

The Burger Court Opinion Writing Database

First National City Bank v. Banco Para el Comercio Exterior de Cuba

462 U.S. 611 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

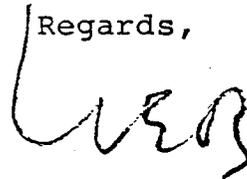
June 14, 1983

Re: No. 81-984, First National City Bank v. Banco Para El Comercio Exterior De Cuba

Dear Sandra:

I join your second draft.

Regards,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 14, 1983

No. 81-984

First National City Bank
v. Banco Para El Comercio
Exterior de Cuba

Dear John,

Please join me in your opinion
concurring in part and dissenting in
part.

Sincerely,



Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 6, 1983

Re: 81-984 - First National City Bank v.
Banco Para el Comercio Exterior de Cuba

Dear Sandra,

Your Memorandum satisfies me.

Sincerely yours,



Justice O'Connor

cc: The Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 8, 1983

Re; No. 81-984-First National City Bank v. Banco
Para El Comercio Exterior De Cuba

Dear Sandra:

Please join me.

Sincerely,

J.M.
T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

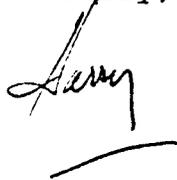
June 6, 1983

Re: No. 81-984 - First National City Bank
v. Banco Para El Comercio Exterior de Cuba

Dear Sandra:

I am just where John is in this case and shall await developments arising from the correspondence between the two of you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath it.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1983

Re: No. 81-984 - First National City Bank v.
Banco Para El Comercio Exterior de Cuba

Dear John:

Please add my name to your opinion concurring in part
and dissenting in part.

Sincerely,



Justice Stevens

cc: The Conference

March 31, 1983

81-984 First National City Bank v. Banco Para De Cuba

Dear Chief:

When we were talking yesterday about this case, I had overlooked the fact that the brief filed by Rex Lee actually was "a brief for the United States".

Moreover, the brief is signed both by the Legal Adviser and the Counselor of the State Department.

Thus, there can be no doubt that even the State Department urges reversal in this case.

Sincerely,

The Chief Justice

lfp/ss

May 31, 1983

81-984 First National City Bank v. Banco Para

Dear Sandra:

I have read with special interest your memorandum, and I think I can join it as a Court opinion.

You rely heavily on the fact that Bancec was dissolved. I would reach the same conclusion if it had not been dissolved, as Cuba would be the beneficiary of its claim in either situation. I agree, however, that decision on the narrower ground is justifiable.

There are three relatively minor points that I now mention. On page 11, in discussing whether international law or domestic law applies, your memorandum adds that "we would be inclined to apply international law" if we had to make a choice. It is unnecessary for us to say this, and I am not sure that this would be true in all situations.

On p. 15, n. 18, you discuss three English cases. I have no question as to citing them as reflecting English law. I would hesitate, however, to cite them with approval - as one may read your memorandum as doing. Indeed, based on the summaries in your footnote, I am not sure I'd agree with any of them - certainly not the Polish case. Western European countries, including England, conduct extensive trade with the Communist countries, and have stronger economic reasons than we do for maintaining the pretense of reciprocal standards.

I doubt that English courts, for example, will agree with the resolution of this case proposed by you in which you properly rely on considerations of equity and fairness. Perhaps you could change the introductory sentence in footnote 18 to read along the following lines:

"The British courts, applying principles that we have not embraced as universally applicable, have shown marked reluctance to attribute the acts of a foreign government to an instrumentality owned by that government."

Finally, in footnote 27 (p. 21) your memorandum rejects the idea that one issue in determining an agency's independence is whether it performs a "governmental function". It may be that this usually is correct. But all instrumentalities established by a government serve one or more of its purposes. I would think the important inquiry is whether the agency's independence is genuine (e.g., as in the case of a TVA) or whether in fact the agency's independence is in name only - as is the situation under totalitarian regimes.

Sincerely,

Justice O'Connor

lfp/ss

June 2, 1983

81-984 First National Bank v. Banco Para

Dear Sandra:

My concern about fn. 27 is that your second sentence will be read as a holding, and one that we need not make in this case.

