreement of the
7 sort in Garamendi that would contemplate
8 dismissal of the prosecution --

9 JUSTICE ALITO: I -- I'll come back to
10 this --

11 MR. FEIGIN: -- which would clearly be
12 granted.

13 JUSTICE ALITO: -- when -- when I have
14 my --

15 CHIEF JUSTICE ROBERTS: Okay. Justice
16 Thomas?

17 JUSTICE THOMAS: No, Chief.

18 CHIEF JUSTICE ROBERTS: There you go.

19 JUSTICE ALITO: All right. So --

20 (Laughter.)

21 MR. FEIGIN: Welcome back. Thank you.

22 JUSTICE ALITO: -- this does seem to
23 me to get into a very interesting question that
24 has ramifications beyond this case. So what is
25 it -- would you say that there are some -- that

1 there's a principle of customary international
2 law that would bind the states under the
3 supremacy clause?

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

12 If it were to come up, I think we
13 would say that the supremacy clause and just
14 the structure of the Constitution overall, as
15 this Court has, you know, repeatedly
16 recognized, vests the federal government with
17 exclusive foreign affairs powers.

18 The foreign affairs powers are
19 principally exercised through the executive
20 branch, and if the -- the executive branch has
21 a number of tools for ensuring that the states
22 don't start making side treaties or do things
23 that the federal government does not approve
24 of, and I think there would be a number of
25 tools that could be used here.

1 I've suggested a couple of them.

2 Another one of them --

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

12 But, when you talk about common law,
13 then I -- I'm more confused. Well, I'm not
14 confused. I'm -- I'm worried because isn't it
15 an interest -- a very important question
16 whether customary international law is binding
17 on the states under the supremacy clause?

18 MR. FEIGIN: Well, Your Honor, I think
19 the Court suggested in Samantar that they
20 should -- that courts should give weight to
21 suggest -- I suppose those were federal courts
22 under the FSIA, but the Court suggested that
23 for foreign officials, courts ought to give
24 some respect or potentially conclusive respect
25 to the views of the executive branch, which

1 would -- and to the extent that those reflect
2 customary international law, I -- I think that
3 might well be binding on the states,
4 particularly because the states don't have any
5 authority to legislate or take action that
6 would be contrary to customary international
7 law.

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

17 But it has never happened, which,
18 again, under Samantar, is something that
19 suggests that it was not something Congress was
20 concerned with in the FSIA. It clearly doesn't
21 bear on the threshold 3231 question, and it
22 doesn't have any purchase here, where it's the
23 federal --

24 JUSTICE ALITO: Well, it's true it's
25 never happened, but nothing like this has

1 happened either.

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

11 If you look at a couple of our recent
12 prosecutions, the Pangang one I referred to
13 earlier is a Chinese-owned corporation that is
14 engaging in economic espionage.

15 We have another one against a
16 Chinese-owned corporation that involves nuclear
17 information, and the -- it's the considered
18 judgment of the executive that in rare cases it
19 is appropriate to bring criminal actions.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

22 Justice Gorsuch?

23 JUSTICE GORSUCH: Yeah. So the
24 absence of state court actions in the past
25 could lead to a couple of different inferences.

1 One might be it isn't a problem, so Congress
2 couldn't have thought about it in the FSIA and
3 we -- we have tools to deal with it.

4 But it seems to me an equally
5 plausible inference is state courts haven't
6 done this historically because no one's ever
7 thought any court could engage in criminal
8 prosecutions of -- of state entities.

9 MR. FEIGIN: Well, Your Honor, to the
10 --

11 JUSTICE GORSUCH: So, on that, does
12 that argument cut?

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

19 If the assumption instead centered on
20 the FSIA and what sort of procedures it should
21 include, I think the absence of a removal
22 provision is a blinking light here because, if
23 the -- if Congress were really concerned that
24 this could ever be a problem, it would have
25 given everyone an easy way to deal with it.

1 JUSTICE GORSUCH: Yeah, it's a
2 blinking right both ways, though, it seems to
3 me. The absence of a removal provision might
4 be suggestive that 1604 means what it says and
5 it just bars these kinds of actions, period.

6 And I -- I -- I know you -- you -- you
7 don't think it's a -- a serious problem, but I
8 guess I -- I guess I'm not totally relieved by
9 your assurances that states won't take a
10 holding that 1604 doesn't bar criminal actions
11 if we were to go down that road.

