No. 02-5115

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GILBERT M. HAIR and ETHEL BLAINE MILLETT
(on behalf of themselves and all others similarly situated),

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee

ON APPEAL FROM THE COURT OF FEDERAL CLAIMS
NO. 01-521c
Judge Firestone

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

ARGUMENT

A. The Statute of Limitations Must Be Interpreted in Light of the Self-Executing Constitutional Right of Plaintiffs to Just Compensation.

Defendant does not understand, or perhaps does not profess to understand, plaintiffs' constitutional argument with respect to the six-year statute of limitations.

Plaintiffs do not argue that the statute does not apply, by its terms, to Fifth Amendment takings. However, the provenance of a limitations period in takings cases is entirely different from sovereign immunity cases, which calls for different interpretive tools. There is no conceptual overlap between takings and sovereign immunity. Contrary to what defendant argues, not a shadow of the mantle of sovereign immunity falls over Fifth Amendment takings. The Fifth Amendment would make no sense at all if sovereign immunity applied to takings. Indeed, the requirement to pay just compensation is a condition upon the exercise by government of its power to take private property for public use. The Takings Clause does not depend upon Congress for implementation; in the words of the Supreme Court, it is "self-executing." United States v. Clarke, 445 U.S. 253, 257 (1980). Consider a hypothetical statute that provides for a six-hour limitations period. Although unreasonable and even bizarre, would such a statute be unconstitutional? In takings cases, the statute would be unconstitutional because it eviscerates with a slight six-hour exception a Constitutional provision that Congress has no power to tamper with in the first place. But in traditional sovereign immunity cases such as governmental contracts and

governmental torts,[1] the hypothetical statute would be constitutional. For if Congress can withdraw its consent entirely, it can withdraw a portion of its consent. Congress if it so chooses in sovereign immunity cases may condition its consent to suit upon any requirement at all, including a six-hour statute of limitations.

It follows that a constitutional challenge could be mounted against the current six-year statute of limitations in takings cases on the ground that Congress has no right to impose a condition upon a condition. The reason that plaintiffs did not mount such a challenge in the court below was motivated by the teaching of Justice Brandeis in the Ashwander case: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 349 (1936)(Brandeis, J., concurring). Plaintiffs

[1] Plaintiffs argued in their Opening Brief that prior to the establishment of the Court of Claims, artful pleaders contended that torts and breaches of contracts deprived plaintiffs of property rights, in order to bring their cases within the Takings Clause of the Fifth Amendment. Plaintiffs called this class of cases "common-law takings" and distinguished them from "eminent domain takings," but do not insist on this nomenclature.

believe that the constitutional question in the present case is avoidable because a fair interpretation of the six-year statute — not even a strained construction to avoid unconstitutionality but only a fair interpretation — shows that it is inapplicable to the facts of the present case. There simply was no accrual of the plaintiffs' claims prior to the filing of the present case, because accrual can only occur when all the facts necessary to the plaintiffs' claim have occurred. The remaining fact necessary for the accrual of plaintiffs' claims would be the government's refusal to pay. As plaintiffs argued below, the government has never signified its intention not to pay just compensation for the claims it waived in the San Francisco Peace Treaty. Thus although there was a taking for a public purpose, the government has retained the option either to pay just compensation or to announce that it will not pay just compensation.[2] Moreover, the Treaty has remained "open-ended" under its most-favored-nation clause, giving the United States the right at any time up to the present moment to collect compensation from Japan in the

[2] If the government's decision not to announce that it will not pay just compensation to those persons who risked or gave their lives to secure the safety of the nation in World War II has been motivated by its fear of adverse political fallout, then to that extent at least the public's belief in and reliance upon the Constitution are alive and well.

amount of plaintiffs' claims and to pay that amount over to the plaintiffs.

B. Defendant Has Conceded *Sub Silentio* that the Cause of Action for a Taking Accrues When the Government Refuses to Pay.

