

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 TURKIYE HALK BANKASI A.S.,)
4 AKA HALKBANK,)
5 Petitioner,)
6 v.) No. 21-1450
7 UNITED STATES,)
8 Respondent.)
9 - - - - -

10
11 Washington, D.C.
12 Tuesday, January 17, 2023

13
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.
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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 state 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 -- could understand
16 analytically your argument, could you waive
17 immunity in -- in district court and would --
18 after the waiver, would they have jurisdiction?

19 MS. BLATT: No. Under --
20 subject-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 -- 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 a 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 immunity
11 is a -- 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 a -- an affirmative defense, but I don't
19 normally think of it as a part of
20 subject-matter 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, with -- with
13 -- with -- bars any jurisdiction, speaks more
14 broadly than Section 1330, which opens up only
15 civil jurisdiction. So the actual immunity
16 confer -- 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 -- I don't
24 think that's correct. But I -- for -- for the
25 three reasons, text, structure, and -- and

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

3 And so the -- remember, the foreign --
4 the -- the 1330 is part of the FSIA. It's
5 passed in one continuous act. The very first
6 prosit -- provision of the Foreign Sovereign
7 Immunities Act is Section 1330, and it says
8 there's civil jurisdiction for these
9 exceptions. And then you get to the broad
10 cancellation of all jurisdiction and then the
11 1605 waiver.

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

22 And, finally, the results that I said
23 are borderline, you know, cataclysmic, that 50
24 states, all counties, and any city in this
25 country that has prosecution authority would

1 all of a sudden have jurisdiction to prosecute
2 any country qua country, and because Congress
3 has expressly waived immunity and canceled it
4 out on the statute, the executive branch can't
5 do anything about it.

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

11 JUSTICE SOTOMAYOR: Ms. Blatt --

12 MS. BLATT: Sure.

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

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

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

7 MS. BLATT: Mm-hmm.

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

12 MS. BLATT: Well, let me --

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

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

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

1 Assuming that I disagree with you on
2 the two aspects of the question presented, that
3 it's not jurisdictional --

4 MS. BLATT: Yeah. So --

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

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

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: Ms. Blatt, please

1 stop. It's not a question of not caring. It's
2 a question of defining what the common law
3 immunity is.

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

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

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

25 It appears or some of the allegation

1 is that it also engages in social services
2 activities, and the allegations in the
3 complaint say the sovereign, the government,
4 dictated what the bank was doing with respect
5 to these transactions.

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

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

9 JUSTICE SOTOMAYOR: But --

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

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

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

1 And if I --

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

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

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

20 MS. BLATT: If you reject --

21 JUSTICE GORSUCH: Yes, yes, yes, yes.

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

25 JUSTICE KAVANAUGH: Well, I -- I don't

1 think that was the question.

2 (Laughter.)

3 MS. BLATT: Oh, sorry.

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

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

8 MS. BLATT: Oh.

9 JUSTICE KAVANAUGH: -- just that --

10 MS. BLATT: Mm-hmm.

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

16 MS. BLATT: So, if the FSIA doesn't
17 apply --

18 JUSTICE KAVANAUGH: Or is it
19 inappropriate?

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

24 JUSTICE KAVANAUGH: Correct.

25 MS. BLATT: I mean, you can do

1 whatever you want, obviously.

2 (Laughter.)

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

9 JUSTICE KAVANAUGH: Well --

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

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

23 MS. BLATT: It is the --

24 JUSTICE KAVANAUGH: That's huge.

25 MS. BLATT: It's huge that -- that Con

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

8 JUSTICE JACKSON: But why do we have
9 to think that --

10 JUSTICE BARRETT: The language is
11 pretty -- the language --

12 MS. BLATT: Yeah.

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

23 I mean, it seems to me like maybe one
24 reason we don't see these prosecutions is
25 because the executive understands foreign

1 countries to have absolute immunity and so
2 would rarely assert them, because I agree with
3 Justice Thomas, we typically think of
4 something -- immunity as something that can be
5 waived.

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

14 MS. BLATT: Mm-hmm.

15 JUSTICE BARRETT: What's wrong with
16 that?

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

24 In Section 13 of the same judiciary
25 act, this Court got original jurisdiction over

1 diplomats and their servants. This -- the
2 first Congress made it a crime to prosecute a
3 domestic servant or a diplomat.

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

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

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

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

1 Iran from sponsoring terrorism, getting
2 involved in the Russia-Ukraine.

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

9 I don't know what -- what expertise do
10 we have to balance all those considerations?

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

22 JUSTICE JACKSON: But is that a -- is
23 that a matter of jurisdiction, or is it a
24 matter of immunity? The thing that concerned
25 me about your brief and perhaps even the way

1 you're reading the Schooner Exchange case is
2 that these are different concepts.

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

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

18 Shouldn't we just be focused on
19 immunity in this case?

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

24 But, on jurisdiction, the argument in
25 both the face of the opinion and every century,

1 there's Berizzi Brothers, Samantar, and Kiowa
2 Tribe, so you've got a case per century saying
3 Schooner Exchange was a jurisdictional case.

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

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

18 JUSTICE JACKSON: In a very particular
19 context.

20 MS. BLATT: Exactly.

21 JUSTICE JACKSON: The context, as I
22 understand it, was that Congress was concerned
23 that Americans who were suing foreign entities
24 didn't have real assured certainty about
25 whether or not their actions were going to be

1 considered because a lot of the power to
2 identify circumstances of immunity or not was
3 with the executive branch, and so they wanted
4 to codify rules in the civil context for when a
5 foreign country was going to be immune.

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

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

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

24 And I do think it is a big step to say
25 that the -- this Court is going to say and

1 leave it to courts when Congress has not
2 spoken, and the only time Congress spoke, it
3 granted broad immunity and then laid down these
4 very specific procedures on how you would ever
5 go about entertaining jurisdiction over a
6 foreign sovereign or its instrumentalities.

7 JUSTICE KAVANAUGH: If we are --

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

17 MS. BLATT: Yes. Our definition of an
18 instrumentality is it has to be created and
19 designated as such by the sovereign and
20 ownership and control. So you wouldn't have --
21 51 percent doesn't get you there. The -- it --
22 but --

23 CHIEF JUSTICE ROBERTS: Why not? I
24 mean, it's --

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

1 CHIEF JUSTICE ROBERTS: -- 51 percent
2 to control and -- and ownership and all that.

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

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

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

22 If it's an organically created by the
23 foreign country, and, you know, here, it's --
24 it's an actual affiliate of the Treasury
25 Department -- or, sorry, the Ministry of -- of

1 Treasury. So it's much more than that. So I
2 don't think it can just be this 51 percent.

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

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

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

1 don't include the sovereign. They don't --

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

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

17 (Laughter.)

