SUPREME COURT OF THE UNITED STATES

No. 91–767

REPUBLIC NATIONAL BANK OF MIAMI, PETITIONER *v.* UNITED STATES

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

[December 14, 1992]

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I cannot join the Court's discussion of jurisdiction because that discussion is unnecessary and may very well constitute an advisory opinion. In my view, we should determine the applicability of §1521 of the Housing and Community Development Act of 1992, 106 Stat. ___. Effective October 28, 1992, §1521 amended 28 U. S. C. §1355 to provide that "[i]n any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction." 106 Stat. ___. The clear import of the new law is to preserve the jurisdiction of a court of appeals in a civil forfeiture action where the res has been removed by the prevailing party—the very issue involved in this case. This law would appear by its plain terms to be dispositive of this case, thus rendering academic the discussion in Part II of the Court's opinion.[1]

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[1]By letter dated October 30, 1992, the Government advised the Court of the enactment of the new law without taking a position on its applicability. On November 3 petitioner informed us by letter that in its view §1521 applies and is controlling.

The Court mentions §1521 in a single footnote, stating simply that "we do not now interpret that statute or determine the issue of its retroactive application to the present case." *Ante*, at 9, n. 5. As a general rule, of course, statutes affecting substantive rights or obligations are presumed to operate prospectively only. *Bennett* v. *New Jersey*, 470 U. S. 632, 639 (1985). "Thus, congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208 (1988). But not every application of a new statute to a pending case will produce a "retroactive effect." "[W]hether a particular application *is* retroactive" will "depen[d] upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U. S. 827, 857, and n. 3 (1990) (SCALIA, J., concurring) (emphasis in original).

In the case of newly enacted laws restricting or enlarging jurisdiction, one would think that the "determinative event" for retroactivity purposes would be the final termination of the litigation, since statutes affecting jurisdiction speak to the power of the court rather than to the rights or obligations of the parties. That conclusion is supported by longstanding precedent. We have always recognized that when jurisdiction is conferred by an Act of Congress and that Act is repealed, "the power to exercise such jurisdiction [is] withdrawn, and . . . all pending actions f[a]ll, as the jurisdiction depend[s] entirely upon the act of Congress." *The Assessors* v. *Osbornes*, 9 Wall. 567, 575 (1870). "This rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by this Court." *Bruner* v. *United States*, 343 U. S. 112, 116–117 (1952). See *id.*, at 117, n. 8 (citing cases).

Moreover, we have specifically noted that "[t]his jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Ibid.*

The same rule ordinarily mandates the application to pending cases of new laws *enlarging* jurisdiction. We so held in *United States* v. *Alabama*, 362 U. S. 602 (1960) *(per curiam)*. There, the District Court had concluded that it was without jurisdiction to entertain a civil rights action brought by the United States against a State, and the Court of Appeals had affirmed. *Id.*, at 603. While the case was pending before this Court, the President signed the Civil Rights Act of 1960, which authorized such actions. Relying on "familiar principles," we held that "the case *must* be decided on the basis of law now controlling, and the provisions of [the new statute] are applicable to this litigation." *Id.*, at 604 (emphasis added) (citing cases). We therefore held that "the District Court has jurisdiction to entertain this action against the State," and we remanded for further proceedings. *Ibid.* Similarly, in *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604 (1978), we held that because the general federal-question statute had been amended in 1976 to eliminate the amount-in-controversy requirement for suits against the United States, "the fact that in 1973 respondent in its complaint did not allege $10,000 in controversy *is now of no moment*." *Id.*, at 608, n. 6 (emphasis added).

It could be argued that the language of §1521 implies an earlier determinative event for retroactivity purposes—such as the removal of the res or the point when the final order disposing of the property "is appealed." 106 Stat. ___. I do not find these terms sufficiently clear to overcome the general rule that statutes altering jurisdiction are to be applied to pending cases; I would therefore decide this case on the basis of the new law. If the Court is plagued with

doubts about the “retroactive application” of §1521, *ante*, at 9, n. 5, the Court should, at a minimum, seek further briefing from the parties on this question before embarking on what appears to me to be an unnecessary excursion through the law of admiralty. There is no legitimate reason not to take the time to do so, for if the Government were to concede the new law's applicability, the Court's opinion would be advisory. I can, therefore, concur only in the Court's judgment on the issue of jurisdiction.

I do, however, join the opinion of THE CHIEF JUSTICE regarding the Appropriations Clause. Because the Court of Appeals retains continuing jurisdiction over this proceeding pursuant to §1521, we cannot avoid addressing the Government's arguments on this issue.