Foreign Sovereign Immunities Act of 1976 — *Sovereign Immunity* — Turkiye Halk Bankasi A.S. v. United States

Under international law, the principle of foreign sovereign immunity is derived from the proposition that "one country cannot exercise jurisdiction over another without violating the core principle *par in parem no*[*n*] *habet imperium* ('an equal has no power over an equal')."[1] The United States codified this rule and set out to "protect the rights of both foreign states and litigants" by enacting the Foreign Sovereign Immunities Act[2] (FSIA). The Act establishes that foreign states "shall be immune from the jurisdiction" of United States courts,[3] but carves out some distinct exceptions,[4] such as for suits based on states' commercial activities.[5] A further purpose of this bill was to "transfer . . . determination[s] of sovereign immunity from the executive branch to the judicial branch."[6] Last Term, in *Turkiye Halk Bankasi A.S. v. United States*[7] (*Halkbank*), the Supreme Court held that the FSIA is limited to civil litigation, barring immunity for commercial entities in criminal cases under the FSIA.[8] The Court, however, remanded the question of common law immunity to the lower court,[9] which had favored the Executive as the decisionmaker on immunity considerations. This move risks future inconsistent and hyperpolitical applications of foreign sovereign immunity in criminal cases in U.S. courts.

The *Halkbank* saga began when the United States indicted Iranian Turkish gold trader Reza Zarrab and Halkbank executive Mehmet Atilla for evading U.S. sanctions by converting Iranian oil and gas proceeds to gold for trade on the international market.[10] After trying the individual criminal cases, the United States proceeded with indicting Halkbank as a state-owned entity.[11] In *Halkbank*, the United States

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[1] Chimène I. Keitner, *Between Law and Diplomacy: The Conundrum of Common Law Immunity*, 54 GA. L. REV. 217, 220 (2019).

[2] 28 U.S.C. §§ 1602–1611.

[3] *Id.* § 1604.

[4] *Id.* § 1605.

[5] *Id.* § 1605(a)(2).

[6] H.R. REP. NO. 94-1487, at 7 (1976).

[7] 143 S. Ct. 940 (2023).

[8] *Id.* at 944.

[9] *Id.*

[10] Kelly Bjorklund, *Trump's Inexplicable Crusade to Help Iran Evade Sanctions*, FOREIGN POL'Y (Jan. 9, 2021, 6:01 AM), https://foreignpolicy.com/2021/01/09/trump-help-iran-evade-sanctions-turkey-halkbank [https://perma.cc/9D79-3CSE]; *see* Indictment at 5–6, United States v. Zarrab, No. 15 Cr. 867 (S.D.N.Y. Oct. 17, 2016), 2015 WL 11623175; United States v. Halkbank, No. 15 Cr. 867, 2020 WL 5849512, at *1 (S.D.N.Y. Oct. 1, 2020).

[11] *Halkbank*, 143 S. Ct. at 944; Press Release, U.S. Att'y's Off., S. Dist. of N.Y., Turkish Bank Charged in Manhattan Federal Court for Its Participation in a Multibillion-Dollar Iranian Sanctions Evasion Scheme (Oct. 15, 2019), https://www.justice.gov/usao-sdny/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar [https://perma.cc/ZZ8H-V4W7] ("The Office has previously charged nine individual defendants, including bank employees, the former Turkish Minister of the Economy, and other participants in the scheme.").

alleged that Halkbank, as an entity, participated in a scheme to launder Iranian oil and gas proceeds through the U.S. financial system, violating U.S. sanctions laws.[12] Halkbank moved to dismiss, countering that as an instrumentality of a foreign state, it enjoyed immunity under the FSIA.[13]

