In the

Supreme Court of the United States

63

FIRST NATIONAL CITY BANK,

Petitioner,

vs. No. 70-295

BANCO NACIONAL DE CUBA,

Respondent.

Washington, D. C.
February 22, 1972

Pages 1 thru 43

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

FIRST NATIONAL CITY BANK,

Petitioner,

v. No. 70-295

BANCO NACIONAL DE CUBA,

Respondent.

Washington, D. C.,

Tuesday, February 22, 1972.

The above-entitled matter came on for argument at 1:04 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HENRY HARFIELD, ESQ., 53 Wall Street, New York, New York 10005; for the Petitioner.

VICTOR RABINOWITZ, ESQ., 30 East 42nd Street, New York, New York 10017; for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-295, First National City Bank against Banco Nacional De Cuba.

Mr. Harfield, you may proceed whenever you're ready.

ORAL ARGUMENT OF HENRY HARFIELD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HARFIELD: Mr. Chief Justice, and may it please the Court:

This case brings up for review a decision by a divided panel of the Court of Appeals for the Second Circuit. The Solicitor General said of that decision: that it seriously impairs the power of the Executive over the control of foreign affairs.

The case may be stated very briefly. The material facts are not in dispute.

In September 1960, the Petitioner, First National City Bank, owned and operated 11 branches in Cuba. On the night of Friday, September 16, 1960, the Cuban Government seized those branches. The instrumentalities it used were its armed militia and the Banco Nacional de Cuba, the respondent here.

On the following day, Saturday, there was a radio announcement that the confiscation of American banks had occurred by reason of Executive Power Resolution No. 2, issued under Cuban law 851.

On the opening of business on Monday, September 19th, the respondent in this case was in full possession of petitioner's foreign branches, and it was the respondent that served formal notice of confiscation on the resident vice president of the petitioner, who had been summoned to the petitioner's former main branch for that purpose.

On the following day the petitioner cabled the respondent, referring to the seizure of the branches, and stating We have exercised our rights of lien and offset and closed your accounts as of September 17th.

Now, among those accounts was a loan account which had originally been made in 1958, and this was a loan made by this petitioner to the Government of Cuba here in New York City.

The borrower was a Cuban Government instrumentality called Bandes, and collateral for the loan was pledged by another Cuban Government instrumentality called Fondo, and a third Cuban Government instrumentality, the respondent in this case, acted as the fiscal agent for the government in connection with this.

On September 21 and 22, we're still operating on the five-day compass, the petitioner sold the collateral that was in New York, and after crediting the respondent the amount of principal and interest on the loan, there remained on the petitioner's books in New York a balance of just about two

million dollars.

Two months later, in November of 1960, the respondent instituted this lawsuit in the United States District Court for the Southern District of New York to recover that balance. And as a defense, counterclaim and setoff, petitioner showed that the value of the confiscated branches exceeded the amount claimed by the respondent.

I pause here to say that there is no dispute as to this value. The parties have stipulated that if the petitioner is lawfully entitled to the offset claimed by it, the amount is such that the respondent shall take nothing in this action.

Q Mr. Harfield, just as a matter of practicality, suppose that the respondent prevails here, what happens to the two million dollars?

MR. HARFIELD: I take it that the two million dollars would -- you mean that, in a sense, physically, would it be remitted to Cuba?

Q Well, does the Banco Nacional get the two million?

MR. HARFIELD: Well, I take it that any recovery by Banco Nacional would be for the benefit of the Cuban Government. Because Banco Nacional is, at least at this point, completely integrated into the Cuban monolithic system.

Now, there is a blocking system as to the --

Q It is this to which my question is directed.

MR. HARFIELD: Yes. My understanding is that the judgment -- if judgment were awarded to Banco Nacional de Cuba, that the amount of that judgment would be subjected to freezing under Executive Order; that is to say it would be credited to a blocked account, preferably to the same bank, until the government reaches a policy, which it has not yet done, as to what if anything is going to happen to the blocked Cuban property.

But I believe it is correct that the amount of that judgment less an allowance for attorney's fees for the successful plaintiff, which I am given to understand is allowed, would be frozen abiding the event ultimately of the dispostion to Cuba be prepared.

Q Well, my next question would be: Why is the respondent fighting so hard for it? And perhaps that's a question I'll ask Mr. Rabinowitz rather than you.

MR. HARFIELD: I can -- there are two million good reason why the respondent is fighting -- I mean why the petitioner is fighting so hard.

Well, let me just continue, if I may, because the time sequence that I've been, perhaps, boring you with is, I believe, important in this case.

The case was submitted on cross-motion for summary judgment in July of 1961, but was not decided until late June 1967. Meanwhile, and this was not indolence on the part of the

District Judge -- meanwhile, the Sabbatino case had been decided by this Court. Thereafter the Congress had enacted the Hickenlooper amendments to the Foreign Assistance Act; the Sabbatino litigation had gone back to the Southern District of New York, sub nomina the Banco Nacional v. Farr, and was there decided.

And so, consistently with its decision in that Farr case, the District Court in this case held that Cuba's confiscation of American property violated international law and that the petitioner was entitled to its offset.