Plaintiffs have argued from the outset of this litigation that a government taking for a public purpose is not itself an event that triggers the six-year statute of limitations. The statute is triggered only if and when the government refuses to pay just compensation for the taking. Plaintiffs cited and discussed an exact precedent: North American Transp. & Trading Co. v. United States, 53 Ct. Cl. 424 (1918). In its Brief in reply, defendant did not mention this case. Nor has defendant made any argument opposing plaintiffs' position that the cause of action for a taking accrues when the government refuses to pay. The point may fairly be taken as having been conceded.

C. The Government in 1952 Did Not Refuse to Pay Just Compensation.

Defendant argues that (a) the waiver in the San Francisco Peace Treaty gave notice to plaintiffs that the United States refused to pay just compensation, (b) the San Francisco Peace Treaty "became effective" in 1952 and this

is the same as saying that plaintiffs' cause of action accrued in 1952, and (c) the United States in 1952 in any event did not believe that it was taking the plaintiffs' claims. The lack of merit of each of these arguments is demonstrable:

(a) Defendant insists that the San Francisco Peace Treaty waived all the plaintiffs' claims against Japan ("The hearings left no doubt that all individual claims against Japan were being waived by Article 14(b)", Def. Br. p. 13). However, there was no need for defendant to insist upon and repeat these arguments because plaintiffs have taken the same position throughout this litigation.

What does the waiver mean? Its core meaning is that the claims of the plaintiffs against Japan for war damages, which constitute rights in property, were appropriated by the United States and given to Japan. Defendant does not contest this core meaning; indeed, it insists upon it.

However, defendant makes three points in an attempt to cloud the meaning of the term "waiver." First, defendant links the waiver with the federal government's power to "espouse" its nationals' claims against foreign governments. Def. Br. p. 15. But neither the Treaty itself, nor the reported negotiations leading to the signing of the treaty in San Francisco in 1951, say

anything about espousal of claims. It is clear that the United States was not acting, and did not purport to be acting, on behalf of the plaintiffs and their legitimate claims against Japan. To be sure, Japan gave up many things of value in the Treaty. For example, it relinquished its sovereignty over the Kurile Islands. San Francisco Peace Treaty, Art. 2 (c), US App. p. 37. But the treaty, of course, did not award the Kurile Islands to the plaintiffs in settlement for their claims against Japan. There is not even a hint in the Treaty that the United States was either espousing the plaintiffs' claims or acting on behalf of the plaintiffs to obtain from Japan a settlement of their claims.[3]

[3] In a separate part of its Brief, Defendant contends that the San Francisco Peace Treaty "gave the United States and its Allies the right to seize and dispose of public and private Japanese assets located within their territories." Def. Br. p. 16. As a matter of law, the Treaty did no such thing. The Japanese assets that were seized during the war had been confiscated as enemy property, and title thereto had vested 100% in the United States at the moment of seizure. The United States had no legal obligation after the war to return any of this property to Japan or to Japanese citizens. The only reason the text of the Treaty stated otherwise was presumably to help the Japanese delegates at San Francisco save face. (A similar howler occurs in defendant's "Statement of the Case", Def. Br. p. 2: "As part of the settlement of war claims, Japan authorized the Allies to seize property of Japan and Japanese nationals in their respective countries." In fact the property had been seized many years before. And "authorization" by Japan, which at the time of the asset seizures was at war with the United States, probably never

Second, defendant argues that during the Senate hearings on the ratification of the San Francisco Peace Treaty, the clarificatory amendment proposed by one legislator that nothing in the Treaty shall be construed to abrogate the claims of private citizens was "overwhelmingly rejected" by the Senate. Def. Br. p. 13. Defendant would like this Court to believe that the rejection was an endorsement by the Senate of the opposite view: that the Treaty did indeed abrogate the claims of private citizens. Defendant's position is meritless generally as well as specifically. Generally, the failure by Congress to pass a bill (or, in this case, a proposed amendment) clearly does not mean that Congress has enacted into law the opposite of the bill's provisions. Specifically, the reason why *all* proposed amendments to the San Francisco Peace Treaty were rejected by the Senate in 1952 — as anyone who reads the entire hearings can plainly see — was the realization that any amendment would require the assent of Japan as well as all the other Allied Powers who signed the treaty, thus necessitating a second San Francisco Peace Conference whose outcome, the next time around, might be in doubt. For both these general and specific reasons, it is illegitimate to

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occurred to any official in either the United States government or in the Japanese government except perhaps as an attempt at wartime humor.)

infer from the defeat of a single proposed amendment that the Senate was taking any position on its merits.

