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Legal Sidebar

The Foreign Sovereign Immunities Act: Prosecuting Foreign States After the Supreme Court's Decision in *Halkbank*

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The Supreme Court's decision in *Türkiye Halk Bankasi A.S. v. United States*, holding that the Foreign Sovereign Immunities Act (FSIA) does not provide foreign states immunity from criminal prosecution, cleared some obstacles to the United States' effort to prosecute a bank owned by Turkey (Türkiye) but left open other questions about the viability of prosecuting foreign-state-owned entities. The United States indicted Türkiye Halk Bankasi (Halkbank) in 2019 on charges related to alleged sanctions evasion, money laundering, and bank fraud. Halkbank, which denies the allegations, argued that the FSIA provided complete immunity from prosecution because the bank is an instrument of a foreign state. In an April 2023 opinion, the Supreme Court held that the FSIA grants immunity only in civil actions and not in criminal prosecutions and left open the possibility that common law immunity may apply. Lower courts must now grapple with how to determine when common law immunity is available—although Congress could influence this issue through legislation that defines foreign sovereign immunity standards in criminal cases.

Background

Background on the Halkbank case, its procedural history, and the FSIA are provided in this Legal Sidebar. Before the Supreme Court, Halkbank asserted several legal theories as to why the Court should dismiss the case: No federal criminal statute gives federal courts jurisdiction over foreign-state-owned entities, the FSIA grants absolute immunity from criminal prosecutions, and, even if the FSIA does not apply, the common law supplies immunity from prosecution.

The Court's Three-Part Decision

In an opinion written by Justice Kavanaugh, the Supreme Court rejected Halkbank's first two arguments but remanded proceedings for the lower court to evaluate the bank's argument that common law immunity prevents criminal prosecution.

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Federal Courts Have Underlying Jurisdiction

While much of the commentary leading up to the *Halkbank* decision focused on whether the FSIA provides immunity, the Supreme Court first addressed a more fundamental question: Did federal courts have jurisdiction to hear the case in the first place? Under 18 U.S.C. § 3231, federal courts have jurisdiction over "all offenses against the laws of the United States." The statute forms the foundation for federal courts to hear prosecutions for all federal offenses. Because Halkbank is charged with federal offenses—bank fraud, money laundering, and several counts of conspiracy—the United States argued that the case fell under Section 3231's general grant of jurisdiction. Halkbank responded by asserting, among other arguments, that Section 3231 was not sufficiently specific to apply to foreign states and their instrumentalities. According to the bank, the statute's history, which dates back to the Judiciary Act of 1789, suggests that Congress would have expressly mentioned foreign states and their instrumentalities if it had intended to open federal courts to prosecuting those entities.

The Supreme Court rejected the bank's view, reasoning that Section 3231 "plainly encompasses" the prosecution. Section 3231's jurisdictional reach is "sweeping," the Court explained, and it "opens federal district courts to the full range of federal prosecutions for violations of federal criminal law" regardless of the defendant's sovereign status. Furthermore, although Halkbank argued that there are federal laws that specify that they apply to foreign states and their instrumentalities, the Court concluded that the same level of specificity is not necessary in this case and declined to create a rule requiring Congress to "clearly indicate its intent" to include foreign sovereigns within Section 3231's jurisdiction.

FSIA Does Not Provide Immunity in Criminal Cases

The Court next addressed whether the case must be dismissed because the FSIA provides Halkbank with immunity. The FSIA creates a comprehensive set of standards to guide courts in deciding when foreign states (which the statute defines to include state agencies and instrumentalities) are immune from suit. Although the Supreme Court has interpreted and applied the FSIA in several cases since its enactment in 1976, those cases only concerned civil suits. The Court never had occasion to address whether the statute applies in a criminal prosecution.

In *Halkbank*, the Supreme Court held for the first time that the FSIA does not provide immunity to foreign states or their instrumentalities in criminal prosecutions. Analyzing the FSIA's text, the Court expressed that the statute is "silent as to criminal matters" and "says not a word about criminal proceedings against foreign states or their instrumentalities." The Court further explained that the FSIA also creates a carefully calibrated scheme governing venue, removal, procedure, and exceptions to immunity, but those provisions either state that they apply only to civil cases or use terms such as *litigants* that are ordinarily used in the civil context.

The Court recognized that one provision in the FSIA (28 U.S.C. § 1604) is written broadly enough that it could conceivably be read to grant immunity in criminal prosecution but only if it were interpreted in "complete isolation." Singling out that text without its broader context "misses the forest for the trees (and a single tree at that)," the Court reasoned. For a "better and more natural reading" of the text, the Court read Section 1604 in tandem with another provision (28 U.S.C. § 1330(a)), which applies only to "nonjury civil actions." The Court held that, when those provisions are interpreted together and placed in their broader context, the FSIA's principles of immunity apply in a "single universe of civil matters" that does not include criminal cases.

Common Law Immunity Remains an Open Question

Although the Court delivered a conclusive interpretation of the FSIA in terms of immunity from criminal prosecution, it refrained from deciding if common law principles of foreign sovereign immunity preclude

criminal prosecution. The common law is the body of law derived from judicial opinions rather than from statutes or constitutions. In a 2010 decision, *Samantar v. Yousuf*, the Supreme Court stated that some suits against foreign individuals and entities that do not fall under the FSIA "may still be barred by foreign sovereign immunity under the common law."