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

24 JUSTICE BARRETT: Well, let me --

25 JUSTICE GORSUCH: For that --

1 MS. BLATT: -- no other country will
2 retaliate.

3 JUSTICE BARRETT: Oh, just --

4 JUSTICE GORSUCH: Please.

5 JUSTICE BARRETT: -- just one more.
6 Let's -- let's say that I disagree with you on
7 the 32 -- 3231 point --

8 MS. BLATT: Yeah, I gathered.

9 JUSTICE BARRETT: -- and so we are
10 talking about the FSIA. And I'm looking at
11 1604, which broadly, if you're just looking at
12 1604, you know, they have these arguments about
13 context of civil cases, but just looking at
14 1604, you know, that language seems to grant
15 immunity here.

16 But then, you know, the government
17 says that when you get to 1605, that all of a
18 sudden you're doing a switch, oh, no, no, now
19 the exceptions only apply in civil cases.

20 I think, you know, that's a pretty
21 good argument. What do you have to say to
22 that?

23 MS. BLATT: Just 1330. Again, the
24 FSIA -- I know it's a couple pages down in a
25 blue brief, but if -- the act of the FSIA

1 starts with Section 1330. It says there is
2 jurisdiction for cases following -- falling
3 within the exceptions in 1605 and -- and 16 --
4 through 1607. So the first provision of the
5 FSIA --

6 JUSTICE BARRETT: But, if we disagree
7 with you about the criminal grant of
8 jurisdiction, does that argument work as well?

9 MS. BLATT: Not as well.

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

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

24 JUSTICE GORSUCH: So state courts
25 would have jurisdiction. And could -- could

1 foreign sovereigns -- and I'm sorry for going
2 over -- even remove to federal court --

3 MS. BLATT: No.

4 JUSTICE GORSUCH: -- in those
5 circumstances?

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

11 CHIEF JUSTICE ROBERTS: Justice
12 Thomas, anything?

13 Justice Alito?

14 Justice Sotomayor?

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

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

23 MS. BLATT: Yeah. So correct. Two
24 points. One, we think that's what they did in
25 1604, but you're -- you're absolutely correct

1 that the ones we cite in Footnote 2 are
2 specific to criminal.

3 And, two, the only thing we know about
4 international law is that French highest court
5 case that says you can't criminally prosecute a
6 -- the -- the Malta Maritime Authority for acts
7 that relate to the sovereignty of the state.

8 JUSTICE SOTOMAYOR: Well, we --

9 MS. BLATT: And that's --

10 JUSTICE SOTOMAYOR: -- we have
11 permitted a suit against a vessel that was
12 owned by Mexico, I think it was --

13 MS. BLATT: Mm-hmm.

14 JUSTICE SOTOMAYOR: -- but operated by
15 somebody else, correct?

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

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: Ms. Blatt, you said in

1 response to Justice Barrett's 1604/1605
2 argument that you were leaning quite heavily on
3 1330. But I'm wondering whether 1330 makes
4 your position even stranger.

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

12 And I would think that you look at
13 those three sections and you think they should
14 all work together, they're all governing the
15 same universe of claims, and that suggests that
16 1604 is doing only civil, just as 1330 clearly
17 is and as you say 1605 is.

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

25 So Congress had no reason to do

1 anything at all about procedures or anything
2 else when it came to criminal cases because
3 there's no such thing. So Congress passed a
4 very broad immunity statute, and then
5 everything else it has to say about the subject
6 is civil because those are the only kind of
7 cases that could go forward.

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

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

24 JUSTICE KAGAN: Well, maybe Congress
25 thought -- may -- would they have said

1 something if they thought that there was common
2 law immunity so that a statute didn't have to
3 get involved? Then they wouldn't have passed a
4 statute with any involvement of criminal
5 actions.

6 MS. BLATT: Oh, no, Justice Kagan. We
7 know -- you've said this so many times -- that
8 the FSIA was to clear all this immunity up once
9 and for all because it was a disaster. It was
10 --

11 JUSTICE KAGAN: Well, but what was a
12 disaster was a lot of civil actions. As you
13 say, the criminal actions were never brought.

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

21 And so, to us, it seems odd that
22 Congress -- I think it's attributing that
23 Congress is just -- I know you might not like
24 the word "indifferent" -- but would let the
25 Justice Department or the President, rather,

1 the President control how these things happen.

2 There would be juries, there would be
3 fraud claims, there would be no removal if this
4 -- if state -- if state courts -- if state --
5 states can -- I mean, I think the government's
6 view is that states could prosecute and you'll
7 have to figure out how it's preempted under I
8 don't know what law they're going to -- I'm
9 sure you'll ask them about preemption, but I
10 don't even know how they would muddle through
11 how this would work out in state court under
12 common law immunity.

13 JUSTICE KAGAN: Okay. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch, anything?

16 Justice Kavanaugh?

17 JUSTICE KAVANAUGH: I do have a few
18 questions, sorry.

19 MS. BLATT: That's okay.

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

1 that's one argument.

2 And the other argument is that there's
3 a long tradition they say where state-owned
4 corporations engaged in commercial activity
5 don't have that common law immunity.

6 So if you could take those two --

7 MS. BLATT: Mm-hmm.

8 JUSTICE KAVANAUGH: -- first. I have
9 more after that, but anyway.

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

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

25 So that's just problematic even in the

1 civil. It's more problematic in criminal,
2 where someone's -- not liberty because you
3 can't put a foreign government in jail, but
4 there's massive political ramifications of
5 being convicted.

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

13 So, if the government is right about
14 the restrictive immunity developing along the
15 commercial, that frees them from -- frees them
16 and allows them and states too, I guess, to
17 prosecute any sovereign itself.

18 The Defense Department, National Park
19 Service, they, you know, sell Cokes and stuff.
20 I mean, our sovereign governments involve --
21 do -- do engage in lots of commercial
22 activities.

23 JUSTICE KAVANAUGH: Okay. Next, they
24 say for at least the past 70 years, the federal
25 government has been applying federal criminal

1 jurisdiction often through subpoenas to foreign
2 government-owned corporations.

3 Same, what -- what's your answer to
4 that?

5 MS. BLATT: So there's been hundreds
6 of thousands if not a million and they --
7 subpoenas and they came up with five. Five.
8 That's not much.

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

20 And I also think there's a huge
21 distinction between a subpoena and actually
22 telling a foreign country, having them
23 convicted by a jury, that they're a criminal.

24 JUSTICE KAVANAUGH: Okay. And you
25 said Congress -- you said earlier Congress

1 should have a vote. The way I conceptualize
2 this, it's Youngstown category 2.

3 MS. BLATT: Yep.

4 JUSTICE KAVANAUGH: So Congress
5 doesn't authorize, Congress hasn't prohibited,
6 but Congress does have a vote. If we rule
7 against you and Congress says no, that -- we
8 don't agree with the President's national
9 security determinations in this area and we're
10 going to take this option off the table, my
11 reading of the Constitution is Congress could
12 do that. So Congress has a voice even if you
13 lose.

