Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Supreme Court Considers Whether the United States Can Prosecute a Foreign-State-Owned Bank

March 6, 2023

The Supreme Court may soon decide whether the United States can prosecute foreign countries and their agencies and instrumentalities in U.S. courts. The United States has accused Türkiye Halk Bankasi (Halkbank)—a Turkish state-owned bank whose name translates to the People's Bank of Turkey (Türkiye)—of conspiring to violate U.S. sanctions and commit bank fraud. Halkbank not only denies the charges, it claims the Foreign Sovereign Immunities Act (FSIA) provides complete immunity from criminal prosecution because the bank is an instrument of a foreign state. There is an ample body of Supreme Court cases on how the FSIA applies in civil actions, but the Court has never addressed whether the statute applies in criminal prosecutions. The Supreme Court is set to consider this issue in *Türkiye Halk Bankasi A.S. v. United States*, and its decision could have lasting implications for Congress, U.S. foreign relations, and the tools at the President's disposal to address national security concerns.

Background and Charges

Although Turkey owns and operates Halkbank, the case before the Supreme Court has its roots in sanctions on Iran. In 2019, a grand jury indicted Halkbank, charging that the bank engaged in schemes to launder billions of dollars from the proceeds of Iranian oil and natural gas sales in violation of the U.S. sanctions. According to the indictment, proceeds from Iran's oil and gas sales were deposited at Halkbank in accounts in the name of several Iranian state-owned entities, some of which are subject to sanctions. The indictment alleges that Halkbank allowed funds in those accounts to be converted into gold and cash that was ultimately transferred to Iran through U.S. dollar-denominated transactions that flowed through U.S. bank accounts. The indictment also alleges that Halkbank tried to exploit exceptions to sanctions for humanitarian assistance by facilitating transactions fraudulently designed to appear as purchases of food and medicine and that bank employees lied to officials from the Department of the Treasury's Office of Foreign Assets Control when questioned about the transactions. High-ranking actors in the Iranian and Turkish governments participated in the scheme and received tens of millions of dollars, according to the indictment.

Congressional Research Service
https://crsreports.congress.gov
LSB10927

Based on these allegations, the United States charged Halkbank with bank fraud, money laundering, and several counts of conspiracy. The bank's deputy general manager was convicted in his individual capacity for similar crimes based on the same set of facts in a 2018 criminal trial, and another alleged co-conspirator pled guilty for participating in the scheme in 2017. Other former Halkbank employees who allegedly assisted in the scheme have been indicted but remain at large.

In lower court proceedings, Halkbank denied the factual claims and argued that the charges should be dismissed for two primary reasons: (1) The FSIA provides it with absolute immunity from criminal prosecution and (2) Congress never granted federal courts jurisdiction to hear criminal cases against foreign states or their agencies and instrumentalities in the first place. (The FSIA collectively defines *foreign state* to include the state's agencies and instrumentalities.) The U.S. Court of Appeals for the Second Circuit rejected those theories, holding that, to the extent that the FSIA applies in criminal cases, Halkbank was not immune because this prosecution fell into an exception to immunity for commercial activities. The Second Circuit also held that it had jurisdiction under 18 U.S.C. § 3231, which allows federal courts to hear prosecutions for federal offenses. When Halkbank petitioned the Supreme Court for review, the Solicitor General recommended that the Court deny certiorari, but the Court granted the petition and held oral argument on January 17, 2023.

Brief History of the FSIA

Congress enacted the FSIA in 1976 with the goal of empowering federal courts to determine when foreign sovereign immunity applies. Before 1976, the executive branch would file "suggestions of immunity" when it believed foreign states were immune from the jurisdiction of U.S. courts, and courts generally treated those suggestions as controlling. For much of U.S. history, these immunity determinations were uncomplicated because, under the then-prevailing theory of sovereign immunity, foreign states had absolute immunity in U.S. courts. By the mid-20th century, however, a new paradigm developed to account for greater governmental activity in private commerce and the rise of government instrumentalities, such as state-owned corporations.

In 1952, the United States transitioned from the absolute theory of sovereign immunity to the "restrictive theory" of sovereign immunity, where sovereigns have immunity for their public acts but not for acts private or commercial in nature. According to the Supreme Court, the paradigm shift caused disarray because the line between public and private acts was not clear, and foreign governments sought to influence immunity determinations by pressuring the executive branch. Congress intended the FSIA to remedy these problems by transferring immunity determinations to federal courts and subjecting those determinations to a clear set of legal standards defined in statute. The Supreme Court has since held that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court."

