REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-5017

MARCIA FEE ACHENBACH
and 597 other similarly situated plaintiffs,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in 02-CV-894, Judge Emily C. Hewitt

ARGUMENT

I. 28 U.S.C. § 2501 Can and Should Be Equitably Tolled

In arguing that the statute of limitations in the present case "cannot" be equitably tolled, U.S. Br. at 7, the government neglects to bring to the attention of this Court Justice Frankfurter's decisive holding for a unanimous Court in *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), applicable to *every* federal statute of limitations:

> And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' [citing cases] This equitable doctrine is read into every federal statute of limitation.

A Supreme Court case that the government does cite, *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89 (1990), does not change the *Holmberg* rule:

> We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.

498 U.S. at 95-96.

The government further argues that the doctrine of sovereign immunity requires a more stringent interpretation of the statute of limitations in cases brought against the United States. That argument was also addressed by the Supreme Court in the *Irwin* case. Chief Justice Rehnquist began by observing that a condition to a waiver of sovereign immunity, such as a statute of limitations, must be strictly construed. 498 U.SA. at 94. But he went on to hold that

> Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any,

> broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation.

498 U.S. at 95.

II. When Did the Cause of Action Accrue?

The concept of equitable tolling in some cases can apply even after a cause of action accrues. For example, if A has all the facts necessary to file a legal action against B, but B physically prevents A from doing so, then the statute of limitations is equitably tolled for the duration of A's involuntary incarceration.

The present case is entirely different. We argue that the cause of action itself did not accrue until the year 2000. In this respect, "equitable tolling" is itself something of a misnomer. It is useful in that it calls attention to the driving forces of equity and justice in the present case. But given the government's insistence upon strict statutory construction, we are willing to rest our appeal in this case strictly upon the word "accrues" in 28 U.S.C. § 2501. We have filed our claim "within six years after such claim first accrues," even apart from any considerations of equity.

It is settled law that if A is injured but does not know and could not reasonably have known that B caused the injury, A's cause of action against

B has not accrued. For example, C's cause of action against attorney D for malpractice does not accrue until client C discovers or reasonably should have discovered D's error. *Hendrickson v. Sears*, 365 Mass. 83, 310 N.E.2d 131 (1974). Although the government argued strenuously in the United States Court of Federal Claims, and repeats its argument on appeal, that the plaintiffs' cause of action accrued when they were injured in Japanese concentration camps during World War II, this argument misses the entire point of the legal term "accrues." If someone throws a brick from the roof of a building into a crowd of people and severely injures E, the statute of limitations does not begin at the moment of E's injury. Rather, it only accrues when E discovers, or reasonably should have discovered, the identity of the brick-thrower. If, through reasonable and diligent effort, E only discovers the identity of the brick-thrower ten years later, E is not barred by a six-year statute of limitations as the government would have it. Even if the statute of limitations is jurisdictional, and even if the brick-thrower is a head of state or has some other kind of sovereign immunity, the statute of limitations still does not begin to run until the cause of action accrues. It only accrues when E discovers (or reasonably should have discovered) whom he may sue.

The present case is much stronger than the brick-throwing hypothetical. A person hit by a brick at least knows that someone maliciously threw it. But the plaintiffs in the present case had no idea that their injuries they suffered were due to the secret policy of the United States. They thought that their injuries were a result of bad luck—being in the wrong place at the wrong time. Of course they knew that the immediate cause of their injuries was the Japanese invasion force. But they did not have, nor reasonably could they have had, the remotest idea that they were deliberately sacrificed by the unseen hand of the government of the United States.

The government chides the plaintiffs for not "even attempt[ing] to cite any law to support their novel tolling theory." U.S. Br. at 12. Rather, it is the government's myopic view of "accrues" that is novel. Nevertheless, we can cite a case—a very sad case—that is very much like the present one.