The government prosecuted Halkbank in the U.S. District Court for the Southern District of New York.[14] The district court rejected Halkbank's motion to dismiss, finding that the FSIA "does not appear to grant immunity in criminal proceedings."[15] The district court found that even if the FSIA did apply to Halkbank, its actions would fall under the commercial activity exception of the FSIA, which limits immunity for foreign states' actions based upon commercial activity "carried on in" or causing a "direct effect" in the United States.[16] The court also held that it had "personal jurisdiction over Halkbank" under 18 U.S.C. § 3231, which grants district courts "original jurisdiction . . . of all offenses against the laws of the United States."[17]

Halkbank filed an interlocutory appeal to the Second Circuit.[18] The appellate court affirmed and agreed that Halkbank's conduct was not subject to FSIA immunity.[19] And even if Halkbank was under the purview of the FSIA, its actions fell under the exception to immunity for commercial activities.[20] The Second Circuit also affirmed the lower court's holding that the district court had jurisdiction over the prosecution under 18 U.S.C. § 3231.[21] Finally, the circuit court found that Halkbank did not enjoy immunity at common law, and that at common law, "sovereign immunity determinations were the prerogative of the [e]xecutive [b]ranch."[22]

The Supreme Court affirmed the lower court's holding in part and vacated and remanded in part.[23] Writing for the Court, Justice Kavanaugh[24] held that the district court had jurisdiction over this matter under 18 U.S.C. § 3231 and that the FSIA does not provide sovereign states with immunity from criminal prosecution.[25]

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[12] *Halkbank*, 2020 WL 5849512, at *1.
[13] *Halkbank*, 143 S. Ct. at 944.
[14] *Halkbank*, 2020 WL 5849512, at *1.
[15] *Id.* at *4.
[16] *Id.* at *5 (quoting Hanil Bank v. PT. Bank Negar Indon. (Persero), 148 F.3d 127, 130–31 (2d Cir. 1998)).
[17] *Id.* at *7.
[18] United States v. Turkiye Halk Bankasi A.S., 16 F.4th 336, 343 (2d Cir. 2021).
[19] *Id.* at 340, 347.
[20] *Id.* at 347–48.
[21] *Id.* at 347.
[22] *Id.* at 351.
[23] *Halkbank*, 143 S. Ct. at 951–52.
[24] Justice Kavanaugh was joined by Chief Justice Roberts and Justices Thomas, Sotomayor, Kagan, Barrett, and Jackson.
[25] *Halkbank*, 143 S. Ct. at 946.

The Court first determined whether courts had jurisdiction to hear the matter under 18 U.S.C. § 3231.[26] The Court held that § 3231 "plainly encompasses" Halkbank's criminal offenses,[27] and though § 3231 does not explicitly reference foreign sovereigns, limiting jurisdiction over those cases would be grafting an "atextual limitation onto § 3231's broad jurisdictional grant over 'all offenses.'"[28] The Court also found arguments concerning § 3231's predecessor, the Judiciary Act of 1789,[29] unconvincing. The Judiciary Act did not contain implicit exceptions for foreign states.[30] And earlier exceptions for jurisdiction for foreign states were previously made at common law, not under the Judiciary Act.[31]

The Court then moved to the immunity question, where it determined for the first time that the FSIA applies exclusively to civil matters.[32] Justice Kavanaugh first took a contextual approach to analyzing the statute. He began by identifying the first provision of the FSIA, where the statute grants original jurisdiction over "civil action[s]," as a key indicator of its limited scope.[33] He then moved to other provisions of the FSIA that refer to rules of *civil*, rather than *criminal*, procedure;[34] reference *litigants*, rather than *prosecutors*; and provide immunity from *suit*, rather than *prosecution*.[35] When it comes to criminal matters, the Court found, the FSIA is silent.[36] The Court found that including criminal immunity as an implicit matter, when the statute makes no mention of criminal jurisdiction, would be akin to Congress hiding "elephants in mouseholes."[37] Then, the Court insisted that the FSIA's grant of immunity should be read in context with the whole statute, rather than as an "isolated provision[]."[38] Justice Kavanaugh outlined FSIA sequentially beginning with § 1330(a), which confers jurisdiction over civil matters against foreign states, and proceeding to § 1604 and its exceptions, which offer immunity in only civil circumstances.[39] Reading the statute in this way, as provided by caselaw and congressional intention, led the Court to limit immunity to only the "universe of civil matters."[40] It is implausible, the Court found, that Congress enacted a statute "focused entirely on civil actions and then in one provision that does not mention