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

18 And, again, you've already tied two
19 hands behind my back saying 1331, they've
20 spoken.

21 JUSTICE KAVANAUGH: Right.

22 MS. BLATT: So, yeah, then I -- I'm --
23 I'm having trouble in, you know, part 2. But,
24 if I think I'm in part 2 right, Congress has
25 given general jurisdiction for federal courts

1 and could not have possibly contemplated that
2 that meant sovereigns could be convicted and it
3 left it up to the -- I don't know who the first
4 attorney general was, Randolph maybe, I don't
5 know -- but whatever that guy's name was, that
6 they left it up to him to prosecute Britain.

7 JUSTICE KAVANAUGH: The Solicitor
8 General, again, representing the
9 Administration, says "nothing could embarrass
10 the Executive Branch more than a judge-made
11 principle that would vitiate a federal criminal
12 prosecution."

13 Do you want to respond to that?

14 MS. BLATT: Yeah. I mean, I was not
15 impressed by that given how ahistorical that
16 this prosecution is. It is -- countries kill
17 people. They engage in extrajudicial killing
18 all the time, and the notion -- and -- and
19 instrumentalities do things like lots of stuff.

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

25 MS. BLATT: The more extreme tool is a

1 massive CFR provision that is for Iran sanction
2 violations, it's like 80 pages, that tells you
3 how you go after sanction violations. It has
4 massive penalties, massive. You can -- I don't
5 want to say you can shut our bank down, but you
6 can shut banks down for sanction violations.

7 JUSTICE KAVANAUGH: But --

8 MS. BLATT: So what are they doing in
9 criminal other than insulting the sovereign?

10 JUSTICE KAVANAUGH: Well, it -- I
11 mean, if you -- again, I don't know, but the
12 news reports suggest this was discussed with
13 President Erdoğan, that Turkey's foreign
14 minister is coming to the United States this
15 week. I mean, I don't -- you know, I don't
16 know about all of that. But I do know that we
17 don't know about all of that.

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

1 That's just a serious accusation. We
2 think it's false. And I get that the executive
3 always gets to decide what to do for criminal
4 prosecutions, but I really think you have to
5 assume Congress gave the executive that power
6 from day one when it wouldn't even let foreign
7 courts deal with diplomats and it made it a
8 crime to charge their servants.

9 JUSTICE KAVANAUGH: Okay. That's it.

10 MS. BLATT: Okay.

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

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: Ms. Blatt, I think
16 one --

17 (Laughter.)

18 JUSTICE BARRETT: Not yet.

19 (Laughter.)

20 JUSTICE BARRETT: I think one of your
21 compelling consequentialist arguments is this
22 argument about the states going wild if the
23 FSIA doesn't apply.

24 But, presumably, you know, states have
25 broad grants of criminal jurisdiction in their

1 courts. Is it -- you know, have states -- I'm
2 just wondering if you know as an empirical
3 matter, have states tried to prosecute
4 commercial entities or instrumentalities?
5 And -- and, if so, is it common law immunity
6 that holds it back, or is this kind of the
7 finger in the dike so that, you know, the --
8 the instrumentalities can say, oh, no, you
9 know, the FSIA deprives you of jurisdiction?

10 MS. BLATT: Well, if you've just ruled
11 against me that the FSIA doesn't apply, they
12 don't have anything but common law immunity,
13 whether that's a federal common law immunity
14 that applies in state court or what have you,
15 but, on empirically, I think what we --

16 JUSTICE BARRETT: Right. I'm just
17 talking about the -- I -- I'm not talking about
18 going forward. I'm just saying --

19 MS. BLATT: Oh. No.

20 JUSTICE BARRETT: -- right now, have
21 states even tried it?

22 MS. BLATT: No, because there's been
23 no -- no decision that has said that -- that --
24 I mean, you're the Supreme Court. So no. But
25 OPEC fixes prices. So that's -- that's a --

1 that's an antitrust violation.

2 JUSTICE BARRETT: Sure. But
3 prosecutors are clever, right? I mean, I'm
4 just wondering, if the FSIA is the only thing
5 that's holding this back in its provision
6 depriving states of, you know, jurisdiction to
7 adjudicate such claims, have they tried it and
8 made these arguments, and -- and you're just
9 saying -- you think not --

10 MS. BLATT: I don't -- I don't know of
11 any.

12 JUSTICE BARRETT: -- because no one
13 has ever thought that --

14 MS. BLATT: I do -- have seen -- I
15 have seen cities, I think, prosecute, I think,
16 Mexico for environmental violations, but it
17 was, like, really random. But I don't -- it
18 was really random.

19 JUSTICE BARRETT: Okay. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: So, if -- if you're
23 right that there's common law absolute immunity
24 for criminal prosecutions, criminal violations
25 of foreign states, I guess I'm still struggling

1 with how you get that out of 1604, and
2 wouldn't -- wouldn't we expect that Congress
3 would have said something about that?

4 We look at 1604 and it's a single
5 sentence conferring immunity but conferring
6 immunity except as provided in 1605 and 1607,
7 which suggests to me that whatever Congress was
8 codifying here, it thought there were
9 exceptions to it.

10 MS. BLATT: Mm-hmm.

11 JUSTICE JACKSON: So how -- how do you
12 read this to be referencing the criminal
13 absolute immunity that you say existed at
14 common law?

15 MS. BLATT: Well, so if you just put
16 1605 exceptions to the side, which is -- you
17 know, Justice Thomas hit on that the first
18 thing, it's just a plain text reading of 1604.
19 It says the jurisdiction.

20 JUSTICE JACKSON: But I can't put it
21 to the side because the plain text of 1604 says
22 you get immunity except as provided in 1605 and
23 1607. So, if that's the structure of --

24 MS. BLATT: Well, 1330 --

25 JUSTICE JACKSON: Yeah.

1 MS. BLATT: -- only grants
2 jurisdiction for civil cases under those
3 exceptions. But, again, I mean, you either buy
4 our, you know, these provisions work in tandem,
5 or you're looking at the structure of -- that
6 Congress just left this completely unregulated
7 and left it to the common law.

8 I mean, if you -- if this Court is --
9 I would -- I mean, if the Court wants to -- say
10 there's a muscular absolute immunity for
11 criminal prosecutions that would apply in state
12 court too, I don't know how you enforce this on
13 state court. It would have to be, I guess, on
14 final review from a state court.

15 That would be okay, but you'd just
16 have these battles with the executive branch
17 under, you know, Justice Kavanaugh's reasonable
18 view that the -- the -- the executive branch
19 gets to bring whatever prosecutions it wants.
20 But the other side of the "v," where there's a
21 due process right, it's just weird to say but
22 the judiciary can't decide a dispositive
23 question of the law because your adversary
24 decided it for you and said, well, you have no
25 immunity.

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

5 JUSTICE JACKSON: All right. Thank
6 you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Feigin.

10 ORAL ARGUMENT OF ERIC J. FEIGIN

11 ON BEHALF OF THE RESPONDENT

12 MR. FEIGIN: Thank you, Mr. Chief
13 Justice, and may it please the Court:

14 Petitioner is asking for an
15 extraordinary and unprecedented rule under
16 which any foreign government-owned corporation
17 could become a clearinghouse for any federal
18 crime, including interfering in our elections,
19 stealing our nuclear secrets, or something like
20 here, evading our sanctions and funneling
21 billions of dollars to an embargoed nation,
22 using our banks, and lying to our regulators.

