

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MARCIA FEE ACHENBACH, *et. al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

PLAINTIFF'S RESPONSE TO THE COURT'S
ORDER OF JANUARY 16, 2003

Plaintiffs respectfully submit this memorandum pursuant to the Court's order of January 16, 2003. The Court specifically inquired as to plaintiffs' awareness of the book "Gestapo Chief." Defendant, in its response, took the occasion to deal at length with matters outside the Court's order. Since the defendant opened the door, we must likewise interpret the Court's request broadly.

I. Plaintiffs Could Not Have Become Aware of "Gestapo Chief" Six Years Before the Complaint was Filed

Although the defendant states that "Gestapo Chief" was

published in 1995, it gives no proof of this statement other than the fact that the book itself states that it was copyrighted in 1995. Nearly all books, however, are copyrighted some time before they are published. Thus the date of actual publication could have been some indefinite period of time after 1995. In this connection, the copy of the copyright page furnished by the Court as an attachment to its Order appears to have the date "Aug 19 1996" stamped on it as the date of receipt by the Library of Congress, although the last and most important digit of that date is partially obscured. Even more important than the date of publication is the date of dissemination; a book can be printed and published but not leave the warehouse for many months. This is particularly true of minuscule publishers, such as R. James Bender Publishing, of San Jose, California. There is no corporate or partnership identity given, making it appear that R. James Bender has published the book out of his own home. In situations such as these, where the author (one "Gregory Douglas") undoubtedly was unable to interest any commercial publisher in his book, a friend might publish copies of the book with the intention of selling them or giving them away individually to friends and contacts in the hope eventually of finding a commercial publisher. Nor is the size of the printing stated by the

defendant. The 600 plaintiffs in the present case comprise such a minuscule percentage of the population of the United States that the book would have had to have been distributed or made available to 458,000 persons in order for a single plaintiff to be included as a matter of probability among the 458,000 total.

For the foregoing considerations, it would be unreasonable to impute awareness of "Gestapo Chief" to any of the plaintiffs in this case prior to July 19, 1996.

II. "Gestapo Chief" Is Not the "Smoking Gun" Document

Despite defendant's totally misleading claim, plaintiffs have never said or implied that the Roosevelt-Churchill conversation purportedly published in "Gestapo Chief" was the missing link, the "smoking gun", in the accrual of the present cause of action. Defendant cites, without quoting, page 20 of our Reply to Defendant's Motion to Dismiss as authority for this accusation. The pertinent language is quite different, and reads as follows:

The defendant's concealment of the relevant information (including the Roosevelt-Churchill transcripts) concealed the fact that the United States was ultimately responsible.

This reference to transcripts in the plural, not singular, was keyed to Paragraph 51 of our Complaint in which we

referred to conversations that took place in the summer of 1941 (and not in November 1941). Moreover, as the quoted sentence makes clear, plaintiffs are not in a position to know what specific information the government is concealing. We believe that the transcripts which have been kept under perpetual seal since 1945 provide this specific information. There may be other relevant records stored in the same place and still kept under seal. Nothing the defendant has provided so far in the various appendices it has filed with its Motion to Dismiss has given even a remote clue as to whether such relevant information exists.

III. Even if "Gestapo Chief" Had Been Available to Plaintiffs Prior to July 29, 1996, It Would Not Have Constituted Reasonable Notice

The purported transcript of the Roosevelt-Churchill conversation of November 26, 1941, contained in "Gestapo Chief," would not give a reader a clue that Roosevelt was preparing to sacrifice the lives of American citizens living in the Philippines. His one specific statement regarding the Philippines was: "As for myself, I will be damned glad to be rid of the Philippines." It was well known that Roosevelt harbored a great antipathy toward the president of the Commonwealth of the Philippines, Manuel

Quezon y Molina, which could explain his statement. Moreover, the Roosevelt-Churchill conversations must be interpreted as highly strategic on both sides. Roosevelt may not have wanted to tip his hand to Churchill that the Philippines might be of any special importance to the United States, because that would give Churchill negotiating leverage in arguing about the best deployment of the American fleet (a deployment that in fact bothered Churchill immensely). Although Roosevelt's statement can appear sinister in retrospect, anyone reading it in 1996 would not have been made suspicious about Roosevelt's intentions toward the American citizens in the Philippines.

