

# The Burger Court Opinion Writing Database

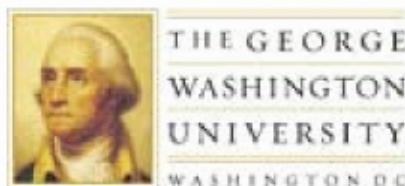
*First National City Bank v. Banco Nacional de Cuba*

406 U.S. 759 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



3  
Supreme Court of the United States

Washington, D. C. 20543

May 2, 1972

CHAMBERS OF  
THE CHIEF JUSTICE

No. 70-295 -- First National City Bank v.  
Banco Nacional de Cuba

Dear Bill:

Please join me.

Regards,

WRB

Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

March 27, 1972

Dear Bill:

In No. 70-295 - First

National City Bank v. Banco Nacional  
de Cuba, would you kindly note at the  
end of your opinion the following:

Mr. Justice Douglas reverses  
the judgment below solely on  
National City Bank of New York  
v. Republic of China, 348 U.S.  
356.

CW

William O. Douglas

Mr. Justice Rehnquist

CC: The Conference

1st DRAFT

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackman  
Mr. Justice Harlan  
Mr. Justice Douglas

From: Douglas, J.

No. 70-295

Circulated:

5-16

First National City Bank, On Writ of Certiorari to Recirculated:

Petitioner, the United States Court  
v. of Appeals for the Second  
Banco Nacional de Cuba. Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, concurring.

*Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, does not control the central issue in the present case. Rather, it is governed by *National City Bank v. Republic of China*, 348 U. S. 356.

I start on the premise that the plaintiff in the present litigation is properly in the District Court. Respondent, who brought this suit, is for our purposes the sovereign state of Cuba; and apart from cases where another nation is at war with the United States, it is settled that sovereign states are allowed to sue in the courts of the United States. See *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 408-410.

Cuba sues here to recover the proceeds of a loan made by petitioner, as reduced by a sale of the collateral securing the loan. The excess allegedly is about \$1.8 million dollars. Petitioner sought to setoff against that amount claims arising out of the confiscation of petitioner's Cuban properties. How much those setoffs would be, we do not know. The District Court ruled that the amount of these setoffs "cannot be determined on these motions," 270 F. Supp. 1004, 1011, saying that they represented "triable issues of fact and law." *Ibid.*

I would reverse the Court of Appeals and affirm the District Court, remanding the case for trial on the amount of the setoff and I would allow the setoff up to the amount of respondent's claim.

M / thought  
about the court

## 2nd DRAFT

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

## SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 70-295

Circulated:

First National City Bank, Petitioner, v. Banco Nacional de Cuba. On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

1/19/72

[May --, 1972]

MR. JUSTICE DOUGLAS, concurring.

*Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, does not control the central issue in the present case. Rather, it is governed by *National City Bank v. Republic of China*, 348 U. S. 356.

I start from the premise that the plaintiff in the present litigation is properly in the District Court. Respondent, who brought this suit, is for our purposes the sovereign state of Cuba; and, apart from cases where another nation is at war with the United States, it is settled that sovereign states are allowed to sue in the courts of the United States. See *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 408-410.

Cuba sues here to recover the difference between a loan made by petitioner and the proceeds of a sale of the collateral securing the loan. The excess allegedly is about \$1.8 million. Petitioner sought to setoff against that amount claims arising out of the confiscation of petitioner's Cuban properties. How much those setoffs would be, we do not know. The District Court ruled that the amount of these setoffs "cannot be determined on these motions," 270 F. Supp. 1004, 1011, saying that they represented "triable issues of fact and law." *Ibid.*

I would reverse the Court of Appeals and affirm the District Court, remanding the case for trial on the

*BR*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. March 28, 1972

RE: No. 70-295 - First National City Bank  
v. Banco Nacional de Cuba

Dear Bill:

In due course I shall circulate a dissent  
in the above.

Sincerely,

*Rehnquist*

Mr. Justice Rehnquist

cc: The Conference

*Please give me*  
2nd DRAFT

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

From: L.

No. 70-295

Circulated: 4-4-72

Recirculated: \_\_\_\_\_

First National City Bank, Petitioner, v. Banco Nacional de Cuba. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April —, 1972]

MR. JUSTICE BRENNAN, dissenting.

The Court today engrafts the so-called "*Bernstein*" exception upon the act of state doctrine<sup>1</sup> on the ground that the doctrine exists primarily, if not solely, as a ju-

<sup>1</sup> "The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674 . . . and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth century, . . . is found in *Underhill v. Hernandez*, 168 U. S. 250 [1897], where Chief Justice Fuller said for a unanimous Court (p. 252):

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 416 (1964).