The Court of Appeals affirmed the decision in the Farr case, explicitly holding that the Cuban confiscations were in violation of international law, but reversed the decision in this case on the grounds that the Act of State doctrine precluded it from inquiring into the validity or even the consequences of those same acts.

Now, it was at that stage that the State Department transmitted to this Court its views that important considerations of foreign policy should preclude the application of the Act of State doctrine to cases like the instant one.

This Court granted certiorari, vacated the judgment, remanded the case to the Court of Appeals for reconsideration in the light of the views of the Department of State. And the court below, nevertheless, Judge Hays dissenting, determined to adhere to its original decision; and this Court granted

certiorari on October 12th, 1971.

Now, I begin with the proposition that the Act of State doctrine was not to seek as a device to create an unfair advantage of foreign governments that come into our courts as suitors.

In this case, to cut off the petitioner's legitimate defense would be manifestly unfair.

Moreover, the Executive Branch, and I'm quoting, has made clear its views that application of the Act of State doctrine would be inimitable to the significant policy interest of the United States.

Q Mr. Harfield, historically, where did the Act of State doctrine originate? Did it originate in the courts or in the --

MR. HARFIELD: It originated in the courts, Mr. Chief Justice.

Q On suggestion from what source?

MR. HARFIELD: I think it was -- it was not precisely on the suggestion from the Executive, but it is so interrelated that --

Q But it's a doctrine of comity, is it not, as between the branches?

MR. HARFIELD: It's a doctrine of comity as between branches, as well as between --

Q Governments.

MR. HARFIELD: -- nations; as between governments.

Q But, internally, within our own framework, it's a doctrine of comity of the courts giving deference to the overriding responsibilities of the Executive in relation to foreign policy; is that not correct?

MR. HARFIELD: I believe that's exactly correct.

And I shall, indeed repeat -- the reason for repeating is that I felt very succinctly I should elaborate that fact is, as I go on, because I think that the extraordinary position we find ourselves in in this case is that a doctrine which was conceived, as the Chief Justice says, as between -- comity between branches as well as between nations, and which clearly was conceived for the benefit of the coordinate branches of our own government, is now attempted to be used as a weapon to create divisiveness among the coordinate branches.

This is perhaps, in my judgment, the singlemost important issue in the case at this particular stage. And it goes beyond simply the recognition of the fact that the doctrine conceived in coordinate comity is now to be used as a lethal weapon. It offends as well -- its application in this case would offend as well the position of the Legislative Branch. Because, clearly, one of the interests that the United -- interests of the United States, to which the government, our government has referred in its amicus brief here, is respect for international law.

And our government has repeatedly emphasized that principle of international law which says that the right of a sovereign to expropriate property is coupled with the obligation to pay for it; to make prompt, adequate, and effective compensation.

In this case, Cuba has defaulted on that obligation, and it's indebted to this petitioner just as surely as if it had defaulted on a promissory note for a bond.

In the National City Bank v. Republic of China, this Court sustained a defense, counterclaim, and setoff, based on a defaulted obligation of a foreign government that entered our courts as a suit.

Now, the respondent has argued that the Republic of China is not an Act of State case, because the words "act of state" weren't used. And besides that, at one point in the brief, the respondent has pointed out that a mere, a mere default by a foreign sovereign may not be sufficiently regarded to be an Act of State.

But if the Republic of China is not an Act of State case, then this is not an Act of State case, because what we're talking about here is the repudiation of an obligation by a foreign government that thereafter comes in here and attempts to seek our law, as Mr. Justice Frankfurter said, clear of any defenses; don't listen to those fellows that say they have a defense.

The Act of State doctrine was not intended for that purpose, and I point out that in the area of comity between nations the Act of State doctrine was devised to avoid a friction there which would, either because our courts had no power or because they chose not to exercise their jurisdiction, that might call in question the validity and the effect of acts fully executed by a foreign government within its own territory.

But to refuse to apply the Act of State doctrine in this case does not result in any reversal of any physical act that took place in Cuba. It doesn't call in question any of the security of titles in international trade. We're simply talking about an offset.

And the refusal to apply the doctrine would be consistent with the policy and interest of the United States, as declared both by the Legislative and the Executive Branches.

The importance of that policy, I suggest, is underscored by the so-called Hickenlooper amendments. These adopt as the law of the United States the international law principle of compensation for the taking of property. Moreover, they specify that when there is a violation of international law, including but not limited to violation of the principle of compensation, then the Act of State doctrine shall not be applicable.

In this case the respondent asserts this Act of State doctrine as a defense, as a defense against the petitioner's

counterclaim. Now, if the respondent has violated the principles of international law, it is not entitled to assert that defense in this Court.

The Court of Appeals, the court below, in the Second Circuit reached the same conclusion, the conclusion that Cuban Law 851 was a violation of international law in the Farr case, and it reached that conclusion in a decision which this Court left undisturbed.

In this case -- even in this case, the court below, the majority did not question the fact that under Cuban Law 851 Cuba was acting in violation of international law.

So, in view of the fact that Cuba's confiscations had been held by our courts to be unlawful, the respondent should not be entitled to defend on that ground the Act of State doctrine.