12 I -- I guess I'm less sanguine about
13 the prospects of state courts not bringing
14 these kinds of prosecutions, and I'm -- I'm --
15 I'm still not sure I understand your answers to
16 Justice Alito about what tools this Court would
17 have to discipline that under -- under the
18 federal Constitution and the supremacy clause.

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

22 JUSTICE GORSUCH: But what -- what
23 provision of the Constitution? I -- I
24 understand your -- your -- your -- your cases.
25 You've said them. I don't want to repeat that.

1 But what provision of the Constitution
2 would you point to that would allow this Court
3 through the supremacy clause, which, again, as
4 Justice Alito talked about, is, well, we
5 certainly have the right to tell state courts
6 that they are violating the -- the
7 constitutional or federal laws, but what -- on
8 what authority could we tell them that they're
9 violating customary international law?

10 MR. FEIGIN: Well, Your Honor, I think
11 very clearly this would extend to, for example,
12 executive agreements. And if this were rising
13 to the level of really becoming a problem, even
14 though it has literally never happened --

15 JUSTICE GORSUCH: I understand.

16 MR. FEIGIN: -- and is, therefore,
17 under Samantar, not something that Congress was
18 going to be concerned with here --

19 JUSTICE GORSUCH: I got that.

20 MR. FEIGIN: We could make an
21 executive agreement with the other country that
22 would preempt -- that would clearly, under
23 Garamendi, preempt the state prosecution.

24 JUSTICE GORSUCH: Okay. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: A couple -- couple
3 follow-ups. You said earlier you were
4 representing all the executive departments and
5 agencies. You're representing the President
6 too, correct?

7 MR. FEIGIN: That's correct, Your
8 Honor.

9 JUSTICE KAVANAUGH: President Biden?

10 MR. FEIGIN: Yes, Your Honor --

11 JUSTICE KAVANAUGH: Yes.

12 MR. FEIGIN: -- and this action was
13 actually brought by the previous
14 administration.

15 JUSTICE KAVANAUGH: Right. Okay.

16 Justice Sotomayor was asking you about
17 the process, and I don't think you described it
18 in full, the process not written, but the
19 process that occurs in a situation like this,
20 which I assume, and all indications are, would
21 involve the Attorney General and the Secretary
22 of State and the National Security Advisor and
23 the White House Counsel and probably the
24 President too.

25 But is that the normal process for

1 something like this, or do you not want to talk
2 about that?

3 MR. FEIGIN: Your Honor, I'd prefer
4 not to discuss the details of internal
5 processes.

6 JUSTICE KAVANAUGH: What were you
7 going to say about the process? Because you
8 were going to say something.

9 MR. FEIGIN: I think I said all I was
10 planning to say, Your Honor.

11 (Laughter.)

12 MR. FEIGIN: I didn't mean to leave
13 the impression that I left something in -- in
14 -- in the box. But, I mean, just -- just to
15 reiterate, I think it is well -- perhaps what I
16 was not able to say is I think it is well
17 understood in the U.S. Attorneys' Offices is
18 not -- that they would need to run this kind of
19 thing up the chain. And when it's run up the
20 chain, the chain will, if you'll forgive the
21 mixing of metaphors, grow some spokes and will
22 consult with the other portions of the federal
23 government that might have concern with a case
24 like this.

25 We don't have examples of cases, and

1 -- and this isn't one of -- certainly isn't one
2 of them in which something is just a frolic and
3 detour by some individual, a Special Assistant
4 U.S. Attorney in some satellite office that
5 only contains that Special Assistant U.S.
6 Attorney.

7 JUSTICE KAVANAUGH: And last question,
8 this is going to take the opposite perspective
9 of the questions I was asking Ms. Blatt and
10 picks up on Justice Gorsuch's questions.

11 So another way to look at this under
12 the Youngstown is -- framework is to think,
13 well, we should -- to avoid all these questions
14 that have been coming up that are difficult, we
15 should try to fit this case within the
16 statutory scheme that exists and that Congress,
17 in essence, has authorized prosecutions or at
18 least said no immunity necessarily when it's
19 commercial activity, has suggested immunity
20 otherwise, and that if the President -- if the
21 executive branch wants more authority than what
22 they could get out of the FSIA, there's
23 indications that they can go back to Congress.

24 Now, maybe that's the entirely wrong
25 way to look at it, but that's what I was

1 thinking on the other side of how to think
2 about this case; in other words, some -- some
3 limits on the executive, but if you want more
4 power go to Congress.