Third, defendant quotes an observation in the Second Restatement of Foreign Relations Law and an obscure comment in an 1801 case to support its notion that the United States may give away its nationals' claims without paying for them. Def. Br. pp. 15-16. But the Second Restatement has long been superseded by the Third Restatement which defendant pointedly does not quote. As for case law, defendant unaccountably fails to inform this Court about the most recent Supreme Court case that is directly in point on this issue and which reaches the exact opposite conclusion. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981), cited in Opening Brief of Appellants p. 20 n.3. The Supreme Court held therein that if the international agreement between the United States and Iran resulted in a taking of private property, the petitioners could resort to the Court of Claims for the adjudication of that issue and to obtain appropriate redress. 453 U.S. at 689.

(b) Defendant's second contention is that the statute of limitations was triggered automatically when the San Francisco Peace Treaty was ratified in 1952. Def. Br. p. 12. Defendant does not refer to the terms of the San Franisco Peace Treaty, but instead relies on three other

cases presumably on the theory that if you've seen one treaty you've seen them all. In the first of defendant's cited cases, Alliance of Descendants of Texas v. United States, 37 F.3d 1478 (Fed. Cir. 1994), the plaintiffs who relied on the 1941 Treaty Between the United States and Mexico were Mexican citizens to whom the Takings Clause of the Fifth Amendment did not apply. But in the present case, the plaintiffs are American citizens to whom the Takings Clause of the Fifth Amendment clearly applies. More significantly for present purposes, this Court in Alliance of Descendants pointed out that the United States could be liable to the Mexican plaintiffs if its involvement in the treaty-making process with Mexico warranted its responsibility under the Fifth Amendment. This Court quoted from its previous decision in Langenegger v. United States, 756 F.2d 1565, 1572 (Fed. Cir. 1985), that "in determining whether a taking exists, where a foreign government's actions are involved, the focus of the inquiry is the same as that undertaken in a domestic taking case: the court must consider whether the United States' involvement . . . warrants its responsibility under the fifth amendment." As applied to the present case, this language mandates a factual inquiry into the United States' involvement in the San Francisco treaty-making process to

see whether that involvement gives rise to responsibility for a taking under the Fifth Amendment. The present case simply cannot be disposed of by a motion to dismiss. Defendant's reliance on Alliance of Descendants is an implicit concession that a trial is necessary. The trial will include the circumstances and negotiations surrounding the San Francisco Peace Treaty in order to determine whether the United States took plaintiffs' claims in violation of its Fifth Amendment obligation to pay just compensation. On information and belief, defendant has all the pertinent records, documents, and memoranda in its possession and has not made them public. Plaintiffs have a right to inspect these documents as part of the adversary process.

The two other cases cited by defendant are similarly unhelpful to its argument. Seldovia Native Ass'n, Inc. v. United States, 144 F.3d 769 (Fed. Cir. 1998), is not a takings case at all; it held only that administrative reshuffling of land parcels did not constitute a governmental taking. In Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States, 373 F.2d 356 (Ct. Cl. 1967), cert. denied, 389 U.S. 971 (1967), a Philippines corporation attempted to sue the United States for waiving the corporation's claims against Japan in the

San Francisco Peace Treaty. Like Alliance of Descendants, the Japanese War Notes case is factually inapposite because foreign nationals are the claimants and hence the Fifth Amendment does not apply to them. Moreover, the Court of Claims determined that the United States in the San Francisco Peace Treaty only waived the claims of American nationals. The claims of nationals and corporations of the Philippines were not affected by the waiver that the United States made in the Peace Treaty.