Q Mr. Harfield, under Rule 13, my understanding is that counterclaims are limited to those against opposing parties; and here, as I understand, Banco Nacional was the plaintiff and you have asserted a counterclaim that basically, as I understand, goes against the Government of Cuba rather than Banco Nacional. And the District Court ruled in your favor on summary judgment, and the Court of Appeals didn't pass on the District Court ruling.

Do you contend here that that was a proper summary adjudication in the District Court, that they're one and the

same?

MR. HARFIELD: Yes, I do, Your Honor.

Q On what basis?

MR. HARFIELD: Well, on two bases. To begin with, that on the record before it, and I would contend that there was more than adequate evidence, the Banco Nacional had been totally absorbed into the Cuban Government, so that it was indistinguishable. If it ever had been, as the respondent argues, an autonomous institution, it lost that autonomy before the events here, because, as the respondent has said, as Cuba was in the process of changing into a socialist state it took all the necessary steps to destroy autonomy.

But, most importantly, in this case the role of Banco Nacional has at all times been that of an agent for the Cuban Government. And that's why I elaborated as much as I did at the outset of my remarks that the collateral, the proceeds of which are now in suit, was pledged by Fondo, which was part of the Cuban Government.

The Banco Nacional, in handling the proceeds of that loan, and in handling the collateral, was acting for the Cuban Government. And you have a perfect opposition, because there is no doubt that if there is a recovery for the -- by the respondent here, that the sole beneficiary will be the Cuban Government. Unless, as Mr. Justice Blackmun says, our government intervenes at some point. But we must not antici-

pate that.

Q Well, what would --

MR. HARFIELD: I think there's perfect opposition to the parties.

Q Let me go back, then, to my previous question: What is -- and I ask this for instruction -- what is the usual routine when assets are frozen under circumstances of this kind? Are claims eventually filed and then the frozen assets perhaps allocated among those claims that are allowed?

MR. HARFIELD: Well, I think that there really is no such thing as a usual procedure.

In this case the offset taken by this petitioner occurred three years -- and this case, this suit was started about three years before there was any government action freezing Cuban assets. So I point out in passing that if this petitioner had not exercise its right of offset, then the response to your question, sir, would have been that the money had probably gone down to Cuba and been used to pay Chinese technicians.

Because the blocking did not occur until about three years afterward.

Now, at that stage, Cuban assets in this country were frozen, but they were not vested, they were not seized. And thereafter, after the freezing, a system of claim submission was set up under the Foreign Claims Settlement Commission.

This was about four years after these transactions.

This petitioner filed its claim with the Foreign Claims Settlement Commission, asserting the taking of its properties in Cuba, and assigning a value to it. It then deducted from the amount it was filing as a claim the amount of its offset in this case. In other words, credited Cuba with it.

And the Foreign Claims Settlement Commission has allowed the petitioner's claim, after deducting from the claim the amount of this offset. So, in effect, they have regarded, the Foreign Claims Settlement Commission has regarded this petitioner as already having recouped to the extent of its counterclaim.

Q But before these funds would be available to pay people whose claims had been filed and been allowed, there would have to be a vesting, wouldn't there?

MR. HARFIELD: That is correct.

Q In addition to a --

MR. HARFIELD: In addition to the freeze.

Q -- to a freeze.

MR. HARFIELD: And I may say, Mr. Justice White, that at the time that the freeze was being put on there was considerable discussion in Congress as to whether the freeze should be moved to that second step for vesting, and the decision was not to do it, at least at that time, because to

take that property, that of private people as well as Cuban Government people, would have been regarded by certain members of Congress as the same kind of sin of which Castro had been guilty.

So there are the two steps that you mention, and our government has not yet taken that second step.

Q Well, of course, lurking in the background are the other claimants who profess to be victims of Cuban expropriation, aren't there?

MR. HARFIELD: Yes.

Q And I suppose it's their position that if you prevail here, City Bank is enjoying a windfall?

MR. HARFIELD: Well, I think that may be a position. I would certainly say that it is not a position that should be regarded very well.

Because, as Mr. Justice White has pointed out, our government has not yet decided that it is going to treat Cuba as if it were bankrupt estate.

But even if it did, all of the learning under the Bankruptcy Act entitles a person who is secured by reason of existing relationships, of having collateral, having liens, that person is entitled to a preference by law. And, surely, a secured creditor always has a preference over an unsecured creditor.

But this is a preference which has been certainly

condoned, if not applauded. And this, if you equate this to bankruptcy, then we're exactly in the position of having exercised a setoff which, under Section 68 of the Bankruptcy law, is solid.

Q Do you think it makes any difference that this security that you hold was not part of any security transaction that relates to the expropriation in Cuba?

MR. HARFIELD: I would think not. I think that my understanding of the law with respect to offsets and counterclaims is that you simply net the accounts between the parties, and not, certainly in New York where this offset was exercised, not for over 100 years has there been the necessity of parceling this out on a precise basis. What you do is to -- you don't have to counterclaim, you don't have to offset in respect of the identical transaction.

Q But the Court of Appeals disposed of this case on another ground, didn't reach this ground and several other issues.

MR. HARFIELD: That is correct.

The Court of Appeals --

Q And this issue would only arise if you won this case on the issue that's here, and we were in the process of determining whether to decide these other questions here or remand?