From 1932 to 1972, 399 poor black sharecroppers in Macon County, Alabama, were denied treatment for syphilis and deceived by physicians of the Unites States Public Health Service. As part of the Tuskegee Syphilis Study, designed to document the natural history of the disease, these men were told that they were being treated for "bad blood." In fact, government officials went to extreme lengths to insure that they received no therapy

from any source. In exchange for their participation, the men received free meals, free medical examinations, and burial insurance. In the 1940s, when penicillin was discovered as a cure for syphilis, it was deliberately withheld from the men. When World War II broke out, many of the men voluntarily enlisted and others were drafted, a total of about 250 men. Had they joined the Army, they would have been routinely given penicillin injections. The Public Health Service succeeded in convincing the United States government to exempt all these men from military service. The forty-year "experiment" was not shrouded in secrecy. A number of articles in medical journals were published throughout the period, discussing the results of non-treatment on the progression and outcome of the disease of syphilis among black men in Macon. *See generally* Jean Heller, "Syphilis Victims in the U.S. Study Went Untreated for 40 Years," *New York Times*, 26 July 1972, p. 1, col. 8; James H. Jones, *Bad Blood: The Tuskegee Syphilis Experiment* (new ed. 1993).[1]

With the aforementioned New York Times exposure in 1972, the Macon "experiment" ended, but not before 28 men had died of syphilis, 100 others were dead of related complications, at least 40 wives had been

[1] President Clinton apologized to the survivors on October 3, 1995, saying "when the government does wrong, we have a moral responsibility to admit it."

infected and 19 children had contracted the disease at birth. A class action lawsuit was filed on behalf of the victims or their estates for the deprivation of their civil rights under 42 U.S.C. § 1986. *See Pollard v. United States*, 384 F.Supp. 304 (M.D. Ala. 1974). In defense, the United States invoked both the one-year federal statute of limitations of 42 U.S.C. § 1986 and the six-year statute at issue in the present case, 28 U.S.C. § 2501. The court rejected this defense, stating:

> It is well settled as a matter of federal law that where a plaintiff is without knowledge of his claim because of the fraudulent conduct of a defendant, the bar of the statute does not begin to run until the fraud is discovered.

384 F.Supp. at 308.

The indigent sharecroppers had forty years during which they could have discovered that treatment for syphilis was deliberately being withheld from them. The evidence was available in specialized medical journals. Why did their cause of action not accrue at least at some point within those forty years? The court answered:

> Under the alleged circumstances of this case, wherein plaintiffs charge that defendants fraudulently concealed from them and from their decedents the existence of their claims, this rule is but an application of the familiar principle that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on

> the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover,* 88 U.S. 342, 348 (1874).

384 F.Supp at 309. In other words, although the evidence was available in medical journals, the plaintiffs had no reason to look for it. They did not know that the doctors who examined them and gave them pills (the pills turned out to be aspirins) were *not* trying to cure their "bad blood" diseases. Instead, they *trusted* the doctors. In such a situation, the court obviously heard no reason proffered by the defendant that the plaintiffs slept on their rights or should have hired a lawyer to read medical journals. When the class action lawsuit was settled for ten million dollars a year later, the government paid all the victims including representatives of those who had died ten and twenty years earlier. See *Pollard v. United States,* 69 F.R.D. 646 (M.D. Ala. 1976).

In the present case, the plaintiffs have been and are one of the most patriotic groups in the United States. They can never forget the day they were rescued from the dreaded concentration camps on the Philippines by the United States Marines. Their trust in the United States equaled if not surpassed the trust the black sharecroppers had in the doctors and nurses who checked and recorded their medical condition for forty years. We now know that the plaintiffs in the present case, and the plaintiffs in the Tuskegee

Syphilis Study, were betrayed by the country in which they placed their implicit trust. Both sets of plaintiffs, not just one, deserve compensation from an independent judiciary.

Instead, the government, through its attorneys, attempts to trivialize the injuries and deaths it caused. The government's brief states:

> The crux of plaintiffs' argument seems to be that their untimeliness should be excused because it had not crossed their minds until the last three or four years that the Government should be held liable for the seizure of their property by the Japanese in 1941.

U.S. Br. at 12. Perhaps these same attorneys would have also told the court, had they argued the Tuskegee Syphilis Study case on behalf of the government back in 1974, that the crux of the sharecroppers' case is that the idea of governmental liability had not "crossed their minds" until the last couple of years.

CONCLUSION

For the foregoing reasons and those stated in our Opening Brief, the decision of the United States Court of Federal Claims should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Achenbach v. US,

04-5017

I hereby certify that the Microsoft Word Counter program on my computer reports a word count of 2,027 words for this Reply Brief.

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PROOF OF SERVICE

I hereby certify that on this 23rd day of March, 2004, I sent two copies of the attached Reply Brief by Federal Express to:

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