

## Foreign-Owned Company Warns Justices of Potential 'Havoc' – In Subpoena Feud.

*"With its decision below, the D.C. Circuit became the first appellate court in American history to exercise criminal jurisdiction over a foreign state," lawyers for the mystery company wrote in their redacted filing at the Supreme Court.*

By C. Ryan Barber | (January 22, 2019)

The foreign-owned company fighting a grand jury subpoena apparently tied to the special counsel's Russia investigation is warning the U.S. Supreme Court that a decision subjecting the enterprise to the U.S. criminal process would create a "foreign policy nightmare" and invite reciprocal treatment from other countries.

On Tuesday, the Supreme Court unsealed [a partially redacted petition](#) from the company's defense lawyers that shed light on a few new details but otherwise maintained the secrecy that has surrounded the case for months. The foreign-owned company is pushing to overturn a decision from a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit, which [ruled](#) in December that the company could not invoke sovereign immunity to dodge a grand jury subpoena.

The company's petition cautioned that the D.C. Circuit panel's ruling, if left intact, could have a global ripple effect. The government has until Feb. 21 to respond to the petition.

"If left to stand, the ruling would wreak havoc on American foreign policy—possibly alienating U.S. allies, undermining diplomatic efforts, and inviting reciprocal treatment abroad for American agencies and instrumentalities," the company's lawyers argued. The lawyers' names were shielded from the public. The D.C. Circuit decision was the "first appellate court in American history to exercise criminal jurisdiction over a foreign state," the lawyers said in their petition.

Indeed, the decision provided [fresh precedent on the subject of immunity for state-owned companies, an area of the law that has long been considered murky.](#) The D.C. Circuit ruling

caught some attention from the white-collar bar, as lawyers who are not involved in the fight parsed any potential wider impact of the ruling.

“I think prior to this opinion, many lawyers probably assumed that the evidence held outside the U.S. by the [state-owned] entity would be largely—not entirely, but largely—immune from the reach of a U.S. grand jury. This opinion is a road map for ways of getting around that and making them accessible,” said [Debevoise & Plimpton](#) partner Bruce Yannett, a former federal prosecutor who leads the firm’s white-collar and regulatory defense practice.

The D.C. Circuit took remarkable measures to conceal the identity of the state-owned company, closing an entire courthouse floor during arguments. Several media [reports](#) have presented circumstantial clues suggesting the case is tied to Special Counsel Robert Mueller’s ongoing Russia investigation, but the office has declined to comment.

In a redacted opinion that referred to the company’s owner only as “Country A,” the D.C. Circuit rejected arguments that the corporation could not be forced to comply with a subpoena under the Foreign Sovereign Immunities Act, a law that shields foreign governments and state-owned companies from lawsuits under certain circumstances.

The appeals panel, upholding a ruling by U.S. District Judge Beryl Howell in Washington, found that even if the immunities law applies to criminal proceedings, a point the government disputed, the corporation would still be required to comply with the subpoena because it falls under an exception for commercial activities.

The D.C. Circuit described the issue of criminal immunities for state-owned corporations as “unsettled,” noting the “paucity” of cases on the subject. “From that paucity,” the D.C. Circuit panel said, “the corporation would have us infer that such corporations are universally understood to possess absolute immunity, but that notion strikes us as highly speculative. An equally likely explanation for the absence of cases is that most companies served with subpoenas simply comply without objection.”

*U.S. District Judge Beryl Howell. Credit: Diego M. Radzinski/NLJ*

The company is being fining \$50,000 daily for noncompliance with the subpoena. Prosecutors had asked Howell to impose a \$10,000 daily fine. The U.S. Supreme Court last month restored the compliance order, rejecting a push from the company’s lawyers to keep a freeze on the subpoena.

The D.C. Circuit’s decision could come into play particularly in investigations into money laundering and sanctions violations. In the area of sanctions enforcement, [Dechert](#) counsel Sean Kane said there have long been questions about whether foreign entities can be forced to comply even with administrative subpoenas issued by the Treasury Department’s Office of Foreign Assets Control, or OFAC.

Kane, a former assistant director for policy at OFAC, said the D.C. Circuit ruling “removes one argument from the quiver if you’re a state-owned enterprise.”

Joon Kim, a [Cleary Gottlieb Steen & Hamilton](#) partner and former acting U.S. attorney for the Southern District of New York, said the decision could give prosecutors more leverage when they subpoena state-owned foreign corporations.

“There are regions in the world with many partially or fully state-owned companies engaged in commercial business,” Kim said. “To the extent these state-owned enterprises in these countries thought there was a question or uncertainty about whether or not they could be subject to the criminal process in the U.S., this decision, at least, says they are.”

Kim said prosecutors in the past might not have been inclined to litigate a foreign, state-owned company’s claims to immunity to a grand jury subpoena. “Now, prosecutors would be more likely to press since they have a circuit court decision that they can point at to compel compliance or use in any litigation over the issue,” he said.

From The redacted Supreme Court petition (Jan. 2019) concerning criminal Grand Jury Subpoena.

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### QUESTIONS PRESENTED

Under the Foreign Sovereign Immunities Act of 1976 (FSIA), "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." 28 U.S.C. § 1604. In a separate FSIA provision entitled "Actions against foreign states," Congress limited federal subject-matter jurisdiction in actions against foreign states to the civil context: "The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a).

Through the FSIA, Congress also codified that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1, 610 and 1611 of this chapter." 28 U.S.C. § 1609. Through 18 U.S.C. § 3231—a non-FSIA statute of general criminal jurisdiction enacted in 1948— Congress vested federal district courts with "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

1. Does the FSIA grant foreign states sovereign immunity from American criminal jurisdiction?

2. Is 28 U.S.C. § 1330(a) the exclusive basis for subject-matter jurisdiction in a federal action against a foreign state, or can 18 U.S.C. § 3231 or another non-FSIA statute provide subject-matter jurisdiction in a federal action against a foreign state?

**3. Do the FSIA's exceptions to jurisdictional immunity (28 U.S.C. §§ 1605-1607) apply only in cases for which 28 U.S.C. § 1330(a) supplies subject-matter jurisdiction?**

**4. Does the FSIA permit an American court to impose and enforce contempt sanctions (monetary or otherwise) against a foreign state?**