MR. HARFIELD: Yes. Or to reinstate the judgment

of the District Court.

I really have very little to add at this time. I'd like to reserve it.

I'm going to make just one last point on the Act of State doctrine, which is the point that we came here on, the point that the majority below dealt with.

And I suggest that any doubt as to the applicability of the doctrine to this case, at this time, has been removed by the supervening expression of the Executive; and that is an expression of the Executive as to the foreign policy interest of the United States.

Now, the position of the United States in this case is crystal-clear, I think there is no dispute at all as to what that position is.

But the respondent would, from his brief, appear to have this Court believe that the Executive is invading the province of the Judicial Branch. And I suggest that precisely the opposite is true.

As Judge Hays said, in dissent below, the majority of the court below by applying the Act of State doctrine, after an independent evaluation of the merits of the State Department's position, is usurping the same Executive function which it is the -- same Executive prerogative, which it is the function of that doctrine to preserve.

The constitutional mandate to the Judicial Branch is

to decide cases, and where there is a concern that the Judicial Branch might transgress on the exclusive province of the Executive, in the conduct of foreign affairs, there is an abstention on the part of the Judicial Branch. And where the Executive is silent, then encroachment is presumed, and the Judiciary tends to abstain.

But here the Executive has formally declared that the foreign policy interests of the United States will be furthered through the exercise by this Court of its normal function, in the resolution of cases before it.

And in the light of that declaration, I would suggest that abstention is not neutrality. It is, as the Solicitor General has said, a serious impairment of the power of the Executive to control foreign affairs.

Now, the doctrine of separation of powers can scarcely be regarded as a requirement of internecine confrontation between coordinate branches of the same government for the benefit of an unfriendly government.

At this point in this case there is no doubt that application of the Act of State doctrine will further the foreign policy interest of Cuba. But I suggest to you that it is inescapably true that it will frustrate the foreign policy interests of the United States.

And I urge that the doctrine is not applicable to this case, and it should not be applied to this case, and that

the judgment of the court below should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Harfield.

Mr. Rabinowitz.

ORAL ARGUMENT OF VICTOR RABINOWITZ, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. RABINOWITZ: Mr. Chief Justice, and may it please the Court:

I would like, preliminarily, to address myself to two questions that were placed by -- one by Mr. Justice Blackmun and the other by Mr. Justice Rehnquist. And while they are preliminary and, in a sense, peripheral issues, at least one of them may be dispositive of the case.

Mr. Justice Blackmun, I don't know why the respondent is fighting so hard in this case. All I know is that I have instructions to fight hard in this and all of the other cases which will involve an increase in the amount of the frozen funds.

Now, those funds were frozen by the Executive Branch of the government, and unless they are unfrozen by the Executive Branch of the government, or perhaps by Congress, they're going to remain frozen and will not go to Cuba, and there is no possibility at all of them getting to Cuba, short of an action by the Executive Branch or the Legislative Branch, and perhaps that means short of some settlement of the general dispute between the United States and Cuba, which may come at

some time in the future. I assume we all hope that some day it will come.

But until that day comes, I think it may be reasonably certain that those funds will remain frozen.

Q Perhaps it might be not unreasonable to ask, then, if your position is that this is just to go into the pool?

MR. RABINOWITZ: Of course.

Q And in that case, then, why is the Cuban Bank so concerned about this?

MR. RABINOWITZ: We want to argue and speculate -- I'm not authorized to speculate; and, given the general public interest and the fact that we are dealing with intergovernmental relations, I prefer not to. I don't know, or I could only guess as to why the Cuban Government is interested in carrying on this, and, as I say, a great deal of other litigation.

I think that something may be said in response to Justice Blackmun's request for information a little while ago. Namely, about what happens to these frozen funds. And what I can tell you is not what will happen in the future, but what has happened in the past. It happened with respect to the Soviet Union, it happened with respect to Yugoslavia, with respect to Romania, with respect to a half a dozen other similar situations.

The frozen funds were collected, they remained in blocked accounts until one day there was a settlement; and

those funds were then used to pay off all creditors. In part, of course. And that is discussed and is the reason for part of the decision of the Court of Appeals below, and I think the first Court of Appeals opinion. And it is a reason, and I think a perfectly valid reason, for commenting that in this case the petitioner is seeking a windfall -- I would prefer to call it a preference. A preference over all other persons who may have claims, and whose only logical salvage, the only way in which they might possibly some day get some return, is through a large frozen fund.

Now, whether my client has that in mind, I do not know, because I haven't been told. And, as I say, I prefer not to guess about these things.

But at least in factual terms and looking at it historically, that is what happened in the case of the other matters that I referred to, the eastern European countries generally, and I suppose that is the theory upon which the funds were frozen in this case.

Mr. Justice White is right, these funds have not vested, as a matter of fact there was a law passed in, I think, 1963 vesting the funds, and it was repealed a year later. So that at present the funds are not vested, they're just held in an account. And you can't get money out of the account without a license from the Treasury Department; and I assure you those licenses are not freely granted.

Q Well, I can understand your not wanting to speculate about the policies of your client, because that involves a matter of your client's foreign policy; but would you care to speculate on why the Court remanded the case to the Court of Appeals for consideration of the State Department's views?

