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The Halkbank Decision from the Supreme Court: The Foreign Sovereign Immunities Act Does Not Apply to Criminal Cases, Offers No Protection to Halkbank So: What is Next?

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In January the Reporter published my short comment on a case then pending in the Supreme Court, *Halkbank v. United States*, in which oral argument had been heard on January 23, 2023.[2] The matter raised an important question: Are sovereign owned enterprises ("SOEs") – that is, commercial entities majority owned by foreign States – immune from criminal prosecution under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). On April 19, 2023, the Court ruled that the FSIA does not provide any immunity against criminal prosecutions because it only applies to civil matters. It left open the possibility that immunity could still be established under "common law," and remanded to the United States Court of Appeals for the Second Circuit to explore this question. This decision leaves open a number of perplexing questions.

The facts are simple: Halkbank is a bank unquestionably involved in commercial activities, but because it is majority owned by the Republic of Turkey it qualifies as a "sovereign" under the FSIA, and for FSIA purposes is indistinguishable from a true foreign nation. It has been indicted in the Southern District of New York for allegedly lurid money laundering activities. As set forth in my earlier comment, its argument on FSIA immunity was pretty straightforward:

- It focuses principally on a part of the FSIA, now found at 28 U.S. Code § 1604, entitled "Immunity of a foreign state from jurisdiction," which states that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."
- It then argues that the "exceptions" contained in § § 1605-1607 by their terms apply only to civil matters, not criminal ones.

In essence, it argued that §1604 granted immunity, and that §§ 1605-1607 did not take it back.

The Second Circuit disagreed with Halkbank on the second part of this analysis: it concluded that the exception in §1605 applicable to an "action [that] is based upon a commercial activity" did apply in criminal matters, and that since Halkbank's acts were commercial, it was not immune. While this outcome makes perfect common sense as a practical and policy matter, for reasons explored by several commentators, and summarized in my earlier note, it was difficult to find support for it in either the precise language or the overall structure of the FSIA.

The Supreme Court obviated this problem by rejecting Halkbank's argument on its first leg (which the Second Circuit had left open): it squarely holds that "the Act [FSIA] does not provide foreign states and their instrumentalities with immunity in *criminal* proceedings."[3] The Court reached this result by, in essence, giving the FSIA a particular hierarchical structure. The biggest challenge was to work around the rather stark statement in §1604 that "a foreign state [which by definition includes an SOE] shall be immune from the jurisdiction of the courts of the United States and of the States…." The Court reasoned that §1604, rather than the core departure point of the entire FSIA, was in fact dependent on the provisions found elsewhere in the FSIA that address the basis for specifically listed "exceptions" (including for "commercial activities") and provided crucial procedural detail for handling civil actions, such as exactly how civil actions were to be handled in federal and state courts, including removal of state court actions to federal courts. Noting that "[i]n contrast to those many provisions concerning civil actions, the FSIA is silent as to criminal matters" (Opinion at 8), the Court concluded that while "[i]n complete isolation, § 1604 might be amenable to [Halkbank's] reasoning," § 1604 needed to be interpreted "alongside its neighboring FSIA provisions" that only described civil matters.[4]

The Court's decision is thus based on an interesting approach to statutory interpretation. As the Court essentially acknowledges, in adopting the FSIA almost a half century ago Congress appears not to have specifically focused on criminal matters at all. This is not surprising: the idea of prosecuting an actual sovereign State would have appeared so farfetched (and would almost certainly be barred by any "common law" concept of immunity) that no provision was necessary for it, but SOEs (now estimated to account for as much as 10% of global economic activity, according to one UN estimate[5]) were far less visible in international commerce, and had not been viewed as potential criminal actors. The Court's legerdemain of interpreting the stark language of §1604 was thus based less on what Congress actually said – which, as the Court admitted, would appear by itself to suggest total immunity in pretty clear terms– but rather on what Congress must have "meant," or perhaps what it "would have done."

While the Court's outcome is not lacking in common sense as a policy matter, it does leave open at least two issues for future exploration.