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[26] *Id.* at 944.
[27] *Id.*
[28] *Id.* at 945.
[29] Ch. 20, 1 Stat. 73.
[30] *Halkbank*, 143 S. Ct. at 945.
[31] *Id.* at 945–46.
[32] *Id.* at 947.
[33] *Id.*
[34] *See id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 948 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).
[38] *Id.* (quoting Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 290 (2010)).
[39] *Id.* at 949.
[40] *Id.*

criminal proceedings somehow stripped the [e]xecutive [b]ranch of all power to bring domestic criminal prosecutions against instrumentalities of foreign states."[41]

Finally, the Court offered three considerations on the limited nature of the FSIA. First, it rejected an important precedent from *Argentine Republic v. Amerada Hess Shipping Corp.*,[42] which for many years touted that the FSIA was the "sole basis for obtaining jurisdiction over a foreign state in federal court."[43] Second, the Court found that there are no other procedural bars to prosecution because the Federal Rules of Criminal Procedure would still apply against foreign entities.[44] And third, the Court held that consequentialist concerns, such as the ability of state prosecutors to bring criminal proceedings and the related foreign policy issues, were not a part of the textual reading of the FSIA.[45] And even if they were, the Court mused that state prosecutions against foreign sovereigns are not frequent and could be avoided through suggestions of immunity.[46] Justice Kavanaugh lastly moved to the question of foreign sovereign immunity at common law, which he remanded to the Second Circuit for review.[47]

Justice Gorsuch, joined by Justice Alito, concurred in part and dissented in part.[48] Justice Gorsuch concurred with the majority's finding of jurisdiction,[49] but dissented from the Court's denial of FSIA immunity in criminal cases, concluding that the indictment sufficiently alleged that Halkbank's actions met the commercial activity exception of the FSIA.[50] Justice Gorsuch posited that the case against Halkbank fell squarely in the jurisdiction of the FSIA, which applies "in every action against a foreign sovereign,"[51] and that the majority opinion failed to "displace the plain statutory text."[52] The majority's reliance on § 1330 and the FSIA's civil-procedure provisions, Justice Gorsuch argued, cut the other way. When Congress intended to limit parts of the FSIA to civil actions, "it knew how to do so."[53] Similarly, Justice Gorsuch disagreed that the exceptions under the FSIA applied only to civil suits, and even if they did, these narrow exceptions would be an indication of Congress imputing greater immunity from criminal proceedings than

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41 *Id.*
42 488 U.S. 428 (1989).
43 *Id.* at 439; *see Halkbank*, 143 S. Ct. at 950.
44 *Halkbank,* 143 S. Ct. at 950.
45 *Id.*
46 *Id.* at 951.
47 *Id.* at 951–52.
48 *Id.* at 952 (Gorsuch, J., concurring in part and dissenting in part).
49 *Id.*
50 *Id.* at 953.
51 *Id.* (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983)).
52 *Id.*
53 *Id.*

civil cases.[54] As for common law immunity, Justice Gorsuch feared a challenging path lay ahead for the Second Circuit, which was now tasked with juggling questions of executive versus judicial decision-making power in the universe of foreign sovereign immunity.[55]

Although the Court rightly concluded that the FSIA does not apply to criminal actions, it remanded the question of immunity at common law to the Second Circuit. As Justice Gorsuch explained in his dissent, the remand leaves important questions of executive versus judicial judgment to the lower court. This is particularly pressing as the United States allocates more resources and prosecutorial attention to enforce its sanctions.[56] The Court's decision to remand the question of immunity at common law to the Second Circuit, which relied heavily on the Executive's common law power to determine immunity, risks inconsistent and politicized immunity determinations. Instead, the Court should have limited determinations of common law sovereign immunity to the courts rather than the Executive.