Halkbank contends that foreign states and their instrumentalities have complete immunity from prosecution under the common law. The United States takes a narrower view and argues that, while the common law has historically afforded sovereign states immunity from prosecution, such immunity does not extend to foreign-state-owned corporations such as Halkbalk. Based on pre-FSIA civil cases that the government argues reflect common law principles, the United States asserts that state-owned companies do not share the immunity of the parent state when engaged in commercial activity.

The government also contends that, in the absence of a statutory scheme defining *immunity*, courts traditionally defer to the executive branch's view on whether foreign sovereign immunity is available. By deciding to prosecute Halkbank, the United States is taking the position that immunity does not apply. A court overruling that decision would embarrass the executive branch by second-guessing its conclusion that the prosecution is in the national interest, the government argues.

During lower court proceedings, the U.S. Court of Appeals for the Second Circuit held that it must defer to the executive branch's view that the prosecution could go forward, but the Supreme Court concluded that the Second Circuit did not adequately analyze the common law immunity claims. Rather than resolving these issues, the Supreme Court remanded proceedings to the Second Circuit for further consideration of the parties' common law immunity arguments.

Justice Gorsuch's Opinion

Justice Gorsuch, joined by Justice Alito, wrote a separate opinion concurring in part and dissenting in part. Justice Gorsuch agreed with the majority that 18 U.S.C. § 3231 provides underlying jurisdiction but opined that the FSIA governs foreign sovereign immunity in both civil and criminal suits. Justice Gorsuch's view of the FSIA focused on the statute's general grant of sovereign immunity in 28 U.S.C. § 1604, which provides that foreign states and their instrumentalities "shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" by the FSIA's exceptions (28 U.S.C. §§ 1605-1607). To Justice Gorsuch, Section 1604's text was "clear as a bell"—sovereign entities "shall be immune" absent a statutory exception. Because the statute does not expressly carve out criminal prosecutions, he contends that it also grants immunity in criminal cases when one of the statutory exceptions do not apply.

While Justice Gorsuch would have applied the FSIA's overall statutory framework in this case, he would not have held that Halkbank is immune from prosecution. Rather, he would have held that Halkbank's alleged misconduct fell into one of the FSIA exceptions to immunity from suit, the commercial activities exception in 28 U.S.C. § 1605(a)(2). Justice Gorsuch also critiqued the majority's decision to remand on questions of common law immunity. That ruling, he argued, leaves litigants and lower courts with the "unenviable task" of unpacking complex questions about common law immunity without the Supreme Court's guidance on how to resolve them.

Open Questions After *Halkbank*

"Right of out of the gate," Justice Gorsuch wrote, lower courts will face the question of what approach best guides common law immunity determinations. Before the FSIA was enacted in 1976, the Department of State routinely prepared "suggestions of immunity" that were filed with the courts when it believed foreign states were immune from suit. Courts generally treated those suggestions as controlling, and the Supreme Court once stated that courts must not "allow an immunity on new grounds which the

government has not seen fit to recognize." Some scholars contend that renewed executive branch control of immunity determinations would violate separation-of-powers principles by undermining the judiciary's role in determining what the common law requires. Moreover, as the Court in Halkbank discussed, Congress enacted the FSIA largely in response to the problems perceived in the executive-branch-driven approach. Before the FSIA, foreign governments lobbied the State Department for suggestions of immunity, and political considerations factored into immunity decisions.

As an alternative approach, courts could independently apply common law rules of immunity, but as Justice Gorsuch characterized, this option "comes with its own puzzles." It is not obvious how courts should identify specific common law principles. Courts generally drew from international law to inform the common law of immunity in pre-FSIA cases, but international principles may be difficult to definitively identify in some cases. The United States is not a signatory to the prevailing U.N. treaty on foreign sovereign immunity, and, even if it were, that treaty is not yet in force and does not apply to criminal proceedings. As a result, international law principles are found in customary international law.

Customary international law is derived from sovereign states' practice that is followed from a sense of legal obligation. Its decentralized and unwritten nature can make it difficult to decipher whether a particular state's practice is sufficiently accepted as binding law. Customary international law also occupies a complex place when incorporated in the United States' domestic legal system. Foreign relations law scholars have long debated whether the 20th century judicial developments (discussed in this CRS Report) foreclose federal courts' ability to apply customary international law as a form of federal common law, but the issue remains unresolved.

Judicial control over immunity determinations could also raise questions if a court were to disagree with the executive branch's view of whether a defendant is immune from prosecution. The executive branch contends that a judicial override of an executive branch immunity determination would undermine its "constitutionally rooted authority and discretion over prosecutorial and foreign-policy decisionmaking."

Legislative Options to Address Open Questions

Congress has amended the FSIA several times since its enactment, including in response to court rulings. Congress may consider using its legislative authority to resolve *Halkbank*'s open questions, as some commentators have urged. It may do so by addressing when foreign sovereign immunity applies in criminal cases and responding to the "thorny questions" that Justice Gorsuch argued were left open on remand.

Dissatisfied with what the Supreme Court described as a state of "disarray" caused by the suggestions of immunity system, Congress enacted the FSIA in 1976 with the aim of providing a clearly defined and comprehensive set of standards for courts to use when faced with foreign sovereign immunity issues. If Congress considers whether FSIA covers criminal cases, it may supplement the current statutory scheme to define when immunity applies in criminal prosecutions. Congress also has the option to provide, through legislation, that foreign sovereign immunity does not apply in criminal cases in U.S. courts. Congress could also refrain from legislating and allow courts to evaluate foreign sovereign immunity in criminal cases based on common law principles developed by the judiciary.

Author Information

Stephen P. Mulligan
Legislative Attorney

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