The so-called "*Bernstein*" exception to this principle derives from *Bernstein v. N. Y. Nederlandsche-Amerikaansche*, 210 F. 2d 375 (1954), where the Court of Appeals for the Second Circuit allowed the plaintiff to challenge the validity of the expropriation of his property by Nazi Germany in view of a letter from the Acting Legal Adviser of the Department of State to the effect:

"The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction

1  
Zay  
STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 1, 16 & 18

3rd DRAFT

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

## SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

Circulated: \_\_\_\_\_

No. 70-295

Recirculated: 4-6-72

First National City Bank, On Writ of Certiorari to  
Petitioner, | the United States Court  
v. | of Appeals for the Second  
Banco Nacional de Cuba. | Circuit.

[April —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

The Court today engrafts the so-called "*Bernstein*" exception upon the act of state doctrine<sup>1</sup> on the ground that the doctrine exists primarily, if not solely, as a ju

<sup>1</sup> "The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674 . . . and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth century, . . . is found in *Underhill v. Hernandez*, 168 U. S. 250 [1897], where Chief Justice Fuller said for a unanimous Court (p. 252):

"'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.'" *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 416 (1964).

The so-called "*Bernstein*" exception to this principle derives from *Bernstein v. N. Y. Nederlandsche-Amerikaansche*, 210 F. 2d 375 (1954), where the Court of Appeals for the Second Circuit allowed the plaintiff to challenge the validity of the expropriation of his property by Nazi Germany in view of a letter from the Acting Legal Adviser of the Department of State to the effect:

"'The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction

80 *Pages 2, 15, 16, 11 + minor changes throughout*

*JW*

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
✓Mr. Justice Black  
Mr. Justice Brennan  
Mr. Justice Powell  
Mr. Justice Rehnquist

## 4th DRAFT

From: L.

SUPREME COURT OF THE UNITED STATES  
Circulated

No. 70-295

Recirculated 4-26-72

First National City Bank, Petitioner, v. Banco Nacional de Cuba. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

The Court today engrafts the so-called "Bernstein" exception upon the act of state doctrine<sup>1</sup> on the ground that the doctrine exists primarily, if not solely, as a ju-

<sup>1</sup> "The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674 . . . and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth century, . . . is found in *Underhill v. Hernandez*, 168 U. S. 250 [1897], where Chief Justice Fuller said for a unanimous Court (p. 252):

"'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.'" *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 416 (1964).

The so-called "Bernstein" exception to this principle derives from *Bernstein v. N. Y. Nederlandsche-Amerikaansche*, 210 F. 2d 375 (1954), where the Court of Appeals for the Second Circuit allowed the plaintiff to challenge the validity of the expropriation of his property by Nazi Germany in view of a letter from the Acting Legal Adviser of the Department of State to the effect:

"'The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction

Page 1, 7 v 8

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
✓Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

## 5th DRAFT

From: Brennan, J.

## SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

No. 70-295

Recirculated: 5-8-7 ✓

First National City Bank, } On Writ of Certiorari to  
Petitioner, } the United States Court  
v. } of Appeals for the Second  
Banco Nacional de Cuba. } Circuit.

[April —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

The Court today engrafts the so-called "*Bernstein*" exception upon the act of state doctrine<sup>1</sup> on the ground that the doctrine exists primarily, if not solely, as a ju-

<sup>1</sup> "The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674 . . . and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth century, . . . is found in *Underhill v. Hernandez*, 168 U. S. 250 [1897], where Chief Justice Fuller said for a unanimous Court (p. 252):

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The so-called "*Bernstein*" exception to this principle derives from *Bernstein v. N. Y. Nederlandsche-Amerikaansche*, 210 F. 2d 375 (1954), where the Court of Appeals for the Second Circuit allowed the plaintiff to challenge the validity of the expropriation of his property by Nazi Germany in view of a letter from the Acting Legal Adviser of the Department of State to the effect:

"The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

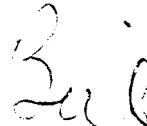
May 9, 1972

RE: No. 70-295 - Banco Nacional de Cuba

Dear Bill:

Your vote to reverse in the above rests solely on National Bank v. Republic of China which holds, as I understand it, that a foreign nation suing in our courts "wants our law" and is therefore bound by it. But what is "our law" in this case? My opinion, joined now by Potter, Thurgood and Harry, would hold that, whatever congressional power may be to limit or alter our appellate jurisdiction, neither Congress nor the President can constitutionally order us how to decide a case within our jurisdiction in this field, and that therefore we should reject the Solicitor General's proposal that we engrave the Bernstein exception on the judicially created act of state doctrine. Bill Rehnquist's opinion on the other hand (the Chief and Byron have joined it but Lewis, who voted that way, has not yet formally returned) would hold that the President may constitutionally tell us how to decide this case and that we should dutifully march to his tune by engraving the Bernstein exception on the act of state doctrine. Does your vote to reverse imply that you agree with Bill Rehnquist? If not, and we are therefore headed for a 4-4 result on the Bernstein question, I will want to revise my opinion to make it clear that there is an affirmation of the Court of Appeals by an equally divided court so that the proceedings on remand go forward on that basis.