5 MR. FEIGIN: So if Your Honor is
6 supposing that the 3231 question is decided in
7 our favor --

8 JUSTICE KAVANAUGH: Hmm-mm.

9 MR. FEIGIN: -- and has decided that
10 the FSIA does apply --

11 JUSTICE KAVANAUGH: Hmm-mm.

12 MR. FEIGIN: -- but the commercial
13 activity exception likewise applies --

14 JUSTICE KAVANAUGH: Correct.

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

17 JUSTICE KAVANAUGH: Assume all of
18 that. Why is that not a bad resolution, just
19 thinking about this at a bigger picture level?
20 The Second Circuit's approach there was, you
21 know, kind of no harm.

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

1 JUSTICE KAVANAUGH: Hmm-mm.

2 MR. FEIGIN: But if the Court were to
3 do that, I think that would -- and simply
4 affirm the decision below, in which both courts
5 found that the commercial activity exception
6 applies, I think we'd be fine with that.

7 JUSTICE KAVANAUGH: No systemic
8 problems from that?

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

11 JUSTICE KAVANAUGH: Okay.

12 MR. FEIGIN: -- and so --

13 JUSTICE KAVANAUGH: That answers the
14 question.

15 MR. FEIGIN: Yeah.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: Justice Kavanaugh
20 pointed out in his colloquy with Ms. Blatt that
21 these kind of suits might be an important tool
22 in the executive's tool kit.

23 Could you explain why -- I mean, given
24 that the government has the authority to
25 prosecute the individual like, you know, the

1 executives at the bank, you know, given that
2 the executive is not going to prosecute the
3 country itself, you say, so what is -- I -- I
4 just want to understand the backdrop. What
5 does the government get out of going after the
6 bank as opposed to all the individuals who work
7 in the bank?

8 MR. FEIGIN: Sure, Your Honor. A -- a
9 few things. First of all, the individuals, as
10 a couple of the individuals are in this case,
11 may be beyond our reach or missing. You could
12 imagine a hostile foreign government acting
13 through one of its corporations that just
14 rotates people in and out, and withdraws them,
15 and won't extradite them for us.

16 More generally, what this does is
17 force a change in the corporation as a whole or
18 potentially disable it. The kinds of penalties
19 we can seek under the criminal provisions would
20 allow a penalty of up to two times the amount
21 involved in the money laundering and --

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

1 MR. FEIGIN: Well, Your Honor, a
2 couple of points. First of all, the other
3 criminal remedy I was going to mention is
4 potential forfeiture of all the assets involved
5 in the offense. And if that were imposed
6 potentially as a condition of probation or
7 something to that effect, then that would
8 enable the United States to essentially disable
9 the Petitioner bank from doing various things
10 within the United States.

11 As for other potential remedies, under
12 the civil remedies, which I believe are at 50
13 U.S.C. 1703, in order to impose fines for that
14 or -- or civil sanctions for that, we'd have to
15 trace each transaction, which is going to be
16 incredibly difficult in the context of a
17 money-laundering scheme where the specific
18 purpose is to hide it. And we'd have to go
19 through transaction by transaction.

20 And the other problem is some of these
21 remedies are sledgehammers. Some of the
22 remedies they propose, up to and including
23 going to war with Turkiye, are -- are not
24 things that -- would have very destabilizing
25 consequences.

1 And what we want to do is to deter
2 other government-owned corporations from these
3 kinds of actions, deter, frankly, other
4 governments from trying to use corporations to
5 do these kinds of things. I'm not saying that
6 that's what happened here, but just
7 hypothetically.

8 And also just to disable this
9 particular bank from doing the kinds of
10 commercial activities potentially that it was
11 engaging in that led to this prosecution.

12 JUSTICE BARRETT: What about the
13 retaliatory consequences that Ms. Blatt points
14 out could result in the other way? The United
15 States is not concerned about those, about
16 foreign countries initiating criminal actions
17 against U.S.-owned corporations?

18 MR. FEIGIN: A couple of points on
19 that, Your Honor. It's not like we undertook
20 this lightly. As I've said numerous times, we
21 have considered that possibility. You know,
22 without specifically --

23 JUSTICE BARRETT: Well, I understand
24 that, but I think --

25 MR. FEIGIN: Yeah.

1 JUSTICE BARRETT: -- part of the
2 questions that you've been getting about states
3 is that, however carefully the United States
4 might consider it before initiating such a
5 prosecution, it may or may not be possible to
6 control what states and municipalities do.