23 And that unprecedented rule is based
24 on essentially nothing. The reply brief drops
25 all their reliance on their secondary sources

1 and anything in customary international law
2 because none of them apply to foreign
3 government-owned corporations, which are
4 separate juridical entities when they are
5 performing non-sovereign functions like the
6 banking function here.

7 And if this is -- I -- I think
8 opposing counsel called it a cataclysm. If
9 this is a cataclysm, I think it's quite telling
10 that only three disinterested countries have
11 joined an amicus brief in this case. We're not
12 hearing the kind of outcry that you would hear
13 if this were unprecedented.

14 What they're trying to do is ask
15 courts, which courts have modestly quite
16 recognized are the least capable branch of
17 doing this, to invent a new immunity rule that
18 overrides the policy judgments of the federal
19 government, which were carefully considered in
20 this case and carefully considered in the very
21 rare cases where we decide it's necessary to
22 take this step because civil sanctions just
23 aren't going to cut it against a repeated
24 violator of sanctions. And there's no license
25 for that. We take these things very seriously.

1 And there's no basis for the common law
2 immunity rule the Court would be inventing.

3 And let's be clear, a -- an idea of
4 common law immunity pervades, I think, all
5 three arguments the Petitioner is making here
6 because the idea that there is some common law
7 immunity and that there's some implicit
8 assumption in the air about these kinds of
9 cases is exactly what informs their
10 interpretation of 3231, the FSIA, and the
11 backdrop common law immunity.

12 I'm sorry, I ran a little over,
13 Mr. Chief Justice.

14 JUSTICE THOMAS: Mr. Feigin, the --
15 could you have indicted the country of Turkey
16 itself as opposed to the bank?

17 MR. FEIGIN: Well --

18 JUSTICE THOMAS: And if you can --
19 couldn't, then, analytically, what's the
20 difference?

21 MR. FEIGIN: -- a couple of points on
22 that, Justice Thomas. I'm not going to disavow
23 the idea that in theory the executive could
24 make that judgment.

25 That said, we do acknowledge that

1 there is a strong customary international law
2 principle against prosecuting a state qua
3 state. We would not endeavor to do so.

4 And I think there are a couple of
5 legal distinctions a court could draw. Number
6 one, the court could say that as the basis for
7 such a -- an immunity is very well established.
8 That could be the very rare case where the
9 court does decide not to defer to the
10 executive, where it's really just bucking an
11 established trend, as opposed to perhaps trying
12 to nudge the law in a particular direction, as
13 we might be perceived to be trying to do in
14 this case.

15 The second thing is -- is actually
16 quite historical, Your Honor. One of the
17 points the Petitioner makes in their briefs is
18 that the original Crimes Act applied to
19 persons. Now then, as now, "persons" obviously
20 covers corporations, but it then, as now, is
21 generally not understood to cover the
22 sovereign. So one might think that
23 contextually that's just not a thing that
24 Congress contemplated in Section 13 of the
25 Judiciary Act, which is the predecessor to

1 today's 3231.

2 JUSTICE SOTOMAYOR: Mr. --

3 JUSTICE KAVANAUGH: On the state --
4 state prosecution question that came up, my
5 understanding was that if states tried to do a
6 prosecution of something -- in something like
7 this, that the federal government could submit
8 a statement of interest, and the foreign
9 affairs preemption doctrine exists to ensure
10 that that kind of activity doesn't occur and,
11 if it did occur, that this Court would be
12 available to review that kind of action by a
13 state. Is that Garamendi, cases like that?

14 MR. FEIGIN: That's exactly our point,
15 Your Honor. And -- and a couple of broader
16 points about that are, number one, there's no
17 dispute, and Samantar, I think, makes quite
18 clear that states could prosecute foreign
19 officials, and there are some instances of them
20 having done so in history for crimes like
21 embezzlement or rape.

22 And the -- the second point I -- I
23 would make is that because -- is that they
24 wouldn't be able to prosecute foreign
25 government-owned corporations for their

1 sovereign actions. There would be obvious
2 common law immunity --

3 JUSTICE GORSUCH: But, counsel --

4 MR. FEIGIN: -- in those cases.

5 JUSTICE GORSUCH: -- counsel, I'm
6 wondering to what extent you've considered the
7 impact, though, of -- of saying that 1604
8 doesn't provide immunity.

9 In the last discussion with Ms. Blatt,
10 the point was made states really haven't tried
11 this, maybe a municipality here or there. But,
12 if we hold that 1604 doesn't apply to criminal
13 cases, then states would be free to try to
14 bring lawsuits against Mexico for this or that,
15 or perhaps China because of COVID, or who knows
16 what an -- a creative state prosecutor might
17 come up with.

18 And, normally, when a -- a federal
19 official is charged with some crime in state
20 court, you have a right to removal. I think
21 it's 1442 maybe. But there would be no
22 corresponding right to removal by a foreign
23 sovereign. And that -- that's just -- that --
24 that's a bit of an oddity, an in -- incongruity
25 in your argument.

1 And the only place for review of these
2 state court actions would be in this Court at
3 the end of the day, perhaps at the end of those
4 federal -- those state prosecutions or on some
5 emergency interlocutory basis.

6 And I -- I just wonder, have you given
7 careful thought to those consequences?

8 MR. FEIGIN: Well, we have thought
9 about the consequences of our position, and
10 we've given it careful thought. But the
11 absence of a removal provision in those
12 circumstances, I think, is actually a very
13 strong point in our favor.

14 Putting aside foreign officials, for
15 which there is no removal provision also, we
16 know that from Samantar, I think, if Congress
17 were -- actually had been thinking about this
18 at all, that is, criminal actions, when it
19 enacted the Foreign Sovereign Immunities Act,
20 it would have included criminal actions in the
21 removal provision because even -- because I
22 think, in the world the Petitioner is
23 envisioning, courts automatically get right
24 whether the Foreign Sovereign Immunities Act
25 even applies in the first place, and that would

1 necessitate on their view dismissal of the
2 case.

3 And even that can be wrapped up in
4 complicated questions. You see some of them in
5 the Pangang litigation, where we are
6 prosecuting a Chinese government-owned
7 corporation for acts of economic espionage.
8 And they could even have been brought up here.
9 It's not entirely clear, although Second
10 Circuit precedent kind of precluded us from
11 making this argument below, and we're not
12 contesting it for FSIA purposes, it -- it's not
13 entirely clear that the Turkish Wealth Fund is
14 actually itself an instrumentality --

15 JUSTICE GORSUCH: Well --

16 MR. FEIGIN: -- of the state.

17 JUSTICE GORSUCH: -- let's put that
18 aside because you didn't raise that. And --
19 and -- and just one last point on 1604. I
20 understand the contextual arguments about 1605,
21 and I -- I get that.