In the Second Circuit, the panel had determined that the common law contains an exception, analogous to the one in FSIA, that allows suit against state-owned enterprises for their commercial activity.[57] Additionally, and more problematically, the Second Circuit stated that decisions of sovereign immunity are "the prerogative of the [e]xecutive [b]ranch; thus, the decision to bring criminal charges would . . . necessarily manifest[] the [e]xecutive [b]ranch's view that no sovereign immunity exist[s]."[58] In the Second Circuit's line of reasoning, the mere fact that the Executive has decided to prosecute a state-owned enterprise is enough for courts to defer to that determination completely. This reasoning overwhelmingly accepts the Executive's role in immunity decisions and dangerously displaces the judiciary's role, risking the possibility of inconsistent applications of sovereign immunity in the future. On remand, it is possible that the Second Circuit will reinforce this reliance on the Executive.

Executive control of sovereign immunity has varied across U.S. history, but can be broken down into three eras. The original, "classical" approach to sovereign immunity was consent based, permitting suit against a foreign sovereign only with the offending state's permission.[59]

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[54] *Id.* at 953–54.

[55] *Id.* at 954.

[56] *See* Dylan Tokar & Ian Talley, *Justice Department Hiring Dozens of New Prosecutors to Enforce Russian Sanctions*, WALL ST. J. (Mar. 2, 2023, 5:58 PM), https://www.wsj.com/articles/justice-department-hiring-dozens-of-new-prosecutors-to-enforce-russian-sanctions-4e9b9047 [https://perma.cc/599M-KW46].

[57] United States v. Turkiye Halk Bankasi A.S., 16 F.4th 336, 351 (2d Cir. 2021).

[58] *Id.*

[59] *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Just. (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984, 984

The second era began in 1952, when a legal advisor with the Department of State, Jack Tate, wrote to Acting Attorney General Philip Perlman to inform him that the State Department would transition away from the classical theory of foreign sovereign immunity determinations.[60] In the letter, Tate described the move as in line with a general shift in international jurisprudence toward a "restrictive theory of immunity."[61] Under the restrictive theory, the State Department would investigate and file "suggestions of sovereign immunity"[62] if the action related to purely governmental transactions.[63] In theory, the State Department would not offer suggestions of immunity if the actions were *jure gestionis*, or commercial in nature.[64] In practice, however, under restrictive immunity, questions of sovereign immunity were decided on a case-by-case basis with great deference to executive decisionmaking.[65] Though the State Department attempted to follow the emerging trend of restrictive immunity through its internal policies, it was unable to avoid political influence surrounding grants of immunity, and sometimes crumbled under diplomatic pressure by the Executive.[66] In response to this inconsistent application of immunity toward states, Congress enacted the FSIA.[67] This third era of sovereign immunity "transfer[red] the determination of sovereign immunity from the executive branch to the judicial branch."[68]

By leaving the question of immunity at common law to the lower court, the Court's decision in *Halkbank* threatens the congressionally intended role of a stronger judiciary in immunity decisions. Professors Ingrid Brunk and William Dodge addressed this issue in an amicus brief to the Court. They argued that the circuit court got the question of common law immunity wrong, and that its decision granted the Executive the power to intervene in specific cases to confer decisions of immunity — "in short, to decide cases."[69] The circuit court's decision,

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(1952) [hereinafter Tate Letter]; *see also* Simon G. Jerome, *Throwback Thursday: The Tate Letter and Foreign Sovereign Immunity*, TRANSNAT'L LITIG. BLOG (May 26, 2022), https://tlblog.org/throwback-thursday-the-tate-letter-and-foreign-sovereign-immunity [https://perma.cc/7M4J-NJA2].