The FSIA and Criminal Prosecutions

Halkbank's argument that the FSIA provides complete immunity from criminal prosecutions centers on its interpretation of 28 U.S.C. § 1604. This statute provides that foreign states (including their agencies and instrumentalities) "shall be immune from the jurisdiction" of all U.S. courts unless an exception applies. FSIA exceptions include waiver of immunity either explicitly or by implication, causes of actions for select terrorism-related claims, and—most relevant to Halkbank—suits involving certain commercial activity by a foreign state with a connection to the United States. Section 1604's grant of immunity does not distinguish between civil and criminal cases, and the parties agree that Halkbank is an instrumentality of Turkey. Had this been a civil case, the FSIA analysis likely would have been relatively straightforward: Section 1604 would have provided the bank with a presumption of immunity, and the court's role would have been to determine whether an exception applies.

Halkbank maintains, however, that this standard approach does not apply in criminal cases. According to the bank, the FSIA provides absolute immunity from criminal prosecutions because Section 1604's grant of immunity applies in all cases, and the FSIA's exceptions to immunity apply only in civil actions. The bank reaches this conclusion by reading Section 1604 in tandem with another FSIA section, 28 U.S.C. § 1330(a). Section 1330(a) gives federal courts jurisdiction over "any nonjury civil action" against a foreign state when a FSIA exception applies. The provision only mentions civil actions, and neither it nor any other provision in the FSIA expressly grants federal courts with equivalent jurisdiction over criminal cases. Reading the two statutes together, Halkbank argues that Section 1604 removed courts' ability to hear all cases against foreign states and Section 1330(a) only restored jurisdiction for nonjury civil actions that fall into one of the FSIA's exceptions. Under this view, Section 1604 acts as a total bar to criminal cases against foreign states.

The United States not only disagrees with this statutory interpretation, it contends that the FSIA does not apply to criminal cases at all. The United States acknowledges that, if viewed in isolation, Section 1604 could be read to provide immunity to criminal cases, but it argues that "every single other contextual factor" shows that the FSIA was not intended to govern criminal prosecutions. For example, in a series of provisions that specifically mention civil suits, the FSIA creates a carefully calibrated process for how litigation against foreign states must unfold. Civil suits must be brought in a specific venue, have special procedures for service of process and pleadings, and have limitations on liability. Civil suits can also be removed to federal court so that state courts cannot hear cases that could disrupt U.S. foreign relations because a foreign state is involved. These provisions specifically mention civil suits only, and the FSIA does not contain an equivalent framework for criminal prosecutions. The United States argues that it would make little sense to create a detailed, federal-court-focused process for civil suits against foreign states while allowing criminal prosecutions to go forward without the same statutory guardrails. The absence of equivalent protections in criminal cases, the United States contends, demonstrates that Congress never considered the statute would cover prosecutions.

The United States also argues that, if the Court concludes that the FSIA does apply to criminal prosecutions, the case can still go forward because this prosecution falls within the statute's commercial activity exception. Defined in 28 U.S.C. § 1605(a)(2), the commercial activity exception provides that foreign sovereign immunity is not available when an action is based on commercial activity in the United States or has a direct domestic effect. Section 1605(a) states that this exception applies "in any case"—which the United States interprets to mean both civil actions and criminal prosecutions. Focusing on this exception, the United States argues that Halkbank cannot "have it both ways": if the bank gets the benefit of the FSIA's immunity in Section 1604, it must also be subject to the FSIA's exceptions in Section 1605. The Second Circuit agreed with this reasoning and concluded that Halkbank's alleged scheme fell within commercial activity exception, meaning the prosecution could go forward. The United States urges the Supreme Court to adopt this reasoning as an alternative theory.

Halkbank's Jurisdictional Challenge

Separate from the FSIA-based immunity inquiry, Halkbank challenges whether Congress has granted federal courts jurisdiction to hear criminal cases against foreign states in the first place. The United States contends that the federal courts have jurisdiction under 18 U.S.C. § 3231—a statute originally enacted by the First Congress, which grants federal courts jurisdiction over "all offenses against the laws of the United States." Halkbank calls it "inconceivable" that the First Congress would have invited the foreign policy problems caused by criminally prosecuting sovereigns. The bank also alludes to the major questions doctrine (discussed in this CRS Sidebar) and argues that Congress would not have intended the "radical step of subjecting foreign sovereigns to criminal prosecutions" without a more definite statement of its desire to do so. The United States counters that the historical context is not relevant and more

specificity is unnecessary because the plain language of Section 3231 encompasses all federal crimes, regardless of the defendant.

Precedent and Similar Prosecutions

One issue that informs the parties' statutory interpretations and was frequently discussed during oral argument is whether there is historical precedent for this prosecution. Halkbank suggests that the Supreme Court should view the case with suspicion because, in the bank's assessment, this is the "first time in the history of the world and on the planet" that a prosecution of this kind has gone forward. The United States contends that it has been asserting criminal jurisdiction in analogous matters for at least 70 years.