I agree that a "governmental function" standard rarely will be controlling for the reasons you state. I expressed a similar view in the last paragraph of my letter of May 31.

Perhaps you could avoid a flat holding by saying something along the following lines:

"We decline to adopt such a standard in this case, as our decision is based on other grounds. We do observe that the concept ... (here, continue the language in your present note)."

When you recirculate, I will join your opinion whether or not you make this change. I do think it is desirable.

Sincerely,

Justice O'Connor

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 3, 1983

81-984 First National Bank v. Banco Para

Dear Sandra:

Please join me.

Sincerely,

A handwritten signature in cursive script that reads "Lewis".

Justice O'Connor

lfp/ss

cc: The Conference

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

✓

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1983

Re: No. 81-984 First National City Bank v. Banco Para
el Comercio Exterior de Cuba

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 3, 1983

Re: 81-984 - First National City Bank v.
Banco Para El Comercio Exterior De Cuba

Dear Sandra:

As you know, I voted the other way at conference, but I find much of what you have written extremely persuasive. Indeed, I believe I could join substantially everything up to and including the first half of page 18. I am, however, somewhat troubled by the disposition you make in the last few pages. I am not sure whether you are holding that we may pierce the corporate veil whenever a foreign instrumentality is dissolved (even if just as part of a reorganization in which its assets and functions are immediately transferred to another entity), or, on the other hand, that on the particular facts of this case Bancec's separate corporate identity was lost during the several day gap between its dissolution and the creation of a new juridical entity. I do not think I could agree with the former approach, and I am troubled by the latter because I think it requires greater knowledge of the facts than is possible without the benefit of detailed factfinding at the District Court level. As you have indicated, only one witness at trial addressed the "alter ego" issue at all.

If you would reject the rule of law that may be implied in your last section, and leave the factual issue open for determination by the District Court on remand, I would join your opinion. Otherwise, I will probably concur in part and write briefly in dissent suggesting that the proper disposition is a remand for factfinding.

Respectfully,

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 7, 1983

Re: 81-984 - First National City Bank v.
Banco Para

Dear Sandra:

Many thanks for your response to my letter. I now plan to join parts I, II-A and II-B of your opinion, but I still am not persuaded that we are in a position to make the ultimate decision that you reach in part II-C. I therefore expect to write two or three paragraphs joining most of what you have written but taking the position that the case should be remanded for further proceedings in the District Court on the question whether the corporate veil was pierced between February 23, 1961 and March 1, 1961.

Respectfully,



Justice O'Connor

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: JUN 13 '83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-984

FIRST NATIONAL CITY BANK, PETITIONER *v.*
BANCO PARA EL COMERCIO EXTERIOR
DE CUBA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1983]

JUSTICE STEVENS, concurring in part and dissenting in part.

Today the Court correctly rejects the contention that American courts should readily "pierce the corporate veils" of separate juridical entities established by foreign governments to perform governmental functions. Accordingly, I join Parts I, II, III-A, and III-B of the Court's opinion. But I respectfully dissent from Part III-C, in which the Court endeavors to apply the general principles it has enunciated. Instead I would vacate the judgment and remand the case to the Court of Appeals for further proceedings.

As the Court acknowledges, the evidence presented to the District Court did not focus on the factual issue that the Court now determines to be dispositive. Only a single witness testified on matters relating to Bancec's legal status and operational autonomy. The record before the District Court also included English translations of various Cuban statutes and resolutions, but there was no expert testimony on the significance of those foreign legal documents. Finally, as the Court notes, the record includes a July 1961 stipulation of the parties and a May 1975 affidavit by counsel for respondent. *Ante*, at 5, n. 3. It is clear to me that the materials of record that have been made available to this Court do not permit us

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

Re. 1-3

From: Justice Stevens

Circulated: _____

Recirculated: _____ JUN 1 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-984

FIRST NATIONAL CITY BANK, PETITIONER *v.*
BANCO PARA EL COMERCIO EXTERIOR
DE CUBA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1983]

JUSTICE STEVENS, concurring in part and dissenting in part.