60 Jerome, *supra* note 59.

61 Tate Letter, *supra* note 59, at 984.

62 Prior to the enactment of the FSIA, sovereign states directly requested "suggestions of immunity" with the State Department. The State Department would then share that decision with the courts. Fern L. Kletter, Annotation, *Suggestion of Immunity from Executive Branch for Foreign Sovereigns and Officials*, 43 A.L.R. Fed. 3d Art. 7 (2019).

63 *Id.*

64 John M. Niehuss, Comment, *International Law — Sovereign Immunity — The First Decade of the Tate Letter Policy*, 60 MICH. L. REV. 1142, 1142 (1962).

65 *See id.* at 1142–43, 1146.

66 Michael Cooper, *Comity & Calamity: Deference to the Executive and the Uncertain Future of the FSIA*, 45 BROOK. J. INT'L L. 913, 923 (2020).

67 *Id.* at 923–24.

68 H.R. REP. NO. 94-1487, at 7 (1976).

69 Brief of Professors Ingrid (Wuerth) Brunk & William S. Dodge as Amici Curiae in Support of Neither Party at 10, *Halkbank*, 143 S. Ct. 940 (No. 21-1450).

according to Brunk and Dodge, is contrary to the general understanding that matters of common law are left to the judiciary.[70] Further, Brunk and Dodge pointed out that the Executive itself has recognized its position as an advisor rather than an arbiter in immunity determinations, for example in the Tate Letter, which clarified that "a shift in policy by the [E]xecutive cannot control the courts."[71] The Court thus missed a valuable opportunity in *Halkbank* to reject the Second Circuit's misinterpretation of the Executive's role at common law.

If, on remand, the Second Circuit holds that the Executive wields the final say at common law in immunity determinations, sovereign immunity risks inconsistent application in criminal cases until the Supreme Court steps back in. Overbroad reliance on the Executive for immunity decisions would be reminiscent of the early days of restrictive immunity, whereby the State Department granted sovereign immunity in actions that were largely commercial in nature.[72] Professor John Niehuss surveyed four cases in the first ten years of the restrictive-immunity policy.[73] In these years, which coincided with the Cold War era, the State Department opposed requests for immunity in cases against the Republic of Korea and the Philippines, but it did not oppose such requests in cases involving the Soviet Union and Czechoslovakia.[74] The obvious conclusion, and the one that Niehuss made, is that the State Department may have been tempering strained relations with the Soviets and Czechs while feeling less concerned about threatening relations with friendly states like Korea.[75] Considering these examples, and that Congress enacted the FSIA to "reduc[e] the foreign policy implications of immunity determinations," it is difficult to illustrate executive immunity decisions as consistent or legally predictable.[76]

The Second Circuit failed to recognize — and the Supreme Court did not contest — that an overbroad reliance on the Executive could bring political considerations to the forefront of immunity decisions today. In fact, even in *Halkbank*, the Trump Administration was particularly involved in blocking criminal charges against the Turkish bank. After multiple conversations during which Turkish President Recep Tayyip Erdogan urged President Trump to "resolve the Halkbank matter," administration officials blocked a request from prosecutors to file criminal charges against Halkbank.[77] And, in the early days of the

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[70] *See id.* (quoting Stern v. Marshall, 564 U.S. 462, 483 (2011)).

[71] *Id.* at 11 (quoting Tate Letter, *supra* note 59, at 985).

[72] Niehuss, *supra* note 64, at 1143–44.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 1144–45.

[76] H.R. REP. NO. 94-1487, at 7 (1976).