IV. Defendant's Bibliographic Excursus Has Produced Nothing of Significance

Although defendant has seemingly dispatched 100 lawyers to read 1000 books on World War II, their bibliographic efforts only go to prove our thesis that the government has successfully concealed its intention to deliberately sacrifice the American civilians in the Philippines in order to rally the American public to go to war against Japan. Nearly all the works they cite contain theories about Pearl Harbor, which simply prove our point that the Pearl Harbor catastrophe made the Philippines

gambit unnecessary (but unavoidable), and hence assigned it top priority for a cover-up. However, one book is cited at length that, upon superficial reading, appears to relate to the present cause of action. The book is John Jacob Beck, MacArthur and Wainwright: Sacrifice of the Philippines (Univ. of N. Mex. Press, 1974). However, a glance at its Table of Contents reveals that the entire story of the book begins on the day when the present cause of action leaves off. Our cause of action deals with events leading to the attack upon the Philippines of December 7, 1941 (U.S. time), whereas the Beck book begins with the attack upon the Philippines of December 8, 1941, which is the same time but a calendar day later according to the Philippines' position on the other side of the International Date Line. The first sentence of the Preface makes the point clear:

This book is the story of General Douglas MacArthur's final days in the Philippine Islands in early 1942 at the start of the war in the Pacific and his subsequent escape via sea and air to Australia.

Id. at xiii.

The book in its entirety makes it clear that the "sacrifice" of the Philippines was a political-military decision made after December 8, 1941, so that the war in the European theatre could be ended first. There is absolutely nothing new about this thesis; it was fully

known and appreciated by the American and British public at the time the "Europe First" decision was made.

However, defendant must be assuming that a busy Court might possibly read the phrase "necessary to sacrifice the Philippines" as applying to the present case. Boldly, the defendant quotes a full paragraph from the book, and adds its own emphasis to the last two sentences:

The die was cast and a significant precedent, never reversed, was established. After the United States entered the war, American political and military leaders, knowing that Germany was the more powerful and dangerous of the two enemies, did not deviate from the "Europe first" principle of global war strategy. **One idea behind this strategy was to sacrifice a few lives in the short run in order to save many lives in the long run. . . . For the Philippines, its ramifications meant defeat and conquest. In order to defeat Nazi Germany and thereby shorten the war, it was necessary to sacrifice the Philippines.**

Def. Response, p. 7 (emphasis added by defendant).

Obviously the United States could not efficiently fight two fronts at once. The decision was made to sacrifice not only the Philippines, but also Guam, Wake, and Midway Islands, and not to defend the British interests in Singapore or the Dutch interests in Indo-China. A holding action was the best the United States could do under the circumstances. Of course lives were lost, but no complaint was ever lodged on behalf of the persons killed.

Everyone knew that military necessity had to come first.

Yet the defendant now wants to twist this well-known story into something entirely different: that the book by John Jacob Beck put the plaintiffs on notice in 1974 that President Roosevelt, prior to December 7, 1941, intentionally sacrificed the Philippines in order to mobilize the American public into supporting a war against Japan. There is nothing remotely in Mr. Beck's language to suggest such a proposition. His account of the "sacrifice" is the standard account that if you have two war goals, one may temporarily have to be sacrificed in order to achieve the other. It is noteworthy that defendant would twist this quotation out of all resemblance to its meaning in order to support its Motion to Dismiss. If this misrepresentation is the best that the defendant can do, then its Motion to Dismiss fully deserves to be refused.

V. Affidavits by the Lead Plaintiff and the Lead Attorney are Appended Hereto.

The Court in its Order stated that "the dispositive issue will be when plaintiff became, or should have become, aware that it had a claim." Since the defendant has ranged widely beyond the "Gestapo Chief" book to address this dispositive issue, plaintiffs attach hereto Affidavits by

the lead plaintiff, Marcia Fee Achenbach, and the lead attorney, Anthony D'Amato, stating exactly when they became aware that they had a claim.

Respectfully submitted,

ANTHONY D'AMATO
D'Amato Keegan & Duggan, LLC
One of the Attorneys for
the Plaintiffs

Anthony D'Amato
Room 311
Northwestern Law School
357 E. Chicago Ave.
Chicago, Illinois 60611
(312) 503-8474 phone
(312) 503-1676 fax
Member of the Bar of the United
States Court of Federal Claims

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2003, I sent two copies of the attached PLAINTIFF'S RESPONSE TO THE COURT'S ORDER OF JANUARY 16, 2003, by Federal Express, to:

Kathryn A. Bleecker. Esq.
Assistant Director
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit 4th Floor
1100 L Street, N.W.
Washington, D.C. 20530

ANTHONY D'AMATO
Counsel of Record for
Plaintiffs
Achenbach v. United States
Case No. 02-894C