22 But just on its plain language, we
23 normally start with the statute itself, and if
24 the statute itself is clear, we stop there.
25 And, here, the statute's language doesn't parse

1 out criminal versus civil. It's a -- it says,
2 you know, courts shall have no jurisdiction to
3 entertain, something like that, pretty broad
4 language that would normally encompass both
5 civil and criminal in a normal case.

6 So why wouldn't that -- why shouldn't
7 we follow our usual practice here?

8 MR. FEIGIN: Your Honor, I think this
9 is a case like United Air Regulatory Group or
10 Brown & Williamson, where you have to look at
11 the statute as a whole. And this statute, if
12 you look at it as a whole from start to finish,
13 is concerned with criminal action -- civil
14 action, excuse me.

15 For example, if you start with the
16 title, which was created by Congress, and it's
17 in the statutes at large, it refers to immunity
18 from suit, that's a civil term. It was
19 Congress's decision to place this in Title --

20 JUSTICE GORSUCH: I understand the
21 contextual arguments.

22 MR. FEIGIN: Yeah, okay.

23 JUSTICE GORSUCH: I -- I -- I -- I do.
24 And I appreciate them and I don't mean to cut
25 you off, but just looking at 1604 itself, have

1 you got anything to help us on -- on the
2 language there, or are you stuck and have to go
3 to these contextual arguments?

4 MR. FEIGIN: Your Honor, I -- I -- I
5 -- I don't think it's an -- it would be
6 unreasonable in complete isolation to read that
7 provision as potentially applying to criminal
8 cases as well.

9 JUSTICE SOTOMAYOR: Mr. Feigin --

10 MR. FEIGIN: I -- I --

11 JUSTICE SOTOMAYOR: I'm sorry.

12 Continue.

13 MR. FEIGIN: I'm sorry. I was just
14 going to say I think this is a case where every
15 single other contextual factor, location,
16 title, everything, you know, the operative
17 provisions, which opposing counsel just told --
18 okay -- cuts the other way.

19 JUSTICE SOTOMAYOR: I -- I am a bit
20 stuck on the drama of this, but the drama of
21 this is also that U.S. Attorneys' Offices,
22 there's 99 of them in the country?

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

24 JUSTICE SOTOMAYOR: Whatever the
25 number is, it's up there. Do they have to get

1 approval on every case that they bring against
2 any defendant? Or --

3 MR. FEIGIN: We do have a process,
4 Your Honor. A process was followed in this
5 case.

6 JUSTICE SOTOMAYOR: No, no. Tell me
7 what that process is. Do they need to get
8 approval and from whom?

9 MR. FEIGIN: Your Honor, we do not
10 have a formal written process, but I -- what I
11 can tell you is the following. Some of the
12 aspects --

13 JUSTICE SOTOMAYOR: So assume the
14 following: You don't have a formal written
15 process --

16 MR. FEIGIN: Your Honor --

17 JUSTICE SOTOMAYOR: -- which in my
18 mind means that some U.S. Attorney's Office in
19 -- I hope it's not a city, I don't mean to
20 denigrate anybody -- Timbuktu -- I -- I'm
21 making up a name, okay -- in Timbuktu, some
22 U.S. Attorney's Office brings such a suit
23 without getting approval.

24 Can DOJ order them, under what
25 authority, to dismiss the suit?

1 MR. FEIGIN: I think we could. First
2 of all, I suppose that could be a rare case in
3 which -- I -- I suppose that could be a rare
4 case in which the government might, if it did
5 so in derogation of what we understand to be
6 common law immunity, that is, it, for example,
7 brought a criminal action against the Kingdom
8 of Sylvania --

9 JUSTICE SOTOMAYOR: Whatever.

10 MR. FEIGIN: -- we could file a
11 suggestion of immunity in that case, but,
12 otherwise --

13 JUSTICE SOTOMAYOR: So --

14 MR. FEIGIN: -- I think the Attorney
15 General --

16 JUSTICE KAVANAUGH: Isn't your answer
17 yes?

18 MR. FEIGIN: -- exercises --

19 JUSTICE SOTOMAYOR: I'm -- I'm sorry.

20 MR. FEIGIN: No, Your -- no, Your
21 Honor. I believe --

22 JUSTICE KAVANAUGH: Your answer is not
23 yes to could the -- could the President or the
24 Attorney General order the suit -- U.S.
25 Attorney to dismiss the suit?

1 MR. FEIGIN: I believe the Attorney
2 General and the President would be quite well
3 suited to ordering that suit --

4 JUSTICE KAVANAUGH: Sorry to
5 interrupt. I just wanted to --

6 MR. FEIGIN: -- dismissed and firing
7 the United States Attorney if the United States
8 Attorney were --

9 JUSTICE SOTOMAYOR: Well, that -- that
10 -- that --

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

12 JUSTICE SOTOMAYOR: I -- I don't know
13 how I would want to leave to the vagrancies of
14 individual prosecutors, whether it's federal or
15 state, the right to insult another nation by
16 giving them this unbridled power to initiate
17 suits.

18 MR. FEIGIN: Well --

19 JUSTICE SOTOMAYOR: You're saying it's
20 limited by the common law, but I'm -- putting
21 aside that -- that I don't know where the
22 dividing line really is on what constitutes
23 commercial and what constitutes sovereign, but
24 that has a danger all its own, doesn't it?

25 MR. FEIGIN: Well, Your Honor, just to

1 -- to finish up the -- the point on the U.S.
2 Attorneys' Offices, I don't think any of the
3 questions here could turn on whether there was
4 a formal written policy. And just because --

5 JUSTICE SOTOMAYOR: Now what do I --

6 MR. FEIGIN: -- there's not a formal
7 written policy --

8 JUSTICE SOTOMAYOR: -- what do I --
9 what -- what do I do with the hearsay news
10 reports that came out that the prior
11 administration was trying to apply pressure to
12 drop this lawsuit on the Southern District of
13 New York? This is a Southern District of New
14 York case, correct?

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

16 JUSTICE SOTOMAYOR: And -- and so what
17 do I do with that?

18 MR. FEIGIN: Your Honor, I -- I think
19 those are internal government deliberations.
20 Some of them have been brought to light, but I
21 think what they do show is there was a process.
22 The U.S. Attorney did not just go through and
23 indict the case without permission from main
24 Justice.

25 But turning to the question of --

1 JUSTICE SOTOMAYOR: But the main
2 Justice, does it go seek permission from the
3 Department of State? Because who is the
4 executive to make this decision?

5 MR. FEIGIN: Your Honor --

6 JUSTICE SOTOMAYOR: We all agree it's
7 the President, but there is no formula out
8 there to tell us who speaks for the President.
9 Is it -- you're saying in this lawsuit it's
10 you, and I'd expect that.

11 MR. FEIGIN: Your Honor --

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

16 MR. FEIGIN: Your Honor, the -- the
17 consultation process in this case, I'm given to
18 understand, involved the other affected
19 departments, like the Treasury Department that
20 was lied to and the Department of State.