[77] Eric Lipton & Benjamin Weiser, *Turkish Bank Case Showed Erdogan's Influence with Trump*, N.Y. TIMES (Oct. 29, 2020), https://www.nytimes.com/2020/10/29/us/politics/trump-erdogan-

prosecution, federal prosecutor Geoffrey Berman fended off repeated requests by Attorney General William Barr to avoid an indictment and instead opt to fine the company.[78] Indeed, the Halkbank dispute with the Trump White House was cited as one of the alleged reasons Berman was asked to step down from his position as United States Attorney for the Southern District of New York.[79]

Interestingly, political negotiations between Presidents Trump and Erdogan occurred despite the Trump Administration's "hard-line stance against Iran."[80] This paradox is most simply explained by former National Security Advisor John Bolton, who believes that President Trump never "fully internalized . . . the nature of the underlying charges" and instead was seduced into dropping the indictment because of his fascination with authoritarian leaders.[81] The Halkbank case demonstrates that if left to the Executive, decisions of immunity can be demonstrably inconsistent with U.S. foreign policy goals, fracturing the position of the Executive on the world stage. Brunk describes this level of reliance as a "popularity contest" whereby the U.S. President may offer immunity based on whether they "like[]" the country or corporation in question.[82] In reinforcing the power of the Executive, the courts are risking a repetition of history, whereby the State Department makes inconsistent and politically motivated recommendations of immunity, but also a future where the personal preferences of a single person strong-arm the judiciary.

At oral argument, the Supreme Court did not shy away from discussing the political considerations surrounding *Halkbank*. Justice Kavanaugh mentioned "news reports" of the Turkish foreign minister coming to the United States, presumably to discuss a grant of immunity.[83] Counsel for Halkbank seemed to recognize this as a foreign policy concern and countered with the idea that it would be impermissible to "let 12 Manhattan jurors figure this out."[84]

However, the alternative is not to let the jurors "figure out" grants of immunity, but to let courts, in their practice of common law

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halkbank.html [https://perma.cc/N2TU-D288]. In a letter to Secretary of the Treasury Janet Yellen, Chairman Ron Wyden of the Senate Committee on Finance alleged that President Erdogan raised the Halkbank case directly with President Trump. Letter from Ron Wyden, Chairman, Senate Comm. on Fin., to Janet Yellen, Sec'y of the Treasury, U.S. Dep't of the Treasury (Mar. 11, 2021).

78 Lipton & Weiser, *supra* note 77.

79 *See* Alan Feuer et al., *Trump Fires U.S. Attorney in New York Who Investigated His Inner Circle*, N.Y. TIMES (Mar. 23, 2021), https://www.nytimes.com/2020/06/20/nyregion/trump-geoffrey-berman-fired-sdny.html [https://perma.cc/Q5PF-9EWB].

80 Bjorklund, *supra* note 10.

81 *Id.*

82 Caleb Symons, *Halkbank Ruling May Create Immunity Mess, Experts Say*, LAW360 (May 5, 2023, 8:29 PM), https://www.law360.com/articles/1605066/halkbank-ruling-may-create-immunity-mess-experts-say [https://perma.cc/M259-J43N].

83 Transcript of Oral Argument at 42, *Halkbank*, 143 S. Ct. 940 (No. 21-1450).

84 *Id.*

decisionmaking, check the Executive's suggestion of immunity and treat it as just that: a suggestion. In this case, a court may be able to take a more nuanced view by making clear the distinction between prosecution of state-owned entities and of states themselves, which do not face criminal liability under international law.[85] Under international law, states are held accountable under the principle of "state responsibility" for wrongful acts.[86] State responsibility in international law is independent of criminal law, which is "primarily" reserved for individuals.[87] In their amicus brief to the Court, Azerbaijan and Pakistan warned that opening foreign states to criminal proceedings "would be unprecedented . . . and make the United States an extreme outlier."[88] Due to the political nature of immunity negotiations in the executive branch, it is unclear if this peremptory norm of international law would be respected if decisions of immunity were left solely to the Executive. One could imagine a world where a criminal case against an unfriendly foreign state proceeds, simply to make a foreign policy statement.[89]

