

UNITED STATES COURT OF FEDERAL CLAIMS

MARCIA V. ACHENBACH, et al.,)
)
) Plaintiffs,)
)
v.) Docket No.: 02-894C
)
THE UNITED STATES,)
)
) Defendant.)

Pages: 1 through 72
Place: Washington, D.C.
Date: April 18, 2003

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MARCIA V. ACHENBACH, et al.,)
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 Plaintiffs,)
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 v.) Docket No.: 02-894C
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 THE UNITED STATES,)
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 Defendant.)

Courtroom 7, Room 508
 National Courts Building
 717 Madison Place, N.W.
 Washington, D.C.

Friday,
 April 18, 2003

The parties met, pursuant to the notice of the
 Court, at 9:02 a.m.

BEFORE: HONORABLE EMILY C. HEWITT
 Judge

APPEARANCES:

For the Plaintiff:

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P R O C E E D I N G S

(9:02 a.m.)

1

2

3

THE COURT: Good morning. Please be seated.

4

MS. BLEECHER: Good morning, Your Honor.

5

MR. D'AMATO: Good morning.

6

THE COURT: We are on the record in Case
7 No. 02-894C, Marcia V. Achenbach, et al. v. The United
8 States. We are here for oral argument on Defendant's Motion
9 to Dismiss. Let me ask if there are any housekeeping
10 matters before I have the parties introduce themselves and
11 return to the argument. Good morning, sir.

12

MR. D'AMATO: Good morning.

13

THE COURT: Any housekeeping matters before we
14 turn to argument for the Plaintiff, Mr. D'Amato?

15

MR. D'AMATO: It's not quite a housekeeping
16 matter, but I'm wondering whether you're looking at this as
17 a summary judgment proceeding.

18

THE COURT: When you argue, you can suggest how I
19 should look at it.

20

MR. D'AMATO: When I what?

21

THE COURT: When you argue, you can suggest how I
22 should look at it in that regard. I understand there's
23 matters potentially outside the pleadings that we might
24 consider.

25

MR. D'AMATO: From the questions you asked, I was

1 wondering whether that was in the Court's mind right now?

2 THE COURT: When you argue, you can suggest how I
3 should consider it.

4 MR. D'AMATO: All right.

5 THE COURT: Thank you. Any housekeeping matters?

6 MS. BLEECHER: No, Your Honor.

7 THE COURT: Thank you very much. All right, if
8 the parties would follow my suggestion, the Plaintiff would
9 make the opening argument. The plan further for the Court
10 is to go in rounds, approximately 30 minutes, approximately
11 20 minutes, approximately 10 minutes.

12 MR. D'AMATO: Again, good morning and thank you
13 for setting aside this much time where we can be all by
14 ourselves and deal with this, I think, very important case.

15 I would suggest that the briefs were predicated on
16 the government's Motion to Dismiss for Failure of
17 Jurisdiction and therefore, while in the course of my
18 argument, and in the course of answering the questions, I
19 think I'm going to spill over into some questions, which
20 would necessarily be of a factual matter. This is kind of
21 inevitable because the government doesn't concede every
22 fact. It only concedes the facts that are reasonably proven
23 and there's a big dispute over what those might be.

24 So by and large, my thrust would be that we need a
25 full ventilation of these arguments and a full trial with

1 discovery as oppose to the trial today. But be that as it
2 may, one other related matter is that the Court says it's
3 unlikely to be persuaded by further argument that it has
4 jurisdiction over Counts 1, 2, 3, 4 and 5 of the
5 Complainant's complaint.

6 Granted, and yet, in answer to Question 4, Your
7 Honor, where was the action of the United States, which has
8 claimed to have effective the taking legal/illegal,
9 authorized/unauthorized, legitimate/illegitimate. The
10 answer that I would propose here is that it was illegitimate
11 with respect to Counts 1 through 5, and legitimate with
12 respect to Count 6.

13 So in a way, by almost a fortiori argument, I'm
14 back to Counts 1, 2, 3, 4 and 5, not on the merits, but
15 simply saying, as I did in a response to one of the
16 government's arguments, that if the government of limited
17 powers, under the Constitution, exceeds those limited
18 powers, not because it's acting as a sovereign, but because
19 it's acting unconstitutionally, illegally, then the
20 government is responsible for the damages that occurs.