7 MR. FEIGIN: And that -- that leads to
8 exactly the second point I was going to make,
9 Your Honor, which is we never controlled what
10 they were going to do. Now, if they decide --
11 I -- I don't know the -- they -- this will
12 enable them -- to the extent that we have
13 government-owned corporations that look like
14 Petitioner here, they will be able to point to
15 this and other cases that we've already
16 brought, potential -- and some of which are --
17 have been resolved, like the recent Petrobras
18 case in Brazil, as precedent for whatever
19 proceeding they wish to undertake.

20 But even before that, they weren't
21 necessarily beholden to our view of the law in
22 the first place. But, you know, we acknowledge
23 that what's good for the goose is good for the
24 gander. We have considered that, and we're
25 prepared to -- to deal with it.

1 Many of the instrumentalities that
2 might be at issue in those cases, or actually
3 they wouldn't really be instrumentalities,
4 they'd be corporations, don't do a great deal
5 of operation outside the United States. You
6 know, for example, if the government bailed out
7 GM by buying 75 percent of its stock, we
8 wouldn't be asserting that GM couldn't be sued
9 in another country. We wouldn't view that as a
10 suit against the United States.

11 JUSTICE BARRETT: Thank you.

12 MR. FEIGIN: I -- I'm sorry, I said
13 "suit." What I meant even was "prosecuted" --

14 JUSTICE BARRETT: Prosecuted.

15 MR. FEIGIN: -- and we wouldn't view
16 that as a criminal prosecution against the
17 United States.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

20 JUSTICE JACKSON: Yes. Can I just go
21 back quickly to Justice Kavanaugh's point about
22 the FSIA. I guess I'm trying to understand
23 whether if we -- if we agreed that the
24 commercial activity exception applied in this
25 circumstance such that there is no immunity

1 under that statute, would that be the end of
2 it, or would we still go on or have to contend
3 with the issue of common law immunity in the
4 criminal realm?

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

7 JUSTICE JACKSON: So we'd have to have
8 the sort of predicate determination that the
9 FSIA is applying in the criminal realm to -- to
10 -- to --

11 MR. FEIGIN: Yes, Your Honor, I think
12 that would be incorrect to hold. Like I think
13 in order -- in order to completely avoid
14 looking -- I -- I don't know that the Court can
15 avoid looking at the common law itself because,
16 again, as I suggested when I started my
17 presentation here, that pervades all of their
18 arguments because --

19 JUSTICE JACKSON: Right. So I guess
20 I'm trying to -- I'm trying to understand
21 what -- your answer to Justice Kavanaugh and
22 the suggestion that we could just look at the
23 FSIA and not address the common law.

24 MR. FEIGIN: So I was --

25 JUSTICE JACKSON: Wouldn't we have to

1 at some level?

2 MR. FEIGIN: Well, I was -- I was
3 taking as a given Justice Kavanaugh -- what I
4 understood to be Justice Kavanaugh's premise
5 that the Court had already decided, contrary to
6 our view, and I think frankly incorrectly, that
7 the FSIA does apply to criminal matters.

8 If it does, then it would displace the
9 common law and it would be fine just to look at
10 the commercial activity exception.

11 I -- I do -- I think there are maybe
12 some differences between the commercial
13 activity exception and the common law and again
14 we don't think the FSIA does apply and may give
15 us -- the common law might give a slightly
16 broader reign over non-sovereign actions. We
17 may not need to locate the acts in the precise
18 same way, the acts comprising the gravamen of
19 the offense --

20 JUSTICE JACKSON: Okay. Can I just --

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

22 JUSTICE JACKSON: -- ask you one last
23 question, mindful of the time. So what is your
24 position as to how much weight courts have to
25 give to an executive non-immunity

1 determination? Is it dispositive in your view?

2 It -- and if so, why isn't that
3 intentioned with this notion of there being
4 some absolute immunity in the -- the criminal
5 law realm?

6 MR. FEIGIN: Well, Your Honor, a --
7 a -- a couple of points on that. I think
8 Republic of Mexico against Hoffman suggests
9 that it would essentially be dispositive. I
10 think it would particularly be dispositive in
11 a -- an inaction such as a criminal prosecution
12 brought by the sovereign itself.