The risk of inconsistent and perhaps prejudiced applications of executive power raises concerns for transnational lawyers on all fronts. If the Second Circuit leaves grants of immunity in the hands of a politicized Executive, prosecutions of human rights abuses in U.S. courts could face opposition from the Executive if the President prioritizes friendly relations over justice. Alternatively, the Executive may refuse to grant immunity to financial institutions, where payouts would be substantial.[90] More recently, in the wake of the *Halkbank* decision, lawyers have alerted foreign corporations to be on "notice" to the potentially

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[85] Sean Fleming, *Leviathan on Trial: Should States Be Held Criminally Responsible?*, 13 INT'L THEORY 427, 427–28 (2021).

[86] *See* Int'l L. Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, at 43 (2001).

[87] Fleming, *supra* note 85, at 429.

[88] Brief for Amici Curiae Republic of Azerbaijan & Islamic Republic of Pakistan in Support of Petitioner at 3, *Halkbank*, 143 S. Ct. 940 (No. 21-1450).

[89] *Cf.* Meagan Flynn, *Missouri Is Suing China over the Coronavirus Pandemic. It's the Latest Conservative Gambit.*, WASH. POST (April 22, 2020, 7:31 AM), https://www.washingtonpost.com/nation/2020/04/22/missouri-lawsuit-china [https://perma.cc/862W-529K] (discussing state efforts to "at least garner some publicity for blaming China" by suing the country over COVID-19).

[90] Sanctions disputes have previously resulted in millions of dollars in fines and settlements. *See, e.g.*, Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Crédit Agricole Corporate and Investment Bank Admits to Sanctions Violations, Agrees to Forfeit $312 Million (Oct. 20, 2015), https://www.justice.gov/opa/pr/cr-dit-agricole-corporate-and-investment-bank-admits-sanctions-violations-agrees-forfeit-312 [https://perma.cc/JR2Z-6C9A]; Press Release, U.S. Dep't of Just., Off. of Pub. Affs., BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (June 30, 2014), https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial [https://perma.cc/Z3W7-5DAC].

broad reach of U.S. sanctions policy as it is may be left to whims of the Executive.[91]

The Court's decision in *Halkbank* to leave the question of immunity at common law to the Second Circuit has left more questions than answers about the role of the Executive in foreign immunity determinations. If, upon remand, the Second Circuit fails to correct the overbroad grant of power to the Executive in immunity considerations, the result would be inconsistent legal applications based on the political preferences of the Executive, and challenges for commercial entities in assessing the risks of transacting with the United States.[92]

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[91] John B. Bellinger III et al., *The Supreme Court Removes Two Obstacles to the Criminal Prosecution of Foreign States in U.S. Courts*, ARNOLD & PORTER (May 5, 2023), https://www.arnoldporter.com/en/perspectives/advisories/2023/05/prosecution-of-foreign-states-in-us-courts [https://perma.cc/Y8VR-FAUE] (observing that in response to the *Halkbank* decision, the U.S. government may have access to new investigative tools such as seizing or seeking forfeiture of state-owned assets). Top lawyers have warned that the *Halkbank* decision should put foreign-owned financial institutions "on notice." Brad Kutner, *SCOTUS Decision in Halkbank Case, A Win for DOJ, Could Put State-Owned Foreign Banks "On Notice*," LAW.COM (Apr. 19, 2023, 5:15 PM), https://www.law.com/nationallawjournal/2023/04/19/scotus-decision-in-halkbank-case-a-win-for-doj-could-put-state-owned-foreign-banks-on-notice [https://perma.cc/43LE-JH5P]; Symons, *supra* note 82 (noting that the *Halkbank* decision introduces a new tool for the Executive to "start policing more conduct abroad if the Second Circuit denies immunity").

[92] At the time of publishing, the Second Circuit has yet to decide on the common law question of criminal immunity. Arguments made in this piece draw from the Second Circuit's seeming reliance on executive decisionmaking in its original opinion dated October 1, 2020.