MR. RABINOWITZ: Oh, I'll get to that, Your Honor. I certainly will get to the State Department's position here. That has nothing to do with the foreign policy of the United -- of Cuba, it has to do with the foreign policy of the United States, and which I feel quite free to speculate, since no one would suggest I'm expressing the views of the government, of the United States Government.

So I will get to that in just a moment.

I would also like, preliminarily, to say, in response to Mr. Justice Rehnquist's question about this counterclaim matter: We do contend, as was suggested, that Banco Nacional is an autonomous government agency, much as, I think we have about 50 autonomous government agencies here in the United States.

No one, I think, would contend that if the Export-Import Bank brought a claim against anyone that he would have the right to counterclaim against the Government of the United States. Even though the funds of the Export-Import Bank all come ultimately from the Treasury of the United States; even

though the Export-Import Bank has a board of directors and which is controlled exclusively by the United States; even though the United States created it by statute and is the sole stockholder, nevertheless it is an autonomous government agency, just as Banco Nacional is an autonomous government agency.

And I think that the record is clear on that, and while I think it is a point which would be dispositive of this case, I don't think it's what we're here for, to discuss.

I would urge the Court, as I have in Point V of my brief, to decide the case on that point. It would be a disposition of the matter in favor of my client. It would avoid all of these other difficult international law problems, and of course my client and I would like it; and I hope the Court is so disposed.

But if it is not, then, obviously, there are other points which are of much greater consequence.

In the petitioner's reply brief, at page 2, he suggests that there are in general two big issues in this case. And if I may reverse the order of those issues and phrase them a little less tendentiously, I would agree, and I would formulate the issues as follows:

In the circumstances of this case, does the Act of State doctrine preclude the Court from considering the petitioner's claim that the respondent acted in violation of international law? That's the Sabbatino point, really.

And it's discussed in Points I to IV of respondent's brief.

And point two: If this is answered in the negative, was the nationalization of petitioner's property by the Republic of Cuba a violation of international law? And this is treated in Points, I think, VI or VII of my brief and the appendix.

Now, the Act of State doctrine has been a part of our law at least since 1897, Underhill v. Hernandez, and the Supreme Court, this Court, in Sabbatino, traced the doctrine back to English precedents, running back 300 years.

The most recent exposition, of course, was the Sabbatino decision, in 1964, in which this Court, in an 8 to 1 opinion, upheld the doctrine and discussed, I think, most of the reasons for the doctrine in great detail.

And I will not repeat the reasons for that decision, the reasons for the Act of State doctrine, because it would involve largely extensive quotations from this Court's opinion in Sabbatino, and I know that the members of the bench are familiar with it, and there's no point in my doing it. Except to say that I submit that it's a sound doctrine, which is designed to keep this Court out of the consideration of the second question; namely, was there a violation of international law here.

Not because the second question is hard to decide, this Court gets lots of cases that are hard to decide; and not

because it's important, because this Court gets lots of cases that are important. But because it necessarily involves political consideration, political questions which are best left to the Executive Branch of the government.

And I think some of the implications of this will appear in the rest of my argument.

Q Well, hasn't the Executive Branch indicated that they would prefer to have the Judicial Branch just go ahead and decide this lawsuit?

MR. RABINOWITZ: It has in this case. In the Sabbatino case it said exactly the opposite. What the next Administration will say, I do not know.

If there is one thing which is certain about our form of government, and which is not, perhaps, true in many places in the world today, is that its Administrations change, and that policies change. And just as Mr. Deputy Attorney General Katzenbach stood at this podium seven years ago and said: Do not extend the Bernstein doctrine, we do not want the Bernstein doctrine extended; it is embarrassment to our government to extend the Bernstein doctrine. So we find the Solicitor General today expressing a contrary opinion, and what tomorrow's Solicitor General or legal adviser to the State Department will say, I don't know.

Now, it is perfectly reasonable and proper for Administrations to differ in policy. We expect that. That's

why we have elections, and that's why one person rather than another is elected President and appoints his legal adviser and his Solicitor General.

It is quite another thing to expect this Court to follow in the steps of the Administration, in that sense. This Court is not equipped to, is not expected to, and was not intended by the Constitution to be an instrument of the foreign policy of the United States, any more than it is an instrument of the domestic policy of the United States.

This Court is to decide things on the basis of law. And the law, unless this Court is prepared to reverse Sabbatino, the law is the Sabbatino case. And on the basis of the Sabbatino case, this Court has said, and I can think of no better way of saying it than the way Mr. Justice Harlan did; he said: the Act of State doctrine has constitutional underpinning; it arises out of the basic relationships between branches of government in a system of separation of powers. It turns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations.

The doctrine as formalted in past decisions expresses the strong sense of the Judicial Branch, that its engagement in the past, of passing on the validity of foreign Acts of State, may hinder rather than further this country's pursuit of goals, both for itself and for the community of nations as a whole

the international sphere.

Now, I know that the legal adviser to the State Department now disagrees with that, and, as a matter of fact, the next sentence in Mr. Justice Harlan's opinion is: Many commentators disagree with this view.