Today the Court correctly rejects the contention that American courts should readily “pierce the corporate veils” of separate juridical entities established by foreign governments to perform governmental functions. Accordingly, I join Parts I, II, III-A, and III-B of the Court’s opinion. But I respectfully dissent from Part III-C, in which the Court endeavors to apply the general principles it has enunciated. Instead I would vacate the judgment and remand the case to the Court of Appeals for further proceedings.

As the Court acknowledges, the evidence presented to the District Court did not focus on the factual issue that the Court now determines to be dispositive. Only a single witness testified on matters relating to Bancec’s legal status and operational autonomy. The record before the District Court also included English translations of various Cuban statutes and resolutions, but there was no expert testimony on the significance of those foreign legal documents. Finally, as the Court notes, the record includes a July 1961 stipulation of the parties and a May 1975 affidavit by counsel for respondent. *Ante*, at 5, n. 3. It is clear to me that the materials of record that have been made available to this Court are not sufficient

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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2.1

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-984

FIRST NATIONAL CITY BANK, PETITIONER *v.*
BANCO PARA EL COMERCIO EXTERIOR
DE CUBA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1983]

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

Today the Court correctly rejects the contention that American courts should readily "pierce the corporate veils" of separate juridical entities established by foreign governments to perform governmental functions. Accordingly, I join Parts I, II, III-A, and III-B of the Court's opinion. But I respectfully dissent from Part III-C, in which the Court endeavors to apply the general principles it has enunciated. Instead I would vacate the judgment and remand the case to the Court of Appeals for further proceedings.

As the Court acknowledges, the evidence presented to the District Court did not focus on the factual issue that the Court now determines to be dispositive. Only a single witness testified on matters relating to Bancec's legal status and operational autonomy. The record before the District Court also included English translations of various Cuban statutes and resolutions, but there was no expert testimony on the significance of those foreign legal documents. Finally, as the Court notes, the record includes a July 1961 stipulation of the parties and a May 1975 affidavit by counsel for respondent. *Ante*, at 5, n. 3. It is clear to me that the materials of record

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 30, 1983

81-984
Re: No. 81-1984, First National City Bank v. Banco Para
El Comercio Exterior de Cuba

MEMORANDUM TO THE CONFERENCE:

Circulated today is a memorandum proposing resolution of this case. It rejects the "governmental function" approach of the District Court, as well as the "key role" test of CA2. Instead, it proposes the application of a presumption of respect for the separate juridical status of a government instrumentality, which can be overcome in exceptional circumstances by application of internationally recognized principles to avoid the injustice of allowing a government to obtain relief through its instrumentality which it could not obtain in its own right.

If a majority approves of this approach, I will recirculate it as a draft without substantial change.

Sincerely,

Sandra

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____ 30 1983 _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-984

FIRST NATIONAL CITY BANK, PETITIONER *v.*
BANCO PARA EL COMERCIO EXTERIOR
DE CUBA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1983]

Memorandum to the Court from JUSTICE O'CONNOR.

In 1960 the Government of the Republic of Cuba established respondent Banco Para El Comercio Exterior de Cuba (Bancec) to serve as "[a]n official autonomous credit institution for foreign trade . . . with full juridical capacity . . . of its own. . . ." Law No. 793, Art. 1 (1960), App. to Pet. for Cert. 2d. In September 1960 Bancec sought to collect on a letter of credit issued by petitioner First National City Bank (now Citibank) in its favor in support of a contract for delivery of Cuban sugar to a buyer in the United States. Within days after Citibank received the request for collection, all of its assets in Cuba were seized and nationalized by the Cuban Government. When Bancec brought suit on the letter of credit in a United States District Court, Citibank counterclaimed, asserting a right to set off the value of its seized Cuban assets. The question before us is whether Citibank may obtain such a setoff, notwithstanding the fact that Bancec was established as a separate juridical entity. Applying principles of equity common to international law and federal common law, we conclude that Citibank may apply a setoff.