21 Now this is not a tort claim because in a tort
22 claim, for example, the government can defend on the ground
23 of military necessity, as you point out in one of your
24 questions. So it's not a tort claim that I'm saying, but
25 rather, if the government violates, for example, a person's

1 right to freedom of travel back to his homeland and the
2 purpose is to set him up as a target for a war. If that's
3 all true, then the government has acted unconstitutionally
4 with respect to his freedom of travel.

5 And we're not claiming that the government should
6 pay a price for this. Obviously, the money mandated
7 argument of the government is correct with respect to
8 violation of the Constitution. You can't say, well, the
9 government denied me my passport, so therefore I can sue.

10 THE COURT: Well, you could but it just wouldn't
11 be here.

12 MR. D'AMATO: No, you couldn't sue here.

13 THE COURT: It wouldn't be now and it wouldn't be
14 here.

15 MR. D'AMATO: All right, but you could bring an
16 injunction.

17 THE COURT: Precisely. My point is on those
18 things however I might have restructured the law
19 differently, starting as an original matter on this, that's
20 not the way the jurisdiction of the Court looks that you
21 could sue here about those matters.

22 MR. D'AMATO: So you would say that an ordinary
23 federal district court could hear Counts 1 through 5,
24 perhaps, but not this Court.

25 THE COURT: Right. I meant to say this right at

1 the beginning because this is a case which is particularly
2 apt for -- I don't like the phrase "devil's advocate." We
3 need to find another way of saying that, but I do take
4 positions in argument. The only position I really take is
5 in my opinions. I take positions in argument that are
6 hypothetical.

7 MR. D'AMATO: Excellent, I appreciate that.

8 THE COURT: I just want to be clear that if I say
9 something -- well, isn't it the case that.

10 MR. D'AMATO: I'm quite familiar with that. I do
11 it with my students every day.

12 THE COURT: I thought you might be. It's a
13 socratic comment, yes.

14 MR. D'AMATO: With respect to that argument.

15 THE COURT: With you, it's socratic. With me,
16 it's the devil, excuse me.

17 MR. D'AMATO: With respect to the argument that
18 this Court's jurisdiction is narrower than that of a federal
19 district court --

20 THE COURT: Different, I prefer to say.

21 MR. D'AMATO: Different, but it does seem strange,
22 given the fact that this is a Court of Federal Claims and
23 that all cases, based on the Constitution, are allowed here.
24 So to say that we have a narrower jurisdiction.

25 THE COURT: All cases are based on constitutional

1 provisions which mandate the payment of money of which there
2 are three or four.

3 MR. D'AMATO: Well, that's right but that's been a
4 gloss been put on it. That's not the statute itself.
5 That's not the Tucker Act itself.

6 THE COURT: Yes.

7 MR. D'AMATO: And the Tucker Act itself doesn't
8 have any such restriction.

9 THE COURT: But I am a trial judge, and in the
10 greater order of things --

11 MR. D'AMATO: You'll leave that for the appellate
12 court to decide.

13 THE COURT: That maybe right, but in a static
14 sense it's wrong. In a static sense of what I must contend
15 with when I write in order not to be a judicial activist.

16 MR. D'AMATO: I appreciate that. And I just
17 wanted to say, though, then that you understand that I would
18 argue that the government's action was illegitimate with
19 respect to Counts 1 and 5 because in order to do its action,
20 it's violating the Constitution.

21 With respect to Count 6, the reason I answer your
22 very pointed question the other way that it's legitimate is
23 because under the takings clause, we would concede that the
24 government has taken the lives and property of these people
25 for a public purpose.

1 THE COURT: I'm going to come back to the lives
2 part for a second, but on the legal/illegal -- we picked up
3 legitimate/illegitimate. Would you care to deal with my
4 other dualities of legal and illegal and authorized and
5 unauthorized?

6 MR. D'AMATO: Yes, well, with respect to the
7 illegitimate, Counts 1 and 5, I would say it was certainly
8 illegal.

9 THE COURT: That's your answer, illegal?

10 MR. D'AMATO: Illegal, yes. And unconstitutional
11 if you wanted to put that in there, too.

12 THE COURT: Does that mean that with respect to
13 Count 6 it was legal? You know the line of cases I'm in
14 here, right?