21 I stand here as -- on behalf of the
22 United States representing every single one of
23 those agencies. They all stand behind this
24 prosecution.

25 CHIEF JUSTICE ROBERTS: I under --

1 JUSTICE ALITO: What if a --

2 CHIEF JUSTICE ROBERTS: -- I
3 understood you to be drawing a distinction
4 between this sovereign qua sovereign and
5 instrumentalities earlier.

6 Well, what do you do with what Turkiye
7 said in its amicus brief, which is that
8 Halkbank is an arm of the state
9 indistinguishable from the government itself?

10 MR. FEIGIN: Well, I --

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

13 MR. FEIGIN: This Court has
14 definitively held that it is not the domestic
15 state that gets to make this judgment. That's
16 in the First National City Bank against Banco
17 Para el Comercio Exterior de Cuba, where this
18 Court held it was a matter of federal law or
19 international law, but it's not something the
20 state exclusively gets to designate.

21 The Court also said in that case that
22 corporations are presumptively separate
23 juridical entities, and that principle dates
24 back to the founding, in fact, before the
25 founding, where it was obviously possible to

1 sue the East India Company.

2 JUSTICE KAGAN: But what do we --

3 CHIEF JUSTICE ROBERTS: Well, what do
4 you --

5 JUSTICE KAGAN: -- do with the fact --

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

9 MR. FEIGIN: So I think the -- there,
10 although we don't think it applies on its own,
11 the commercial activity exception that the FSIA
12 has is helpful and informative, but, of course,
13 the definition of "commercial" there isn't
14 particularly well fleshed out, and it's just
15 something that courts have had to develop.
16 But, here, we're talking about just what are
17 sovereign and what are non-sovereign actions,
18 the kinds of things that have been held to be
19 sovereign actions, for example, the one foreign
20 case they have on this, the French Supreme
21 Court case involved the flagging of ships and
22 registration of ships, which is exclusively
23 something a sovereign could do, but it's not
24 something that I think even the British common
25 law courts had too much trouble with.

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

9 JUSTICE KAGAN: What -- what do we do
10 with the fact that the FSIA rejects the
11 distinction between sovereigns and their
12 instrumentalities? I mean, that would suggest
13 a kind of preexisting common law rule that the
14 FSIA was picking up from that -- that -- that
15 was no sharp line between the two?

16 MR. FEIGIN: Well, no, Your Honor, I
17 don't think that's -- that's quite right
18 because, as we note in our brief, and we have a
19 -- a source that goes into this in more detail,
20 the FSIA definition is broader because there
21 are possible foreign policy implications with a
22 case like this. And we don't deny them.
23 That's why we take them so seriously and bring
24 them so rarely.

25 But, under the common law, qua common

1 law, they really haven't identified anything in
2 customary international law or common law --

3 JUSTICE KAGAN: But you're saying that
4 Congress --

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

6 JUSTICE KAGAN: -- when Congress
7 enacted the FSIA, Congress was changing the
8 common law with respect to instrumentalities of
9 sovereign states in that dramatic a fashion?

10 MR. FEIGIN: I don't think it was
11 changing the common law. I think what it was
12 trying to do was recognize that other cases
13 could potentially have these kinds of
14 implications and ensure that it was taking care
15 of those cases too.

16 In fact, if you look at the principal
17 problem at which the FSIA was directed, it was
18 the need for the executive branch to have to
19 handle all -- these suggestion of immunity
20 letters in all of these private suits. I think
21 suits against corporations might even be more
22 common than suits against states or suits
23 against agencies of states. And, of course,
24 Congress would not have wanted to leave the
25 executive with that burden in those cases, and,

1 admittedly, it wasn't handling that burden
2 particularly well or particularly consistently.
3 But it didn't by their -- by doing so move
4 where the common law was and always has been.

5 And, in particular, this Court -- I --
6 I think there are four principles that kind of
7 show that these kinds of prosecutions are
8 possible, all of which date back to the
9 founding.

10 One is prosecutions against foreign
11 officials, which date back at least to the
12 1790s.

13 The second would be the
14 well-recognized difference between a
15 corporation and the state, which likewise dates
16 back prior to the founding.

17 The third would be the well-recognized
18 distinction between sovereign and non-sovereign
19 functions, which goes from the East India cases
20 up to the French Supreme Court case and is,
21 frankly, embodied in the FSIA today.

22 And the fourth would be the long
23 history of deference to the executive. The --
24 the --

25 JUSTICE GORSUCH: Mr. Feigin, what we

1 don't have in that list, though, is any
2 evidence at the time of the founding that a
3 suit against a sovereign qua sovereign would be
4 something that this -- these -- our American
5 courts would have accepted as -- in criminal
6 cases.

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

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

22 JUSTICE GORSUCH: I understand that,
23 but that's contested factually here, and it's
24 also not something the Second Circuit much
25 addressed, as Justice Sotomayor pointed out an

1 hour ago. And does that perhaps stand as an
2 argument for remand for consideration of
3 whether 3231 or general law principles I don't
4 think of as common law -- I think of that as
5 domestic -- but general international law
6 principles preclude the prosecution here?

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

9 JUSTICE GORSUCH: It's not what we
10 want to do --

11 MR. FEIGIN: Okay.

12 JUSTICE GORSUCH: -- or what we will
13 do or what we have the power to do. It's what
14 we are supposed to do under the law that I'm
15 looking -- looking for guidance on.

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

18 JUSTICE GORSUCH: It's not what I need
19 to do either. It -- it's what we -- what we
20 should do I'm asking for your thoughts on. And
21 if the Second Circuit didn't consider this
22 question, if it was an FSIA analysis, and if
23 you concede that there is some general or
24 international common law immunity for
25 sovereigns that the court didn't consider

1 below, is -- isn't a remand appropriate?

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

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

17 And if you compare the Petitioner here
18 and you look at the actual sources that are
19 cited in Turkiye's brief, which are a couple of
20 declarations filed in a civil Southern District
21 case, what they make clear is that the -- the
22 control over the bank is exercised through the
23 majority shareholder status and the general
24 assembly of shareholders. They could sell
25 those shares tomorrow. It's publicly traded on

1 the Ankara stock exchange. They're subject to
2 private banking and regulatory laws. And they
3 can even be sued and they'll defend in their
4 own name. I don't think anyone is saying you
5 could attach the sovereign's own assets.

6 JUSTICE GORSUCH: I -- I -- I --

7 MR. FEIGIN: If you compare --

8 JUSTICE GORSUCH: I'm sorry to
9 interrupt, but I -- I --

10 MR. FEIGIN: Yeah.

11 JUSTICE GORSUCH: -- we do have that
12 before us --

13 MR. FEIGIN: Okay.

14 JUSTICE GORSUCH: -- and I appreciate
15 that. But I guess my question is a little more
16 fundamental, which is you -- you seem to
17 agree and -- I guess I just want to understand
18 if you agree -- that at the founding, the --
19 the understanding of the predecessor of 3231 in
20 light of this country's history, it really is
21 the underdog and being more concerned about
22 being sued abroad than haling others into our
23 courts and -- and worried deeply about the
24 possibility, if we did, what international
25 repercussions would follow for a relatively

1 weak new nation, that there is some core common
2 law immunity that does apply to states, common
3 law, general law, international law, that --
4 that some court has to apply and consider at
5 some stage.

