IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MARCIA FEE ACHENBACH, *et. al.,*	)	
Plaintiffs,	)	
v.	)	No. 02-894C Judge Hewitt
THE UNITED STATES,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR RECONSIDERATION

Plaintiffs Marcia Fee Achenbach *et al.* through counsel of record Anthony D'Amato hereby move this Court, pursuant to RCFC 59, to reconsider its judgment of June 19, 2003, dismissing the complaint.

There are two central allegations in the complaint: (1) failure to warn the plaintiffs of the impending attack by Japan (hereinafter "failure-to-warn"), and (2) preventing the plaintiffs from evacuating from the Philippines (hereinafter referred to as "incarceration"). This Court has considered and passed upon failure-to-warn. We do not ask the Court to reconsider its careful findings on that point. But the Court has not dealt with incarceration, except to subsume it within failure-to-warn. Yet these two central allegations ought to be treated, in fact and in law, as separate and distinct from each other. We request reconsideration solely on the issue of incarceration.

Suppose the warden of a federal penetentiary receives a telephonic bomb threat. He duly evacuates the guards and civilian employees from the prison building, but does not initiate the fire-drill procedures (which would include releasing a switch that unlocks all the cells). However, the warden does issue a warning over the public-address system that a bomb threat has been received. An hour later, the bomb explodes, mortally wounding half the prisoners and seriously wounding the others. It is clear from this grim hypothetical (far less grim than its counterpart in the present case) that the warning itself was of little consequence. It was not the warning that helped the prisoners or its absence that would have injured the prisoners, but rather it was the locked cells alone that hurt them.

In the present case, a warning to the plaintiffs on the Philippines would simply have frustrated and scared them. They would have quickly found that all exits were closed and no ships would give them passage, whether to the United States or any other destination. Complaint ("Compl.") at ¶¶ 33-34. Like the prisoners in the hypothetical case, the plaintiffs were in fact incarcerated in the Philippines.[1] Neither the government in its motion to dismiss, nor the Court in its Judgment, contests the adequacy of these allegations, which are to be taken as true for the purposes of a motion to dismiss.

This Court, citing facts that were faithfully disclosed by the plaintiffs in the appendices to their pleadings and affidavits, found that some plaintiffs were aware in 1940, 1945, 1947, or 1950, that, unlike other American citizens in mainland Asia, they had not been warned. Their possible cause of action for failure-to-warn thus accrued at least by the early 1950s, and is surely time-barred now. But there is no evidence that the

[1] Perhaps because of the lack of warning, the plaintiffs never knew that they were being deliberately incarcerated, as we shall argue below.

plaintiffs, or any of them, were aware that the government had incarcerated them on the islands. The very idea that their own government would prevent them from leaving a danger zone by depriving them of their right to return to the territory of their own nation was too monstrous even to be imagined. Every person who was denied a passport was led to believe that his or her own circumstance was unique; there was no inkling of a policy of general denial of passports. Many people believed they were victims of bureaucratic procrastination or inefficiency. Compl. ¶¶ 35-37, 42, 101, 104. No one thought to question the statements of military captains of ships leaving the Manila port that military ships were not permitted to take civilian passengers. Compl. ¶ ¶ 37, 42.[2] In short, there is nothing in our pleadings or appendices, nothing in the pleadings by the defendant, and nothing in the oral argument by the government, alleging that any plaintiff knew prior to the year 2000 that he or she was part of a group singled out for incarceration in the Philippines.

However, one internee-plaintiff used the word "expendables" in referring to the experience. We supplied Dr. Stevenson's testimony in one of our appendices, and this Court has quoted the word "expendable" three times. Judgment at 7, 8. The word should be read in its context, because it was a very popular and over-used word in 1947 when plaintiff Stevenson employed it in his testimony to Congress. This Court should take judicial notice that a film was released in 1946, "They Were Expendable," which then and now is regarded as one of the greatest war films ever made. It tells a fictional story about American sailors manning PT (patrol torpedo) boats in the Philippines in 1942. In the film, as in real life, General Douglas MacArthur escaped from the Philippine island of

[2] After the Philippines was attacked by Japan, this "restriction" vanished into the same thin air from which it came. Military vessels leaving Manila took aboard as many civilians as they could carry.

Corregidor and went to Australia where he continued his command-and-control operation. The PT sailors' heroic confrontation against overwhelmingly greater Japanese naval forces enabled MacArthur and other leaders to escape. But the PT sailors themselves eventually were captured or killed. The unexpected Japanese attack on Pearl Harbor had disabled most of the American naval forces in the Pacific, and thus there was nothing that the United States could do to save the PT sailors. "They were expendable," the film told the viewing public.