I know that they disagree with this view. One of the persons who disagrees with this view is Mr. Justice White. but the fact is that the Sabbatino decision discussed all of this, and discussed it in considerable detail, and came to a conclusion which, I submit, is as sound today as it was in 1964.

Q I agree with you.

MR. RABINOWITZ: Thank you. I knew you would, Your Honor!

[Laughter.]

It is not within the competency of this Court, with all due respect to it, to get involved in complicated and difficult questions involving the application of the international policy of the United States.

Now, let me give you an example which is not hypothetical at all. The Cuban expropriations here took place in, I think, 1960. Almost immediately the State Department issued a statement saying: these confiscations are violations of international law.

The State departments always do that in this kind of

a situation, and I assume it is done in pursuit of the foreign policy of the United States. These confiscations are illegal.

Now, we are here, ten year, eleven years later -- we could have, under other circumstances, been here sooner. And one of the issues that is presented to this Court is: Were those confiscations violations of international law?

Suppose this Court, after consideration of the law, should be impelled, as I would urge it to do, to hold that it was not a violation of international law at all. This Court would then be placed in a position of having to disagree with the State Department on a question on which the State Department had expressed itself, not once but many times.

And I submit that this Court should not be placed in that position. This Court should not be placed in a position where it may be called upon to express opinion on questions of international law which are contrary to the opinions expressed by the Executive Branch in pursuit of its foreign policy, not this Court's foreign policy but the Executive Branch's foreign policy, because that's its responsibility.

And this Court ought not to be placed in a position where it has that responsibility which, as I say with all respect to this Court, it is not equipped to account.

Q Mr. Rabinowitz.

MR. RABINOWITZ: Yes, sir?

Q It is my understanding, both from the Courts

below and from one of the briefs here, that the Act of State doctrine is an exception to the general rule of The Paquete Habana, that generally courts of the United States do decide questions of international law, unless the Act of State doctrine exception applies.

You're not suggesting that the Act of State doctrine simply swallows up that general rule, are you?

MR. RABINOWITZ: Oh, no, sir. No, sir.

Q You're limiting it to questions of the validity of the government -- of the laws of foreign governments?

MR. RABINOWITZ: I'm limiting it to the question of the validity of the acts of a foreign sovereign done within its territory.

And, as I say, it does seem to me that the position that the petitioner here is advocating raises this very serious danger in connection with the separation of power.

Now, this case is exactly -- I might, just to dispose for a moment of this Hickenlooper amendment point, I don't know whether it's really argued seriously.

The Hickenlooper amendment is drawn in very, very narrow language. The language is very hard to understand. And I'm not going to try to read it here, it's going to require very careful study, and I've tried to analyze it in my brief, to be of assistance to the Court, but it can't very well be done in oral argument.

The Court of Appeals held, and here the court was unanimous, that the Hickenlooper amendment does not apply to this kind of situation at all, it was never intended to apply to this situation. The Court of Appeals for the State of New York has also held that the Hickenlooper amendment is to be given a very narrow reading, and did not apply to a situation before it in the French case.

So that the Hickenlooper amendment, I really don't think has anything to do with this case, and I think this Court, when it gets to analyzing it in detail, will come to the same conclusion.

What is much more important is not the Hickenlooper amendment but the letter of Mr. Stevenson.

Q Mr. Rabinowitz, in connection with the Hickenlooper amendment, if we had a case here that clearly and admittedly fell within the scope of the Hickenlooper amendment, so that, if you can imagine one upon which you wouldn't disagree, would your argument be that the amendment is unconstitutional?

MR. RABINOWITZ: I have argued so.

Q Yes. And you must, in order to sustain your position, you've already stated, I take it --

MR. RABINOWITZ: Yes.

Q -- because you couldn't accept Congress's direction for the courts to, as you would put it, invade the

sphere of the Executive.

MR. RABINOWITZ: Thank you, Your Honor, you have expressed it even better than I did.

Q Yes.

MR. RABINOWITZ: I agree. I think the Hickenlooper amendment is unconstitutional because it's an effort on the part of Congress to tell this Court what it may or may not do.

Q But if it isn't, then it is rather relevant to this case, even if it doesn't apply, I take it?

MR. RABINOWITZ: No, sir. If it doesn't apply, I don't think it's relevant.

Q Well, it's rather a vast fundamental expression by Congress to the relationship between the courts and the Executive, and what the Judicial job is, for example.

MR. RABINOWITZ: Well, it is a direction to this Court which, if constitutional, I suppose this Court has to follow, that in certain kinds of cases -- not this kind, but other kinds of cases -- the Act of State doctrine shall be suspended.

Q Other cases in which even more severely might represent some threat to the --

MR. RABINOWITZ: Might.

Q -- foreign policy.

MR. RABINOWITZ: I suppose --

Q Yes.

MR. RABINOWITZ: -- that would be quite possible.

Now, we have here an expression by the legal advisor to the State Department, which seeks to undercut the Act of State doctrine. And while the legal advisor limits his contention or his letter to counterclaims, I really don't understand why, because all of his arguments go to any kind of claim.

But once we eliminate the counterclaim element, there is nothing new about this proposal. The proposal, in effect, is a suggestion that the Executive Branch of the government shall have the right to tell the Court either to apply or not to apply the Act of State doctrine.