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

11 JUSTICE GORSUCH: Or -- or prior to
12 the founding. I mean, Vowell --

13 MR. FEIGIN: Yeah, we -- we -- we
14 that applies to states qua states.

15 JUSTICE GORSUCH: Yeah.

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

17 JUSTICE GORSUCH: Here.

18 MR. FEIGIN: -- to foreign
19 government-owned corporations.

20 JUSTICE GORSUCH: I -- I understand --
21 I understand that point.

22 MR. FEIGIN: And -- yeah.

23 JUSTICE GORSUCH: Okay. Thank you.

24 JUSTICE JACKSON: And isn't the
25 question that follows from that, so who should

1 be deciding under these circumstances in this
2 case whether we have an -- a for -- foreign
3 corporation versus their argument that this
4 really is the state? Shouldn't we send it back
5 to the Second Circuit to really flesh that out?

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

12 JUSTICE JACKSON: On the point of
13 who's --

14 MR. FEIGIN: On the point --

15 JUSTICE JACKSON: -- an
16 instrumentality?

17 MR. FEIGIN: Sorry. On the point of
18 whether someone is -- whether a -- whether
19 sovereign or non-sovereign functions are being
20 exercised. I guess, on the question of who is
21 an instrumentality, I think there's always been
22 deference on that point too, subject to
23 potentially -- I mean, I -- I can't tell this
24 Court that that's not subject to any form of
25 judicial review, but, here, it's clearly

1 covered by the Cuban bank case because, if you
2 look at that, the bank in that case was created
3 by Cuban law, it was a hundred percent owned by
4 the Cuban government, it was financed by the
5 Cuban government, it sent its profits to the
6 Cuban government, and a Cuban minister was the
7 president of the bank.

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

18 And let me just make a quick point on
19 why this is clearly not a jurisdictional rule.
20 I don't think the Court needs to look any
21 further than pages 758 and 759, I think it is,
22 of *Ex parte Peru*, in which the Court makes
23 quite clear -- and this is another one of these
24 in rem ship cases -- that the court has
25 jurisdiction, it's just a question of whether

1 it declines or doesn't decline to exercise it.

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

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

20 MR. FEIGIN: Okay, Your Honor. I
21 mean, put -- putting aside that that could
22 happen with foreign officials already under
23 this Court's law and we would be in the exact
24 same spot, but --

25 JUSTICE ALITO: All right. Let's say

1 it's against a foreign state. So it's --

2 MR. FEIGIN: So -- so say they -- say
3 we're against --

4 JUSTICE ALITO: -- it's the people
5 against whatever.

6 MR. FEIGIN: If -- if -- again, Your
7 Honor, if they brought a criminal action that
8 said, like, Commonwealth of Virginia against
9 the Kingdom of Sylvania --

10 JUSTICE ALITO: Yeah.

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

13 JUSTICE ALITO: All right. And so the
14 court receives that and the court says well,
15 fine, that's your opinion, but we don't agree.
16 Then what?

17 MR. FEIGIN: Well, Your Honor, that's
18 subject to review in this Court just the same
19 way --

20 JUSTICE ALITO: After the -- after the
21 -- the -- there's been a trial and an appeal
22 through the state courts, until there's a final
23 -- when there's a final decision from the
24 supreme court of the state, then it could come
25 here?

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

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

22 JUSTICE ALITO: Well, under what
23 theory would this state prosecution be
24 preempted by federal law? The Supremacy Clause
25 applies to the Constitution and the laws of the

1 United States. So what is the law of the
2 United States that would block the state
3 prosecution?

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

9 JUSTICE ALITO: Well, we had that I'm
10 -- I -- I can't --

11 MR. FEIGIN: -- to the President's
12 foreign affairs determination --

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

19 MR. FEIGIN: I -- I -- I don't want to
20 argue against myself. I think you're thinking
21 of Medellin, Your Honor.

22 JUSTICE ALITO: Yeah. Medellin,
23 right.

24 MR. FEIGIN: But even -- even if
25 that -- it -- that were not enough, there are a

1 number of other actions the federal government
2 could take, up to and including, for example,
3 entering into an executive agreement of the
4 sort in Garamendi that would contemplate
5 dismissal of the prosecution --

6 JUSTICE ALITO: I -- I'll come back to
7 this --

8 MR. FEIGIN: -- which would clearly be
9 preemptive.

10 JUSTICE ALITO: -- when -- when I have
11 my --

12 CHIEF JUSTICE ROBERTS: Okay. Justice
13 Thomas?

14 JUSTICE THOMAS: No, Chief.

15 CHIEF JUSTICE ROBERTS: There you go.

16 JUSTICE ALITO: All right. So --

17 (Laughter.)

18 MR. FEIGIN: Welcome back. Thank you.

19 JUSTICE ALITO: -- this does seem to
20 me to get into a very interesting question that
21 has ramifications beyond this case. So what is
22 it -- would you say that there are some -- that
23 it is a principle of customary international
24 law that would bind the states under the
25 Supremacy Clause?

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

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

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

23 I've suggested a couple of them.
24 Another one of them --

25 JUSTICE ALITO: Well, I just want to

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

9 What -- but, when you talk about
10 common law, then I -- I'm more confused. Well,
11 I'm not confused. I'm -- I'm worried because
12 isn't it an interest -- a very important
13 question whether customary international law is
14 binding on the states under the Supremacy
15 Clause?

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

1 well be binding on the states, particularly
2 because the states don't have any authority to
3 legislate or take action that would be contrary
4 to customary international law.

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

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

21 JUSTICE ALITO: Well, it's true it's
22 never happened, but nothing like this has
23 happened either.

24 MR. FEIGIN: Your Honor, that's not
25 true. We've been doing this for decades.

1 Admittedly, it's be -- it's since the '80s.
2 I'm not going to claim that we've been doing
3 this since -- for 7,000 years or claim that
4 we've been doing this since the founding,
5 because we haven't. But that's because of a
6 rise of government-owned corporations
7 concealing some very serious crimes.

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

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

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 Justice Gorsuch?

20 JUSTICE GORSUCH: Yeah. So the
21 absence of state court actions in the past
22 could lead to a couple of different inferences.
23 One -- one might be it isn't a problem, so
24 Congress couldn't have thought about it in the
25 FSIA and we -- we have tools to deal with it.