13 But even aside from that, if the Court
14 wanted to draw a distinction, as I think I
15 suggested earlier today, there might be cases
16 where it is so clear that what the executive is
17 asking for deference for is completely contrary
18 to customary international law that the kind of
19 role that the executive is playing in this case
20 in developing international law, which the
21 Court recognized is perfectly legitimate in
22 Sabbatino, for instance, wouldn't really
23 pertain.

24 And you would really have a situation
25 in which deferring -- a court might

1 independently decide that deference is not
2 warranted, but we're nowhere near that here
3 because, as I suggested -- as I began and --
4 and may end, there really isn't anything here.
5 There's no there, there.

6 There's nothing about government-owned
7 corporations that are exercising non-sovereign
8 functions, which are separate juridical
9 entities, and their actions aren't
10 presumptively attributed to the government.
11 That's why the FSIA itself in Section 1606
12 allows punitive damages against
13 government-owned corporations but not against
14 the sovereign itself because the actions of the
15 corporations can be wrongful, even if we don't
16 think the actions of the sovereign qua
17 sovereign can.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 JUSTICE KAVANAUGH: When you were
21 answering Justice Barrett's questions just now,
22 were you talking about foreign states or U.S.
23 states? I was -- or both? Or do you know?

24 MR. FEIGIN: I -- I was understanding
25 her questions to be about foreign states.

1 Okay.

2 JUSTICE KAVANAUGH: Got it. Thank
3 you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 MR. FEIGIN: Thank you.

7 CHIEF JUSTICE ROBERTS: Ms. Blatt.

8 REBUTTAL ARGUMENT OF LISA S. BLATT
9 ON BEHALF OF THE PETITIONER

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

12 I -- I really thought it should have
13 gone without saying that Congress has not
14 authorized federal courts to convict Israel,
15 Saudi Arabia or the Vatican City. I mean,
16 nothing has changed in the wording of the
17 statutes since the founding, and all the
18 government has is to return us to pre -- I
19 guess after -- before 1976, that the executive
20 will sort of make this up as it goes and courts
21 will have to figure this out on their own.
22 Even though Congress expressly granted
23 jurisdiction over foreign sovereigns in 1332
24 and 1875. So there's always been express
25 congressional authority to deal with

1 sovereigns.

2 So -- and on this bit about sort of
3 let's just do it all under the common law, the
4 government waived any argument that Halkbank is
5 not an arm of the state of Turkey. It went
6 whole hog. It said, we can indict sovereigns
7 qua sovereigns and we can wave immunity at
8 will. It never made any argument in district
9 court that we weren't a sovereign arm.

10 And no matter what he said up here,
11 his indictment indicts the government of Turkey
12 acting through its bank, although only the bank
13 is named in the indictment.

14 The other thing he mentions on this
15 wealth fund, on page 5 of our brief and the
16 Turkey brief, it makes clear -- it cites a -- a
17 declaration and that declaration says the
18 wealth fund is not a juridical entity. It is
19 like the -- the general fund, the Social
20 Security fund, the judgment fund. It's an
21 actual fund of the Treasury Department.

22 So it's actually -- it just has no
23 legal entity. So I don't see how the wealth
24 fund is at issue.

25 On this bit about, well, it's -- I

1 think he said, we'll protect sovereigns qua
2 sovereigns and we'll protect instrumentalities
3 acting with sovereign actions. And I -- I
4 think that gets into the waiver point. It's --
5 the indictment itself alleges that this was
6 carried out on behalf of -- of -- of Turkiye to
7 inflate their exports.

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

19 You're giving courts no guidance
20 except for, I guess, go back to the British
21 India something or other. That wasn't even a
22 foreign corporation.

23 So -- and always through the law,
24 in -- in the U.S., also -- the one other thing
25 I will say about this Cuba case, that -- no one

1 disputes that a juridical entity, Amtrak, is
2 juridically separate from the United States.
3 And that case, the Cuba case, says Amtrak can't
4 be liable for the United States' debts although
5 the court went on and said we're going to make
6 Cuba liable for the bank's debts.

7 But the -- the -- the Postal Service
8 last time I checked was a separate juridical
9 entity. Last time I checked, it mails things
10 abroad. In most states, the Postal Service is
11 a commercial activity.

12 And so there are lots of entities that
13 actually do things abroad and so for the
14 government to come up here and say: Well, I --
15 I don't know who's going to determine it's a
16 sovereign act. I guess it'll be Venezuela
17 courts or Russian courts or something like
18 that, but they're not going to be bound by the
19 government's -- government's argument here.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

23 (Whereupon, at 12:44 p.m., the case
24 was submitted.)

25

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