15 MR. D'AMATO: Yes, and what I'm saying is that the
16 property, with respect to Count 6, was taken for a public
17 purpose, but just compensation hasn't been given yet.

18 THE COURT: Let me ask again, more pointedly, was
19 it legal in the sense that at least this is the type of
20 thing that executives do? Do you see where I'm going? I'm
21 trying to understand where you are in terms of the history
22 of the takings law in this area.

23 MR. D'AMATO: Right, I would say that it's
24 analogous to, if not exactly the same thing as an inverse
25 condemnation case. If the government opens up a dam

1 intentionally and it floods the drainage basin and the
2 farmer's house is swept away by the waters, that's inverse
3 condemnation and the farmer can recovery.

4 THE COURT: And the government's business is to
5 make decisions about opening up dams.

6 MR. D'AMATO: That would be for public purpose.

7 THE COURT: They're trying to deal with a
8 situation of aridity.

9 MR. D'AMATO: That's right. No one can say to the
10 government you can't do this because it's illegal. They
11 certainly can do it. They only have to pay for it. And in
12 this case we would argue, under Count 6, that the government
13 for the purposes of Count 6 in the greater public interest
14 kept these people in the Philippines in harm's way. And
15 like the waters of the dam, the Japanese army surged in and
16 did what anybody could have expected them to do. Namely, to
17 attack, kill and imprison these people. Precisely, the
18 outcome that the government wanted for the purposes of
19 Count 6.

20 We're saying, if that's true, and if all of that
21 is proven factually, then the government has no right not to
22 pay these people for the losses they incurred because the
23 losses they incurred was for the general public good.

24 THE COURT: Let me ask about the
25 authorized/unauthorized as well, just your comments on that,

1 because I'm sure you've thought about all of these linked
2 pairs.

3 MR. D'AMATO: Yes, a harder question, of course,
4 if you take away Counts 1 through 5, the action that
5 Roosevelt took was illegitimate, it's hard to say that it
6 was authorized. Now in a sense, the President of the United
7 States has a certain power to, just like we saw President
8 Bush has a certain power to go into Iraq. And one would say
9 was that authorized or not? Well, in the larger sense it
10 was, but in a smaller sense, you might say Congress has the
11 power to declare war and the president does not.

12 So unless we characterize the President's act,
13 it's not a war against Iraq, but rather a police action,
14 then, perhaps, it was authorized; perhaps, it wasn't. Here
15 I would say, that the if the American public had known that
16 President Roosevelt in order to stir a complacent and get
17 them galvanized to fight Japan, would actually sacrifice up
18 to 7 or 8,000 American citizens, I think everybody would say
19 that is clearly unauthorized. In fact, it's impeachable.

20 THE COURT: Isn't that the remedy?

21 MR. D'AMATO: It could be a remedy, but the
22 impeachment would not be in the Plaintiffs' control. It
23 would be in the House of Representatives.

24 THE COURT: But very little of what the President
25 does is in the control of an individual.

1 MR. D'AMATO: The President has a what?

2 THE COURT: Very little that the President does is
3 in the control of an individual.

4 MR. D'AMATO: That's right. So therefore, in a
5 sense, getting back to authorized, the President's action
6 with respect to you and me is authorized by his office. But
7 that doesn't mean that he can't act unconstitutionally or
8 illegally. He might. So it depends on how you look at it.

9 If I were the president, if I were in Roosevelt's
10 shoes, and I said the only way to get us into war against
11 Japan is to have Japan strike first. And the only way to
12 make that a big issue is to have them strike, not on the
13 Philippines which is becoming independent and the American
14 public couldn't care. But on Americans in the Philippines,
15 that makes it a far more vital issue. Now we are rising to
16 the self-defense of our people. I would be given pause. I
17 might say, well, maybe the reason I'm not the president is
18 because I hate to make that kind of decision. I would not
19 be the sort of person who could make that.

20 Now President Roosevelt had an alternative. He
21 could have broken his promise to the American people. The
22 promise I will never send your sons into war. In October
23 1940, he got elected.

24 Between 1940 and 1941, he had a year to work the
25 fireside chats and all the other things available to office

1 to teach the United States that the Hitler menace was so
2 credibly important to stop that we had to intervene in this
3 war. And everyone would say, well, you're breaking your
4 promise and he said exactly right. I have learned since
5 then that we cannot allow this kind of totalitarianism to
6 take over Europe because sooner or later it will take over
7 the United States.