Now, that's not a new proposal. It was made first when Mr. Stevenson was chairman of the International Law Committee of the Bar Association of the City of New York, in 1959; it was repeated by Mr. Stevenson when he was writing for the American Journal of International Law in about 1963. It was discussed by the Court in the Sabbatino case. It is, as I read it, a position that is endorsed by Mr. Justice White, or was in his opinion, in his dissenting opinion; and it was opposed, it was opposed most vigorously by the -- by Mr. Katzenbach and by Mr. -- and by the Solicitor General in the last Administration. And the Court, in the Sabbatino case, disapproved it.

And it disapproved it for reasons that are set forth

in the Sabbatino decision. And nothing new has happened, except that, whereas the last Administration had said this is not a business for the Executive Branch or the Court at all, and we'll take care of our own foreign policy; we don't need the Courts to get mixed up in it, because who knows how the Court is going to decide? It's really uncontrollable.

We don't know how the Court is going to decide any particular question, and therefore we would sooner that the Court stay out. And it referred over and over again to the possibility of embarrassment to the Executive Branch because we don't know how the Court will decide the case.

Now this Administration differs. And while, as I say, Mr. Stevenson of course is quite consistent, he took this position while in private practice, he took this position as editor of the Journal, and he takes this position now; and it's quite proper that he should be consistent, and it's quite proper that the Administration should change when the Administration changes.

But that is not the problem of this Court. The problem of this Court is to apply a doctrine which is 80 years old at least, in our Courts, and which was most recently affirmed in Sabbatino, and no new reasons have been suggested why that doctrine should not be applied at this point.

Now, once we get past, if this Court should decide that the Act of State doctrine is not to be applied, --

Q Let me ask you one question, Mr. Rabinowitz.

MR. RABINOWITZ: Surely.

Q Do you say that Bernstein is inconsistent with Sabbatino and must have been disapproved by implication in Sabbatino?

MR. RABINOWITZ: I think not. I think that Bernstein was a freak. I think the case was a sport. It arose in a situation which is very difficult to duplicate. The facts were most unusual and it's one of those cases which, because it involved the Hitler Government, because it involved terrible excesses against persons of Jewish faith, the seizure of property under circumstances which we're all familiar with, and because the government was no longer in existence, presented a situation which, as I say, is sui generis. It's its own situation.

And this is exactly -- I mean this isn't my idea; this is exactly -- it's not only my idea -- this is exactly what the Solicitor General said in the brief he submitted in Sabbatino. He said it's an exceedingly narrow situation, and I commend the reading of that brief to Your Honors. It's an exceedingly narrow case. It ought not to be extended at all. It arose out of very unusual facts, which are not duplicated here; and this Court, the Supreme Court, has never passed on it. In effect, let's let it rest. Let's not resurrect it.

And, as I read the Sabbatino opinion, that's what

the Sabbatino court said also. It said Bernstein ought not to be extended. It happened a long time ago, leave it alone; it gives us no lessons for a different situation.

So that while I think the Sabbatino case is not inconsistent with Bernstein, at least it says leave Bernstein alone, don't extend it any further.

If this Court, for one reason or another, decides that it will go into the question of the legality of the Cuban expropriations, that of course is the question that under Sabbatino we shouldn't be discussing at all. I attempted in my brief to discuss the nature of international law and what the practice of nations has been.

International law is supposed to be the practice of nations, not the practice of the United States and Great Britain, but the practice of all nations, including the Soviet Union and Indonesia and China and the whole entity that we in general terms now call the Third World, or the Developing Nations, or, as Mr. Justice Harlan said, the capital importing nations.

And I have attempted in an appendix to do a job which I hope was as good as I could do, with the facilities I had, to show that the practice of nations is by no means clear. And again this was not my thought, because that's what this Court again said in Sabbatino, that there's wiped out about whether an expropriation under these circumstances is a

violation of international law, because there is grave doubt as to what is the practice of nations. Not the morality, not the Fifth Amendment or the due process legality of these expropriations but the practice of these expropriations.

Q Did you go into the -- give your view of the legality under international law of discriminatory expropriation?

MR. RABINOWITZ: I don't know that I discussed that, but, (Your Honor, there is no -- I'm glad you raised that -- there is no suggestion in this record that this was a discriminatory expropriation. Every Cuban bank was expropriated at the same time as the American -- a couple of days later perhaps -- as the American banks were. This was part of a transformation of a government from a --

Q Would you say the same thing in Sabbatino?

MR. RABINOWITZ: But -- I said the same thing in Sabbatino, but the Court, at least the Court of Appeals, disagreed with me.

But the Court of Appeals, if the opinion will be read carefully the Court of Appeals -- and I really think this was wrong, Your Honor, of the Court of Appeals in that case. The Court of Appeals found it discriminatory, and it said: Sure, they confiscated not only American property but Cuban property as well, but there was a difference of two weeks.

And those two weeks were the -- three weeks or a month perhaps; but it was a difference of a few weeks in time. And those few weeks were critical, because that was the time of the sugar harvest; and that is what made it discriminatory, according to the Court of Appeals in Sabbatino.