Dr. Stevenson obviously chose to use the word "expendable" not only because of its patriotic association with the Philippines and with a popular movie, but also perhaps to share for himself and his fellow internees a claim of heroism: he and they contributed to the war effort, he was in effect saying, even at the cost of being expendable. There is absolutely no indication in any of Dr. Stevenson's testimony that he knew that he and his fellow plaintiffs were being deliberately sacrificed. Instead, Dr. Stevenson explained their continued presence in the Philippines as due to the failure of the United States to warn them to leave; they were not warned because in effect they were expendable. Dr. Stevenson, in his testimony quoted by the Court, affirmatively disavows "any cold and calcuated plan so describing us officially [as 'expendables']." Judgment at 7. There is not a hint of evidence that he entertained the thought that the United States had decided to sacrifice him and his fellow American citizens in the Philippines. The sailors in the film "They Were Expendable" were <u>not</u> deliberately sacrificed; quite to the contrary, they would have been saved if they could have been saved. In contrast, the American civilians in the Philippines could have been saved, but in fact were sacrificed. Moreover, it never occurred to Dr. Stevenson that he was in fact prevented from evacuating from the

Philippines had he decided to evacuate. He says precisely the opposite. This Court quotes his 1946 testimony as follows:

> Although it is true that some individuals could have, and if duly warned would have, withdrawn and sought safety in the homeland, it is a positive fact that the American community in the Philippines could not have been liquidated without a complete reversal of the whole American policy in the Philippines and a defeat of the program under which the aggrerssion build-up of the enemy was met with a solid front.

Judgment at 6. Dr. Stevenson's conjecture is false. If there had been a warning, his fellow citizens nevertheless would have been prevented from evacuating. Dr. Stevenson obviously did not know that the United States government had taken steps to prevent American civilians from evacuating. No one enlightened him of this fact. No Congressional testimony mentions it. None of the 10,000 to 20,000 American citizens in the Philippines had even the slightest idea that there was a deliberate governmental plan to block them from leaving the islands. Moreover, it is clear that Dr. Stevenson himself would not have testified as he did in 1946 and 1947 if he had had any inkling that he was being prevented from leaving the Philippines. He was a medical missionary, and had no reason to try to leave; see Compl. ¶¶ 95-97. He joined the present lawsuit like many of the other internees only after learning from counsel that, unbeknownst to him and them, they could not have left the Philippines in 1940-1041 even if they had wanted to.[3]

[3] An article from the New York Daily News of August 15, 1950, supplied by the plaintiffs to this Court as an appendix to the Achenbach affidavit, states that some internees believed that the State Department "occasionally blocked" their attempts to book passage home. Judgment at 8. The allegation that the State Department "occasionally" set up obstacles shows that there was no belief at the time that it was the Department's goal to prevent nearly everyone from leaving the islands. Moreover, the news article is hearsay upon hearsay. Finally, this Court may take judicial notice that there are some people who attribute malicious motives to government officials irrespective of fact or rationality; consider the social security recipient whose check does not arrive in the mail and who immediately suspects that a government official is engaged in a personal vendetta against him.

It is clear that the animus of Dr. Stevenson's testimony was his mental struggle with the failure of the United States government to warn the American civilians to leave the Philippines. Perhaps if there had been a warning, he himself would have voluntarily tried to evacuate; we do not know. America in 1946-1947 was still awash in the great patriotism that had so recently sustained this nation in defeating the Axis powers and the threat they posed to civilization itself. Dr. Stevenson put the best patriotic face on the government's failure to warn its citizens in the Philippines, testifying that the warning itself could undermine the morale of the Philippine government and its people. He told Congress:

> the whole official attitude in the Philippine Islands – as revealed in Army, Navy, and civil government offices – was that public morale must be maintained and that the Americans, collectively and individually, must set an example to the Filipinos, an example to give no encouragement to the enemy through admission of weakness or unwillingness or unreadiness to meet any emergency which might possibly arise.

Judgment at 6. If Dr. Stevenson had thought longer and harder about the matter back in 1946, he might have realized that the morale issue was evanescent: the Philippines was due to be attacked by Japan. When Japanese planes began dropping their bombs on the Philippines on December 7, 1941, whatever "morale" had been built up by then was rudely shattered. In short, the "morale" issue that exonerated in Dr. Stevenson's mind the American failure to warn its citizens in the Philippines, was of limited and superficial use to the Filipinos; indeed, it may have given them a false sense of security, leaving them unprepared for the Japanese onslaught.