If defendant had perused the actual text of the San Francisco Peace Treaty, it would have found that the text proves the opposite of its contention that the treaty was finalized in 1952. Article 26 of the Treaty provides:

> Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.

Def. App. p. 55. This most-favored-nation clause shows that the terms of the treaty affecting the United States were open-ended as of 1952 and have remained open-ended ever since. The clause provides that if Japan were to enter into peace treaties with nations that did not ratify the San Francisco Peace Treaty, any advantages granted to those nations by Japan would accrue to the states party to the San Francisco Treaty including the United States.

On information and belief, plaintiffs alledge that Japan subsequent to 1952 has entered into at least eleven separate peace settlements with various nations who had not signed the San Francisco Peace Treaty. Included in these settlements were payments explicitly earmarked for the nationals of those countries in order to compensate them for their pain and suffering during World War II. Defendant has in its possession the documents relating to these payments as well as possible memoranda detailing additional payments made off the record. The present case should be remitted to trial in order to ascertain the facts relevant to the defendant's contentions that the Treaty became effective in 1952 and plaintiffs' claims accrued in 1952. Plaintiffs have the right at trial to inspect the relevant documents in defendant's possession. Illustrative of relevant facts that plaintiffs have discovered on their own in advance of trial is the peace settlement of 1955 between Japan and Switzerland in which 2,426,693 Swiss francs belonging to Japan were distributed by Switzerland directly to Swiss nationals as settlements for the personal injuries of the said nationals inflicted by Japan in the course of World War II. Other peace settlements include payments by Japan to Burma of $20,000,000 in 1954, by Japan to Indonesia in the amount of $233,080,000 in 1958, by

Japan to the Philippines for $25,000,000 in 1956, and by Japan to Vietnam for $39,000,000. The Japanese National Diet Library reportedly concluded that Japan has paid out more than $27 Billion under the terms of the 1951 treaty and in state-to-state settlements. Congressional Research Service, U.S. Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan, RL 30606, at 25 (2001). As each of the aforesaid eleven or more nations entered into settlements with Japan, the United States Department of State presumably took cognizance of all the facts and circumstances. This information has not been made public. In addition, defendant presumably has memoranda of conversations among high government officials, at the time of the conclusion by Japan of each of the settlements with the eleven or more nations, discussing whether the United States should exercise its rights under Article 26 of the San Francisco Peace Treaty to insist on equally advantageous payments in order to compensate American nationals for their personal injuries inflicted by Japan during World War II. Presumably those discussions reached conclusions to the effect that although the United States is entitled to obtain such monetary compensation from Japan, it declines to do so for various reasons of state.

(Perhaps the State Department even reminded the Japanese Ambassador on one or more of those eleven occasions that the United States was once again waiving the claims of its nationals as a political favor to Japan in order to help the Japanese economy.) Since these documents may reasonably be presumed to contradict defendant's assertion on appeal that the San Francisco Peace Treaty became effective as a final matter in 1952, defendant's assertion cannot be accepted by this Court as a reason to dismiss the plaintiffs' claims in the absence of corroborating evidence. Plaintiffs are entitled to a trial that would include discovery of the relevant documents in the defendant's possession.

Since the United States has continuously enjoyed on at least eleven occasions the potential to recoup all or nearly all[4] of the value from Japan of the claims of American nationals that were waived in the San Francisco Peace Treaty, it is impossible to draw the conclusion that

[4] The uncertainty in the text as to "all or nearly all" reflects plaintiffs' lack of information compared to defendant's. The United States would appear to have a right under Article 26 of the San Francisco Peace Treaty to an amount for each of its own nationals equivalent to the highest per capita payment by Japan to the nationals of the eleven or more nations that made separate settlements with Japan. Defendant has in its possession all the relevant records. On information and belief, plaintiffs anticipate that this highest per capita amount, in today's dollars, would exceed the total damages they demand.