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

6 MR. FEIGIN: Well, Your Honor, to the
7 --

8 JUSTICE GORSUCH: So, on that -- does
9 that argument cut?

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

16 If the assumption instead centered on
17 the FSIA and what sort of -- sort of procedures
18 it should include, I think the absence of a
19 removal provision is a blinking light here
20 because, if the -- if Congress were really
21 concerned that this could ever be a problem, it
22 would have given --

23 JUSTICE GORSUCH: It's --

24 MR. FEIGIN: -- everyone an easy way
25 to deal with it.

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

6 And I -- I -- I know you -- you -- you
7 -- you don't think it's a -- a serious problem,
8 but I -- I guess I -- I guess I'm not totally
9 relieved by your assurances that states won't
10 take a holding that 1604 doesn't bar criminal
11 actions 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, a -- again, Your
20 Honor, I think it's quite clear under, for
21 example, Garamendi that if there were -- if we
22 needed --

23 JUSTICE GORSUCH: But what -- what
24 provision of the Constitution? I -- I
25 understand your -- your -- your -- your cases.

1 You've said them. I don't want to repeat that.

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

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

16 JUSTICE GORSUCH: I understand.

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

20 JUSTICE GORSUCH: I got that.

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

25 JUSTICE GORSUCH: Okay. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

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

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

10 JUSTICE KAVANAUGH: President Biden?

11 MR. FEIGIN: Yes, Your Honor.

12 JUSTICE KAVANAUGH: Yes.

13 MR. FEIGIN: And this action was
14 actually brought by the previous
15 administration.

16 JUSTICE KAVANAUGH: Right.

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

1 But is that the normal process for
2 something like this, or do you not want to talk
3 about that?

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

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

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

12 (Laughter.)

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

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

8 JUSTICE KAVANAUGH: Okay. Last
9 question. This is going to take the opposite
10 perspective of the questions I was asking Ms.
11 Blatt and picks up on Justice Gorsuch's
12 questions.

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

1 Now maybe that's the entirely wrong
2 way to look at it, but that's what I was
3 thinking on the other side of how to think
4 about this case, in other words, some -- some
5 limits on the executive, but if you want more
6 power, go to Congress.

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

10 JUSTICE KAVANAUGH: Mm-hmm.

11 MR. FEIGIN: -- and has decided that
12 the FSIA does apply --

13 JUSTICE KAVANAUGH: Mm-hmm.

14 MR. FEIGIN: -- but the commercial
15 activity exception likewise applies --

16 JUSTICE KAVANAUGH: Correct.

17 MR. FEIGIN: -- I think they -- 1330
18 is -- it can't just be -- I won't --

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

24 MR. FEIGIN: Well, Your Honor, I don't
25 know that as a practical matter we'd have a

1 problem with that. For the reasons I've said,
2 I don't think that's the correct solution.

3 JUSTICE KAVANAUGH: Mm-hmm.

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

10 JUSTICE KAVANAUGH: No systemic
11 problems from that?

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

14 JUSTICE KAVANAUGH: Okay.

15 MR. FEIGIN: -- and so --

16 JUSTICE KAVANAUGH: That -- that
17 answers the question.

18 MR. FEIGIN: Yeah.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: Justice Kavanaugh
23 pointed out in his colloquy with Ms. Blatt that
24 these kind of suits might be an important tool
25 in the executive's toolkit.

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

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

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

25 JUSTICE BARRETT: But, if it's a

1 hostile government, why are they going to
2 cooperate with any of that, and why can't you
3 just impose sanctions or -- or use other tools?

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

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

23 And the other problem is some of these
24 remedies are sledgehammers. Some of the
25 remedies they propose, up to and including

1 going to war with Turkiye, are -- are not
2 things that -- would have very destabilizing
3 consequences.

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

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

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

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

1 JUSTICE BARRETT: Well, I understand
2 that, but I think --

3 MR. FEIGIN: Yeah.

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

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

23 But even before that, they weren't
24 necessarily beholden to our view of the law in
25 the first place. But, you know, we acknowledge

1 that what's good for the goose is good for the
2 gander. We've considered that, and we're
3 prepared to -- to deal with it.

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

15 JUSTICE BARRETT: Thank you.

16 MR. FEIGIN: Or -- I'm sorry. I -- I
17 said "suit." What I meant even was
18 "prosecuted" --

19 JUSTICE BARRETT: Prosecuted.

20 MR. FEIGIN: -- and we wouldn't view
21 that as a criminal prosecution against the
22 United States.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: Yes. Can I just go

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

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

12 JUSTICE JACKSON: So we'd have to have
13 the sort of predicate determination that the
14 FSIA is applying in the criminal realm to -- to
15 -- to --

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

24 JUSTICE JACKSON: Right. So I guess
25 I'm just trying to -- I'm trying to understand

1 what -- your answer to Justice Kavanaugh and
2 the suggestion that we could just look at the
3 FSIA and not address the common law.

4 MR. FEIGIN: So I was --

5 JUSTICE JACKSON: Wouldn't we have to
6 at some level?

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

13 If it does, then it would displace the
14 common law and it would be fine just to look at
15 the commercial activity exception.

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

25 JUSTICE JACKSON: Okay. Can I just --

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

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

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

17 But even aside from that, if the Court
18 wanted to draw a distinction, as I think I
19 suggested earlier today, there might be cases
20 where it is so clear that what the executive is
21 asking for deference for is completely contrary
22 to customary international law that the kind of
23 role that the executive is playing in this case
24 in developing international law, which the
25 Court recognized is perfectly legitimate in

1 Sabbatino, for instance, wouldn't really
2 pertain.

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

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 JUSTICE KAVANAUGH: When you were
25 answering Justice Barrett's questions just now,

1 were you talking about foreign states or U.S.
2 states? I was -- or both? Or do you know?

3 MR. FEIGIN: I -- I was understanding
4 her questions to be about foreign states.
5 Okay.

6 JUSTICE KAVANAUGH: Got it. Thank
7 you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 MR. FEIGIN: Thank you.

11 CHIEF JUSTICE ROBERTS: Ms. Blatt.

12 REBUTTAL ARGUMENT OF LISA S. BLATT
13 ON BEHALF OF THE PETITIONER

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

16 I -- I really thought it should have
17 gone without saying that Congress has not
18 authorized federal courts to convict Israel,
19 Saudi Arabia, or -- or the Vatican City. I
20 mean, nothing has changed in the wording of the
21 statute since the founding, and all the
22 government has is to return us to pre -- I
23 guess after -- before 1976, that the executive
24 will sort of make this up as it goes and courts
25 will have to figure this out on their own, even

1 though Congress expressly granted jurisdiction
2 over foreign sovereigns in 1332 and 1875. So
3 there's always been express congressional
4 authority to deal with sovereigns.

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

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

17 The other thing he mentions on this
18 wealth fund, on page 5 of our brief and the
19 Turkey brief, it makes clear -- it cites a -- a
20 declaration and that declaration says it -- the
21 wealth fund is not a juridical entity. It is
22 like the -- the -- the general fund, the Social
23 Security fund, the judgment fund. It's an
24 actual fund of the Treasury Department. So
25 it's -- actually just has no legal entity. So

1 I don't see how the wealth fund is at issue.

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

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

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

25 So -- and always through the law,

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

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

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

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.

25

1 (Whereupon, at 12:44 p.m., the case
2 was submitted.)
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