But this thought apparently never entered Dr. Stevenson's mind. Inasmuch as he was one of the most thoughtful of the internees, as well as one of the most personally

heroic, it is hardly likely that anyone else followed the chain of reasoning here set forth. The mind-set of the internees at the end of the war was (roughly) that they were liberated by the extraordinary efforts of the American soldiers, they owed their lives to the American military effort, the hated Japanese soldiers were defeated and demoralized, and there was nothing that one could say about the United States that was too good to say. Those who survived the Philippine ordeal counted themselves lucky; they uniformly attributed their misfortunes and the lost of their loved ones during the war to being in the wrong place at the wrong time.

None of the plaintiffs knew prior to the year 2000 that they had all been prevented from leaving the Philippines. Marcia Achenbach, the lead plaintiff, did not know. Dr. Stevenson, as we have seen, did not know. Nor had any plaintiff reason to suspect that he or she was deliberately sacrificed. The thought has been surprising and shocking to the plaintiffs who have joined this lawsuit. Despite all the "devils' theories" of history that have been floated in recent years, despite the historical revisionism of scores of historians combing through the records of how and why we got into World War II, there is no mention even in speculative theory of the government's deliberate sacrifice of American citizens in the Philippines. The government's attempts to conceal these facts have been extraordinarily successful. Our complaint alleges many examples of deliberate concealment: ¶ 35 (personal letters to passport applicants); ¶ 41 (keeping the embargo on American citizens a closely-held secret); ¶ 42 (cover of "military security"); ¶ 67 (unpublicized two-month lifting of the passport restriction on November 15, 1941); ¶ 35 (allowing a few people to leave the Philippines who might otherwise have raised a public

furor, such as business partners and people in need of medical services available only in the United States). We also have alleged that the

> United States has concealed the evidence for its acts by keeping the stenographic transcripts of the Roosevelt-Churchill telephone calls of the summer of 1941 under seal, and on information and belief, by redacting nearly all references to the American civilians on the Philippines in the voluminous records of World War II that have been published by the United States and made available to historians and researchers, with no indication (for example, by ellipses or other marks) that they have been redacted and expurgated.

Compl. at ¶ 112. In addition:

> The secret United States policy was not reasonably discoverable by the plaintiffs or their decedents. Of the thousands of historians from all over the world, hundreds of Ph.D. theses on the causes of World War II, hundreds of thousands of research articles on the subject, plaintiffs are not aware of a single one that claims that American civilians in United States-owned territories in the South Pacific were deliberately kept in harm's way in order to precipitate a war with Japan and the other Axis powers. If all these historians and students of history were unable to come up with this thesis, then it is clearly unreasonable to expect that the victims of the United States' actions and misrepresentations should have come up with such a thesis. The success of the United States in keeping this matter secret for over sixty years demonstrates beyond a reasonable doubt that plaintiffs or their decedents should not be charged with knowledge that they had a cause of action against the United States.

Compl. at ¶ 113.

The government's cover-up has indeed been so successful that some observers might take the absence of evidence as proof that there was no incarceration in the first place.[4] Defendant makes an equivalent argument in the present case. As quoted by the Court, defendant argues that

> plaintiffs' bald allegations of the Government's misdeeds, coupled with their illogical assertion that the lack of evidence is evidence of the Government's complicity, is insufficient to allege the affirmative, serious misconduct required to invoke equitable tolling or estoppel.

[4] This is the well-known "historian's fallacy": that if evidence of an event was successfully concealed and destroyed at the time, then the event never happened at all.

Judgment at 6. This remarkable argument is not only self-defeating, but it actually concedes the plaintiffs' position on the statute of limitations. How could the plaintiffs' cause of action have accrued in 1945 or 1950 when there was no evidence to support it? How could it have accrued at that time when the admitted lack of evidence effectively stopped anyone from thinking that such governmental misconduct was even possible? The defendant won't even admit it now; how could the plaintiffs have figured it out in 1950? Yet if the cause of action did not accrue in 1945 or 1950, then it only accrued in 2000 when thousands of facts from disparate sources were painstakingly assembled and unified into a coherent theory—a theory that may not prove the plaintiffs' allegations, but sets forth a rebuttable presumption that only a judicial trial on the facts can resolve.[5] The defendant's above-quoted argument at most can be read as a denial of the allegations that the government's misconduct resulted in (1) incarceration of the plaintiffs in the Philippines, and (2) a cover-up regarding the facts of the incarceration itself. This double-barreled denial cannot serve to dismiss the plaintiffs' complaint. It can only serve at best to invite the government to defend at trial the plaintiffs' allegations of incarceration and cover-up.