Sincerely,



Mr. Justice Douglas



pp. 1-4, 15, 20

and minor changes throughout

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

6th DRAFT

From: Brennan, J.

## SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

No. 70-295

Recirculated: 5-30-72

First National City Bank, | On Writ of Certiorari to  
Petitioner, | the United States Court  
v. | of Appeals for the Second  
Banco Nacional de Cuba. | Circuit.

[June —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

The Court today reverses the judgment of the Court of Appeals for the Second Circuit that declined to engraft the so-called "Bernstein" exception upon the act of state doctrine as expounded in *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 (1964).<sup>1</sup> The Court,

<sup>1</sup> "The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674 . . . and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth century, . . . is found in *Underhill v. Hernandez*, 168 U. S. 250 [1897], where Chief Justice Fuller said for a unanimous Court (p. 252):

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 416 (1964).

The so-called "Bernstein" exception to this principle derives from *Bernstein v. N. Y. Nederlandsche-Amerikaansche*, 210 F. 2d 375 (1954), where the Court of Appeals for the Second Circuit allowed the plaintiff to challenge the validity of the expropriation of his

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 2, 5

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
 Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

7th DRAFT

**SUPREME COURT OF THE UNITED STATES**

From: Brennan, J.

Circulated:

No. 70-295

Recirculated: 6/6

First National City Bank, Petitioner, v. Banco Nacional de Cuba. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 7, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

The Court today reverses the judgment of the Court of Appeals for the Second Circuit that declined to engraft the so-called "Bernstein" exception upon the act of state doctrine as expounded in *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 (1964).<sup>1</sup> The Court,

<sup>1</sup> "The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674 . . . and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries, . . . is found in *Underhill v. Hernandez*, 168 U. S. 250 [1897], where Chief Justice Fuller said for a unanimous Court (p. 252):

"'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.'" *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 416 (1964).

The so-called "Bernstein" exception to this principle derives from *Bernstein v. N. Y. Nederlandsche-Amerikaansche*, 210 F. 2d 375 (1954), where the Court of Appeals for the Second Circuit allowed the plaintiff to challenge the validity of the expropriation of his

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

April 5, 1972

No. 70-295 - First National City Bank  
v. Banco Nacional de Cuba

Dear Bill,

I should appreciate your adding my name  
to your dissenting opinion in this case.

Sincerely yours,

PS,  
P

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 28, 1972

Re: No. 70-295 - First National  
City Bank v. Banco Nacional  
de Cuba

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 5, 1972

Re: No. 70-295 - First National City Bank v.  
Banco Nacional de Cuba

Dear Bill:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Brennan

cc: The Conference

3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 8, 1972

Re: No. 70-295 - First National City Bank v.  
Banco Nacional de Cuba

Dear Bill:

Please join me in your dissent.

Sincerely,

HAB.

Mr. Justice Brennan

cc: The Conference

May 25, 1972

Re: No. 70-295 First National City Bank  
v. Banco Nacional de Cuba

Dear Byron:

I have been having trouble with the above case (as well as with several others).

My present thought is to concur in the result reached by Bill Rehnquist's opinion, and to file a short concurring opinion along the lines of the memorandum attached.

As you will see, I thought your dissent in Sabbatino was ever so sound. Yet, my knowledge in this area is limited. Would you mind reading the memorandum and telling me whether I am taking a tenable position.

Sincerely,

J. P.

Mr. Justice White

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-295

First National City Bank, } On Writ of Certiorari to  
Petitioner, } the United States Court  
v. } of Appeals for the Second  
Banco Nacional de Cuba. } Circuit.

[May —, 1972]

MR. JUSTICE POWELL, concurring.

Although I concur in the judgment of reversal and remand, my reasons differ from those expressed by MR. JUSTICE REHNQUIST and MR. JUSTICE DOUGLAS. While *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 419-420 (1964), technically reserves the question of the validity of the *Bernstein* exception, as MR. JUSTICE BRENNAN notes in his dissenting opinion, the reasoning of *Sabbatino* implicitly rejects that exception. Moreover, I would be uncomfortable with a doctrine which would require the judiciary to receive the executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.