Some of the disagreement between the parties depends on legal nuances and terminology. For example, the United States agrees that it has never prosecuted a sovereign state itself (what the government calls a *foreign state qua state*), but the government maintains that state-owned corporations like Halkbank are a different matter. As an example of its claim to 70 years of precedent, the United States cites a case from 1952 in which it sought to use federal criminal jurisdiction to enforce a subpoena on a foreign-state-owned company. Halkbank responds that subpoenas are a poor analogy and present "significantly lesser dignitary harm" than prosecutions.

Other, more recent cases that the United States cites involved actual criminal charges rather than subpoena-enforcement. For example, in 2016, the United States charged the state-owned China General Nuclear Power Company (CGNPC) with conspiracy to unlawfully produce special nuclear material without authorization. Another example occurred in 2018, when a Brazilian state-owned-and-controlled energy company paid more than $850 million as a criminal penalty for violating the Foreign Corrupt Practices Act. Halkbank seeks to distinguish these cases because the state-owned companies waived immunity, or, in CGNPC's case, refused to appear in the proceedings. In Halkbank's view, this case is still unprecedented because no state-owned company that has appeared to defend itself and maintained its immunity claim has ever been brought to trial despite asserting immunity.

Criminal Prosecution vs. Traditional Foreign Affairs Tools

Another issue that arose frequently during oral argument is whether criminal prosecutions of foreign states are part of the President's "toolkit" for addressing national security concerns. Halkbank argues that this case is unprecedented because, when the United States has a disagreement with a foreign government, Presidents normally resolve the dispute with what the bank calls the "time-tested tools of the international system," such as diplomacy, tariffs, sanctions, economic statecraft, and, when necessary, military force.

The United States responds that Presidents have many options at their disposal to address national security concerns—including criminal prosecution—and courts are not equipped to decide which tool is best suited for a dispute. In this case, the Trump and Biden Administrations decided criminal prosecution was the optimal approach because, in the executive branch's view, elements of the criminal offense are easier to prove than their civil counterparts, and criminal sanctions are more likely to deter Halkbank and other state-owned banks from evading sanctions in the future.

Considerations for Congress

Any time a foreign state seeks and is denied immunity in U.S. courts, Congress may have an interest in the case. A primary reason for this interest would likely arise because sovereign immunity in many countries is built upon the principle of reciprocity, meaning a U.S. court's decision to exercise jurisdiction over a foreign state could result in other countries allowing their courts to hear the same types of cases against U.S. agencies and instrumentalities. Counsel for Halkbank intimated during oral argument that

this risk could mature, noting that the United States has more than 90 federally owned corporations, such as Voice of America and the Export-Import Bank. According to Halkbank, these U.S.-government-owned corporations that are active internationally could be "obvious targets" for foreign criminal prosecutions. Congress may evaluate how to balance the desire to hold foreign-state-owned companies accountable for breaking U.S. law with the risk that countries could allow reciprocal prosecutions against U.S.-state-owned entities.

Congress might also consider whether the Halkbank case could affect U.S.-Turkey relations. Turkey filed an amicus brief with the Supreme Court arguing that Halkbank should be fully immune from prosecution and describing the United States' pursuit of the case as a "demeaning move against Türkiye's dignity."

Congress has the power to influence the underlying statutory interpretation issues that are driving the Halkbank case. Congress has amended the FSIA on several occasions in the past, sometimes in response to specific court rulings. In the Halkbank case, Congress could enact legislation clarifying whether the FSIA is limited to civil actions or applies to criminal prosecutions. If Congress does allow criminal prosecutions against foreign states, it may consider details such as what types of sovereigns are subject to criminal charges, what courts can hear those cases, and whether special procedural rules should be put in place. Congress could also clarify the underlying jurisdictional question surrounding whether 18 U.S.C. § 3231's grant of federal criminal jurisdictional applies when a foreign state is the defendant.

Congress may consider addressing broader aspects of the law of sovereign immunity. The FSIA was intended to create a comprehensive framework for resolving sovereign immunity issues, but it does not address every issue of immunity that a foreign country might raise. For example, the Supreme Court held in *Samantar v. Yousuf* that the FSIA does not dictate the immunity that foreign state officials (i.e., individuals) might possess. Immunity for some officials, such as heads of state, is still evaluated using the suggestion of immunity system. Congress may seek to expand the FSIA to address official immunity.

Finally, Congress might consider whether changes to the FSIA's provisions related to immunity from attachment (examined in earlier Legal Sidebars) are warranted. Sovereign immunity questions have arisen in the context of the Biden Administration's freezing of Afghanistan's central bank assets and Russia's foreign currency reserves. A comprehensive review of sovereign immunity could address whether to modify current rules that restrict litigants who successfully obtain judgments against foreign states from attaching those states' assets to satisfy the judgments.

Author Information

Stephen P. Mulligan
Legislative Attorney

Disclaimer