Q Well, anyway, you don't --

MR. RABINOWITZ: But there's no such thing here.

Q Anyway, you do not address yourself to that issue in your brief here?

MR. RABINOWITZ: No, I do not address myself to that issue.

Q All right, that's all I wanted to know.

MR. RABINOWITZ: Quite right. I should have, and next time 'round I'll try to.

[Laughter.]

But I did not and I agree that I should have, Your Honor.

But I don't believe that this was discriminatory, and I don't believe that any argument can be or has been made that it was discriminatory.

Now, as I say, the -- we are not here discussing the morality of nationalization. The result of any review of the cases, of the facts, will show enormous diversity. And while it is true that there have been settlements reached and compensation paid in many of these cases, never, never has it

been the result of a judicial ruling, never has it been because some court said this or that is illegal; it has been the result of the way we settle international disputes in this world, by diplomatic negotiations and not by judicial interpretation.

The suggestion and the reason for the State Department's letter in this case is that they want, the State Department wants to protect foreign investments abroad.

And, if I may just have one minute, I think the Sabbatino court answered that. If a foreign developing country is prepared to risk breach of diplomatic relations, freezing of assets, embargo on trade, embargo on travel, end of all aid, and a host of other sanctions that the Executive Branch can make, it seems to be most unlikely that it is going to be upset by the fact that a court some time, ten years hence, is going to say that in addition the expropriation was illegal.

The sanctions have been applied, Cuba will not get the money, as I pointed out a moment ago, and that ought to take care of that, in terms of the policy of the United States.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rabinowitz.

Mr. Harfield, you have five minutes left.

REBUTTAL ARGUMENT OF HENRY HARFIELD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HARFIELD: Thank you, Mr. Chief Justice.

I'd like to begin just by, without attempting to argue these points, to indicate that at page 15 of our reply brief we pointed out that on October 13, 1960, and that date is important, this was between the time that the Cuban Government had confiscated the bank's property in Cuba and after the bank had asserted its right of offset, which I mentioned to you was within a matter of days.

That following that, but before the action was commenced, the Cuban Government dissolved Fondo, which had been the owner of this collateral that was pledged; and as we point out, as I say, at page 15 of the reply brief, transferred the rights of Fondo in the collateral to this respondent.

Then, when that had been done, they started the lawsuit.

I don't want to dwell too much on the question of the autonomy of this respondent. I think, and I made this point back in the District Court days, some 11 years ago, there is a pretty good precedent on this, which goes back to Genesis, and says: The voice is Jacob's voice, but the hands are the hands of Esau.

Now, I think that that is applicable in respect to the relationship and the transactional relationship between

the Government of Cuba and this respondent.

Q Well, I didn't think there was much doubt about that. Mr. Rabinowitz said he didn't want to get into discussing his client's foreign policy, and I don't assume banks in Cuba have foreign policies; so I don't think we need to dwell much on it.

MR. HARFIELD: Thank you, Your Honor.

As to the argument about the windfall, I would refer the Court, with respect, to page 10 of our reply brief, where we've done the best we can to deal with that argument, and I won't trespass further on your time.

I want to close simply by doing what is really not my job to do, and that is talk about the fact that there is a great deal more that has happened since the Sabbatino case than a change of Administration, and a great deal more in respect of what our government has done.

This Court will surely be aware that in the Sabbatino case the government made no expression whatsoever, and protested against a misconstruction of what had been alleged to be its statement. Here it has done what it set out to do, and is, I submit, entirely consistent in its position, as to its function and its duty with respect to the foreign policy of the United States and with suggestions to a coordinant branch when it becomes appropriate to do so, and I think the Department has been perfectly consistent.

Now, let me close on this point. The argument that has been made here comes on two prongs. One of them is that this Court should apply the Act of State doctrine, whether or not it's otherwise applicable, because its coordinant branches of government request it not to do so, and that unless the Court does this extraordinary thing it's going to find itself in the position that it has to make a decision as to international law.

Well, this is the function of the Court, as was recognized by the late Mr. Justice Harlan in Sabbatino, it's one of the many functions; and the suggestion that the Court must shy away from a decision of international law seems to me perfectly absurd.

Turning then to the question of what is the international law on this issue, and again I don't want to burden the Court, but we have a history that goes back as far as there is any record of government policy and of acceptance by the Judicial Branch. The proposition that when a foreign government takes somebody's property, particularly if it's the property of an American, there is an implied obligation to pay for it.

To recognize that obligation does not involve characterizing the foreign government as being a thief or a villain; this does not really call into question the validity. But to the extent that the validity can be called in question,

as I suggest it already has been, under a case which Mr. Rabinowitz agrees the Hickenlooper amendment applies to as, say, in the Farr case, there can be no doubt.

Q Well, evidently -- can the motives of a sovereign ever be called into question in an expropriation? Is it not just the value of the property that's involved?

MR. HARFIELD: Well, I think that would be so, Your Honor. Here, as I said, the value is stipulated. The motives may be taken into consideration where there is discrimination, as I believe the finding has been so far of the courts in the United States.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Harfield.

Thank you, Mr. Rabinowitz.

The case is submitted.

[Whereupon, at 2:06 o'clock, p.m., the case was submitted.]