Nor do I find *National City Bank v. Republic of China*, 348 U. S. 356 (1955), to be dispositive. The Court there dealt with the question of jurisdiction over the parties to hear a counterclaim asserted against a foreign State seeking redress in our courts. Jurisdiction does not necessarily imply that a court may hear a counterclaim which would otherwise be nonjusticiable. Jurisdiction and justiciability are, in other words, different concepts. One concerns the court's power over the parties; the other concerns the appropriateness of the subject matter for judicial resolution. Although attracted by the justness of the result he reaches, I find little support for MR. JUSTICE DOUGLAS' theory that

June 5, 1972

Re: No. 70-295 First National City Bank  
v. Banco Nacional de Cuba

Dear Bill:

You thoughtfully inquired whether your reference to my concurring opinion accurately reflected my position as to Sabbatino.

I do think the bald statement that "Mr. Justice Powell rejects Sabbatino itself" goes somewhat beyond my position. It would be more accurate to say:

"Mr. Justice Powell rejects the specific holding in Sabbatino, believing it was not required by the principles underlying the act of state doctrine."

If it is convenient for you to do so, I would welcome a change along the foregoing lines. But I certainly do not consider this a major point and leave the decision to you.

Sincerely,

LFB

Mr. Justice Brennan

Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun  
Mr. Justice Powell

From: Rehnquist, J.

1st DRAFT

Circulated: 3-27-72

SUPREME COURT OF THE UNITED STATES

No. 70-295

First National City Bank, Petitioner, v. Banco Nacional de Cuba. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April —, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In July 1958, petitioner loaned the sum of \$15 million to a predecessor of respondent. The loan was secured by a pledge of United States Government bonds. The loan was renewed the following year, and in 1960 \$5 million was repaid, the \$10 million balance was renewed for one year, and collateral equal to the value of the portion repaid was released by petitioner.

Meanwhile, back at the ranch, on January 1, 1959, the Castro government came to power in Cuba. On September 16, 1960, the Cuban militia, allegedly pursuant to decrees of the Castro government, seized all of the branches of petitioner located in Cuba. A week later the bank retaliated by selling the collateral securing the loan, and applying the proceeds of the sale to repayment of the principal and unpaid interest. Petitioner concedes that an excess of at least \$1.8 million over and above principal and unpaid interest was realized from the sale of the collateral. Respondent sued petitioner in the Federal District Court to recover this excess, and petitioner, by way of set-off and counterclaim asserted the right to recover damages as a result of the expropriation of its property in Cuba.

30  
11/11/71  
joined w/ B binder  
To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell

2nd DRAFT

From: Rehnquist, J.

SUPREME COURT OF THE UNITED STATES

No. 70-295

Recirculated: 4-7-72

First National City Bank, Petitioner, v. Banco Nacional de Cuba. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April —, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In July 1958, petitioner loaned the sum of \$15 million to a predecessor of respondent. The loan was secured by a pledge of United States Government bonds. The loan was renewed the following year, and in 1960 \$5 million was repaid, the \$10 million balance was renewed for one year, and collateral equal to the value of the portion repaid was released by petitioner.

Meanwhile, on January 1, 1959, the Castro government came to power in Cuba. On September 16, 1960, the Cuban militia, allegedly pursuant to decrees of the Castro government, seized all of the branches of petitioner located in Cuba. A week later the bank retaliated by selling the collateral securing the loan, and applying the proceeds of the sale to repayment of the principal and unpaid interest. Petitioner concedes that an excess of at least \$1.8 million over and above principal and unpaid interest was realized from the sale of the collateral. Respondent sued petitioner in the Federal District Court to recover this excess, and petitioner, by way of set-off and counterclaim asserted the right to recover damages as a result of the expropriation of its property in Cuba.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell

From: Rehnquist, J.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated:

Recirculated: 5-2-72

No. 70-295

First National City Bank, Petitioner, v. Banco Nacional de Cuba. On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April —, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In July 1958, petitioner loaned the sum of \$15 million to a predecessor of respondent. The loan was secured by a pledge of United States Government bonds. The loan was renewed the following year, and in 1960 \$5 million was repaid, the \$10 million balance was renewed for one year, and collateral equal to the value of the portion repaid was released by petitioner.

Meanwhile, on January 1, 1959, the Castro government came to power in Cuba. On September 16, 1960, the Cuban militia, allegedly pursuant to decrees of the Castro government, seized all of the branches of petitioner located in Cuba. A week later the bank retaliated by selling the collateral securing the loan, and applying the proceeds of the sale to repayment of the principal and unpaid interest. Petitioner concedes that an excess of at least \$1.8 million over and above principal and unpaid interest was realized from the sale of the collateral. Respondent sued petitioner in the Federal District Court to recover this excess, and petitioner, by way of set-off and counterclaim asserted the right to recover damages as a result of the expropriation of its property in Cuba.