all the necessary facts the plaintiffs needed to perfect their cause of action ended in 1952. The treaty was deliberately left open-ended. Each subsequent decision by the United States not to exercise its rights under Article 26 is a separate step that effectuates a taking without just compensation under the Fifth Amendment. Indeed, since Article 26 places no time limit upon the signatories to demand most-favored-nation treatment, it is possible even today that defendant can obtain from Japan all or nearly all the value in today's dollars of the plaintiffs' claims that the United States waived in 1952. Thus, although there was a taking for a public purpose of the plaintiffs' claims in 1952, plaintiffs' cause of action has not yet accrued because it remains open for defendant *under the Treaty* to pay just compensation to the plaintiffs by collecting an equivalent amount from Japan as provided in Article 26 and hence to reduce the quantum of the Takings Clause violation or even eliminate the violation altogether.[5]

(c) Defendant's third argument is that there was no taking because the government believed that there was no

[5] Plaintiffs make no mirror-image argument that the six-year statute of limitations bars the United States from redressing its Fifth Amendment violation, even though fifty years have passed since the United States waived plaintiffs's claims at San Francisco.

taking. Despite the fact that it bases its Motion to Dismiss on the argument that there was a taking in 1952 that is now time-barred, defendant somehow steps outside the argument to raise the incompatible claim that there was no taking at all in 1952. Defendant announces a new rule of constitutional law that a taking does not occur unless the United States "believes" that it has effected a taking. Def. Br. p. 15. Among the many inconsistencies and take-backs in defendant's brief, one that deserves passing mention here is defendant's argument that "there can be no question that plaintiffs had actual notice of their potential cause of action" in 1952. Def. Br. at 13. Presumably the plaintiffs' "actual notice" occurred at the same time as the government's active disbelief in 1952 that there was any taking that any citizen could complain about.

In any event, the question whether the government in 1952 believed that it had not effected a taking of plaintiffs' claims is a factual question that should be aired at trial. It is a matter of evidence derivable primarily from records and documents in the defendant's possession. It cannot be disposed of in a Motion to Dismiss. If the defendant succeeds in proving at trial that some officials in 1951 and 1952 in fact believed that they were not taking the plaintiffs' claims, plaintiffs

reserve the right to argue, among other things, that those officials made a mistake of law.

D. Defendant's Assertion that Just Compensation Was Actually Paid Is Preposterous.

Defendant asserts that the United States paid just compensation to the plaintiffs pursuant to the War Claims Act of 1948. Def. Br. pp. 16-17. Plaintiffs had previously stated in their prayer for relief that their damages should be reduced by "the amounts the United States paid to them and other claimants following the War Claims Act of 1948 (in present-day dollars)." Compl. at "Wherefore" paragraph (US App. pp. 18-19). Thus there is no question that the War Claims payments have been gratefully acknowledged.

But it is preposterous for the government to suggest that the small monies paid to the plaintiffs in the 1948 period constitute just compensation within the meaning of the Fifth Amendment. The value of the War Claims fund was not calculated on the basis of the plaintiffs' injuries; rather, it was an unrelated sum consisting of the value of confiscated Japanese property. The fund was distributed to the plaintiffs. If the War Claims Fund had had a value of one dollar, then one dollar would have been divided up and

distributed to the plaintiffs. Defendant cannot plausibly argue that, whatever the dollar worth of the fund happened to be, its mere distribution ipso facto constituted "just compensation" as mandated by the Fifth Amendment. Nor can defendant plausibly argue that the actual amount received by plaintiff Gilbert Hair, whose share of the fund was based on the classification mandated by Congress and applicable to all the plaintiffs, constituted just compensation. Defendant knows, but presumably could not bring itself to mention in its brief, that Mr. Hair was paid fifty cents for each day of his debilitating internment in the Philippines. Compl. ¶ 27 (US App. p. 15).

CONCLUSION

For the foregoing reasons as well as those contained in plaintiffs' Opening Brief, the judgment of the Court of Federal Claims should be reversed and the cause sent back for trial.

Respectfully submitted,

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