First, the Court noted that Halkbank's backup argument – that, if the FSIA did not apply, it could rely on "common law" immunity – had not been addressed by the lower courts, and thus it remanded to the Second Circuit for this issue to be explored. It is difficult to predict that the Circuit will do anything other than find that Halkbank's banking activities are not protected by "common law immunity," but the reasoning for such a conclusion may not be obvious and could be consequential. Among other things, the Department of Justice takes the position that under principles of separation of powers, the Executive Branch has the exclusive power to determine if a sovereign is immune under the specific circumstances of the situation; it will be interesting to see if the courts adopt this position, which would certainly add to the Department of Justice's already powerful collection of tools with which to negotiate.

And second, the Court's opinion acknowledges what it calls a "consequentialist" argument made by Halkbank: A core principle of the FSIA was to federalize all aspects of civil litigation involving sovereigns, to the total exclusion of State courts, thereby assuring that issues relating to foreign sovereigns (and thus to foreign relations generally) would be handled solely by federal courts. By ruling that the FSIA does not apply to criminal matters at all, State and local prosecutors are free to indict and prosecute not only SOEs but actual foreign States. The implications of this were actively discussed at oral argument, during which several justices expressed concern about the risks of local (and possibly "elected") prosecutors pursuing foreign actors. But in its opinion, the Court essentially pooh-poohs the significance of this, noting quite breezily that States have not in fact prosecuted foreign sovereigns or SOEs, and that if they do, the federal government may submit a "suggestion of immunity" in State courts, that State court decisions might

be reviewable by the Supreme Court, or that federal preemption might apply (carefully noting that the Court was not "deciding" any of these issues).[6]

The real issue here is that Congress should focus on SOEs, and come up with principles to apply federal standards of immunity to their prosecution, but hasn't. The FSIA has two main goals. One is to address the widely perceived problem of "inconsistency" that resulted from applying principles of common law immunity on a "case-by-case" analysis.[7] This decision puts all criminal matters on a pre-FSIA basis – that is, immunity claims by SOEs and actual States to federal or State prosecution will need to be addressed by applying "common law" standards case-by-case. A second goal was to assure that the United States speaks with "one voice" on matters relating to foreign affairs.[8] The basic structure of the FSIA insures that in civil matters the "one voice" will be that of the federal courts, to the total exclusion of State ones. This opinion makes clear that there is no blanket preclusion of State prosecution of SOEs, or even foreign States; while the Court offered several open-ended suggestions of how potential federal "common law" can be applied to any such prosecutions, in the absence (specifically admitted by the Solicitor General) of removal provisions, exploring these possibilities risks messiness in which State as well as federal "voices" will be heard.[9]

Congress should address this. SOEs are simply an important part of the globalized economy; Halkbank may be the first but will not be the last such entity to face criminal prosecution. As my earlier note concluded, the FSIA offers no coherent framework for addressing this issue. The Court's somewhat strained interpretation of the statute may be the "least bad" outcome available to it, but leaves open issues that that will continue to bedevil the courts unless Congress acts.

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[2] Davis, *The Halkbank Case: Are Sovereign Owned Enterprises Immune From Prosecution?*, Vol. 39, No. 2, https://ielr.com/content/halkbank-case-are-sovereign-owned-enterprises-immune-prosecution [1]

[3] Opinion at 5, emphasis in original.

[4] Opinion at 10.

[5] UNODC, *Corruption in State Owned Enterprises*, https://www.unodc.org/e4j/zh/anti-corruption/module-4/key-issues/corruption-in-state-owned-enterprises.html [3]

[6] Opinion at 14.

[7] Opinion at 6.

[8] For a discussion of the "one voice doctrine," see Robert J. Delahunty, Federalism Beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs, 37 Stan. J. Int'l L. 1, 17 (2001).

[9] In a dissenting opinion joined by Justice Alito, Justice Gorsuch basically agreed with the Second Circuit that the FSIA did apply, including the "commercial activities" exception found in § 1605. This would address the "inconsistency" problem by avoiding reference to common law immunity, but in the absence of removal provisions would not insure a unitary "voice."