In brief, the plaintiffs' case, leaving aside the failure-to-warn issue in light of this Court's findings in its Judgment of June 19, 2003, may be summarized as follows: (a) plaintiffs were denied passports in 1940-41, Compl. at ¶ 35; (b) ships and planes leaving from the Philippines would not allow any person to board who did not have a passport, Compl. at ¶¶ 34, 37; (c) the plaintiffs could have been evacuated from the Philippines in a

[5] Suppose it is argued that a lawyer in 1950 might have been able to assemble the same theory. However, in fact no lawyer was asked to do so. Lawyers cannot act as independent seekers of barratry. Even in 2000 the plaintiffs did not know they had an incarceration case; they simply asked a lawyer to research their legal rights. It would be stultifying to the legal profession to be told that if a lawyer through her independent research first uncovers a past wrong it is already too late because of the statute of limitations.

week's time or less, Compl. at ¶ 56.; (d) the Philippines were undergarrisoned and underdefended, Compl. at ¶ 18; (e) the United States government believed that the Philippines would be Japan's first and most likely target, Compl. at ¶ 71, Judgment at 3; (f) the government's prediction came true, Compl. at ¶¶ 72-72; (g) the plaintiffs suffered grievous injuries, many of them mortal injuries, Compl. at ¶ 77, Judgment at 3.

These facts speak for themselves. It is a case of *res ipsa loquitur*. How does the defendant explain these facts? What theory does the defendant offer to justify incarcerating the plaintiffs in the Philippines when it knew that the Philippines was the "first and most likely"[6] target of the Japanese in the inevitable war in the Pacific? The defendant is surely entitled to present its explanation at trial. It has not rebutted the plaintiffs' theories merely by labelling them, as it did during oral argument, "speculative."

Plaintiffs have offered a theory to account for their incarceration in the Philippines. It is that they were sacrificed in order to fulfill President Roosevelt's desire to bring the United States into World War II without violating his campaign pledge to keep American boys out of the war. Compl. at ¶¶ 21, 50. The theory is prima facie plausible and fully explanatory, even though its full implementation would require discovery of documents and recordings that have been sealed in perpetuity by the defendant. Compl. at ¶ 112.[7] If this Court does not want to hear the plaintiffs' theory, at the very least it should require the defendant to present its own theory. What theory does

[6] This is a quote from the 1946 Congressional testimony of former Secretary of War Henry L. Stimson, cited by this Court in its Judgment at 3.

[7] Notably, the marshalling of disparate facts contained in the Complaint in the present case will undoubtedly serve as the impetus for historians to revisit the dramatic question of how the United States got into World War II. There can be little doubt that books will be forthcoming that will use the general analysis presented in the Complaint and carry the story of the sacrificed American up to and through the present litigation. How American courts have dealt with their claim will be as much a part of the historical record as how the United States government treated them over fifty years ago during the war years.

the defendant have that can tell the Court what the plaintiffs were doing in the Philippines at a time when the islands were uniformly regarded by American military planners as ripe for immediate Japanese aggression?[8] Without a plausible explanation, the defendant should not be handed a decision in its favor on a motion to dismiss simply because it claims that the plaintiffs' allegations are speculative. If the plaintiffs' allegations are speculative, at the very least the defendant ought to provide an alternative theory that is less speculative.

In sum, plaintiffs cannot know in advance of trial on the merits what explanatory theory the government might adduce to justify in law its decision to incarcerate the plaintiffs within the Philippine islands. But that's what trials are for. Plaintiffs have a clear Due Process right to such a trial. The well-pleaded allegations referred to in this Motion for Reconsideration have not been controverted and must be taken as true. This Court should reconsider its judgment dismissing the complaint. For all they have suffered, the plaintiffs are entitled to their day in court.

[8] A plausible prima facie argument by the defendant would be that the plaintiffs were, unknown to them, scheduled for immediate induction into the United States Army so that they might have been able to resist physically the impending onslaught of the Japanese armed forces. At the same time war broke out on December 7, 1941, the United States was presumably in the process of providing to the plaintiffs the necessary rifles and side-arms that could possibly make their resistance to Japanese invaders effective. Such a plan presumably would include training for infants, children, young women, mothers, and elderly persons in the handling and firing of guns, since this category of persons made up the majority of the American civilians in the Philippines at the time.

WHEREFORE, plaintiffs respectfully move this Court to reconsider its Judgment of June 19, 2003.

Respectfully submitted,

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