I

Resolution of the question presented by this case requires

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 31, 1983

No. 81-984 First National City Bank v.
Banco Para

Dear Lewis,

Thank you for your letter and suggestions. I will happily make the suggested changes on pp. 11 and 15. They improve the draft. With your indulgence, I would prefer to leave fn. 27 as is since in this particular case we are not adopting the governmental function approach.

Sincerely,

Sandra

yes, but she is trying to eliminate it for all case.

Justice Powell

I would not yet join. I know WTR's clerk had the same reaction to fn. 27: it is an absolutely unnecessary piece of dictum, as demonstrated by its placement in the conclusion section. And SOC's clerk conceded that he drafted the opinion with the footnote because he "feels strongly" about eliminating this major argument of the SG. SOC wants your "indulgence" here to keep in dictum; in Brown I got you to get it out of the opinion.

John Nobe

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 2, 1983

No. 81-984 First National Bank v. Banco Para

Dear Lewis,

I will adopt your suggestion of June 2 in the recirculation. Thank you for proposing specific language.

Sincerely,

Sandra

Justice Powell

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 6, 1983

No. 81-984 First National City Bank v. Banco Para

Dear John,

Thank you for your June 3rd letter. In the enclosed second draft I have made several changes to meet your concerns. The new draft clarifies that we are not adopting a per se rule piercing the corporate veil whenever a government instrumentality is dissolved. Instead it rests on the application of recognized equitable principles to the particular undisputed facts in this case, facts, which, I might add, are contained in the sworn affidavit (and accompanying exhibits) filed by Bancec's counsel in support of its motion to substitute Cubazucar as plaintiff. App. 132-137. When Bancec was dissolved on February 23, 1961, its assets were split between Banco Nacional and the newly established Ministry of Foreign Trade, both of which we all would agree may be held liable for the expropriation of Citibank's assets. See Banco Nacional de Cuba v. First National City Bank, 478 F. 2d 191, 194 (CA2 1973). The draft opinion merely holds as a matter of law that once the separate instrumentality's assets are assigned to entities that may be held liable for a setoff, a foreign state may not escape such liability by reassigning the assets to newly constituted entities. Thus, because the identity of the current owner of Bancec's claim is irrelevant, further factfinding is not necessary.

I hope the foregoing has met your concerns. In any event, I have made a number of changes in the new draft that may permit you to join parts of the opinion, if you cannot join it all.

Sincerely,



Justice Stevens

Copies to the Conference

Stylistic Changes Throughout

PP. 3, 8, 9, 10, 11, 15, 21, 22
19

Handwritten initials and a large diagonal slash mark.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: JUN 6 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-984

FIRST NATIONAL CITY BANK, PETITIONER *v.*
BANCO PARA EL COMERCIO EXTERIOR
DE CUBA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1983]

Memorandum to the Court from JUSTICE O'CONNOR.

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I

Resolution of the question presented by this case requires

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Stylistic Changes Throughout

pp. 1, 5

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-984

FIRST NATIONAL CITY BANK, PETITIONER *v.*
BANCO PARA EL COMERCIO EXTERIOR
DE CUBA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1960 the Government of the Republic of Cuba established respondent Banco Para El Comercio Exterior de Cuba (Bancec) to serve as "[a]n official autonomous credit institution for foreign trade . . . with full juridical capacity . . . of its own. . . ." Law No. 793, Art. 1 (1960), App. to Pet. for Cert. 2d. In September 1960 Bancec sought to collect on a letter of credit issued by petitioner First National City Bank (now Citibank) in its favor in support of a contract for delivery of Cuban sugar to a buyer in the United States. Within days after Citibank received the request for collection, all of its assets in Cuba were seized and nationalized by the Cuban Government. When Bancec brought suit on the letter of credit in United States District Court, Citibank counter-claimed, asserting a right to set off the value of its seized Cuban assets. The question before us is whether Citibank may obtain such a setoff, notwithstanding the fact that Bancec was established as a separate juridical entity. Applying principles of equity common to international law and federal common law, we conclude that Citibank may apply a setoff.

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Resolution of the question presented by this case requires

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