8 Therefore, his alternative would be to break his
9 promise and go to work. Or keep his promise and engineer it
10 so that the Japanese would attack the Philippines and kill
11 and imprison a number of American citizens. Thereby,
12 pushing us into the larger and more important action, which
13 is to fight Japan earlier rather than later. This ties in,
14 in a way, with your military necessity point, Your Honor.

15 THE COURT: That is my next question. You've
16 gotten yourself out of answering Count 5 by your answer to
17 Count 4. Now you're on Count 6.

18 MR. D'AMATO: Right, it's a good a time as any to
19 tie it up because I might say, from Roosevelt's point of
20 view it was politically necessary to do this. That is, to
21 get the United States public galvanized behind a war effort,
22 but militarily it wasn't. Because his advisors, the
23 Secretary of War and all his generals were telling him the
24 very thing that the Defendant quotes.

25 Mr. Stinson quoted and I quoted the same language

1 that said that normally speaking we would like to attack at
2 a time and place of our own choosing. We know a war is
3 coming with Japan. From the military point of view, it's
4 absurd to get hit first. There's no military justification
5 for that, but there is a political justification. And that
6 is, that Roosevelt wants to keep his promise and he figures
7 this is the way to get the American public galvanized to
8 fight a war. So political necessity, yes. Military
9 necessity, quite the opposite. Militarily, the best advise
10 at the time was to pick a time and a place and hit your pan
11 hard and knock them out of the war. That we didn't do.

12 THE COURT: So let me have that answer again in a
13 summary. Assuming the action, how is the claim affected by
14 the doctrine military necessity? You think it's not
15 justified by military necessity?

16 MR. D'AMATO: That's right.

17 THE COURT: And how is this Court suppose to
18 determine that?

19 MR. D'AMATO: Excuse me?

20 THE COURT: What's the juris prudence in this
21 Court that would get me into that discourse of deciding
22 whether things, if this were moved, are or are not military
23 necessities? How would I get into that?

24 MR. D'AMATO: Well, one way you would get into it
25 is, is to ask the Defendant whether they want to make

1 that claim. And then, let's see what they can prove. They
2 would have to show to your satisfaction that keeping
3 civilians, the vulnerable civilians -- women, children and
4 everything -- in the Philippines was militarily important.
5 Now, I mean, that almost boggles the mind. I don't see how
6 they could do that.

7 Keeping a garrison there or fortifying the
8 garrison, we were undermanned in the Philippines, that might
9 be a matter of military necessity. But putting citizens in
10 harm's way could not possibly help the war effort. Just
11 like in the Persian Gulf War in 1990, President Bush had the
12 foresight to remove some 5000 Americans from Iraq before the
13 invasion. And later, a few months after it all happened,
14 Saddam Hussien said the biggest mistake he every made was
15 letting those Americans out. I mean, there they were as
16 hostages.

17 THE COURT: Doesn't it say some where in the
18 briefing that it made more sense, militarily, just to make
19 sure this isn't moving around on me here, and maybe it's in
20 Ms. Bleecher's briefing, but it made more sense militarily
21 to have a first attack at the Philippines rather than Pearl
22 Harbor simply because their military assets were more
23 limited there?

24 MR. D'AMATO: That's right. From President
25 Roosevelt's point of view and all the books that I've read

1 about him and his closest biographer said he was Navy man.
2 He felt that the American power lay in its fleet. He
3 resisted Churchill's adjurations to move most of the fleet
4 to the Atlantic. He kept, actually, most of it in the
5 Pacific. Doing all this because that was his prize asset at
6 Pearl Harbor. So that would boggle the mind. If I were a
7 judge and somebody said, well, did Roosevelt set up Pearl
8 Harbor? I would say you would really have to prove that one
9 because every piece of logic that I know in my mind tells me
10 that, that's an absurd proposition.

11 THE COURT: Let me press, actually, my first
12 question, what property was taken?

13 MR. D'AMATO: Well, that leads to a big question,
14 too. First of all, there was considerable personal
15 property. As we allege with respect, for example, to the
16 named Plaintiff, Gilbert Hare.

17 THE COURT: Actually, Ms. Achenbach is the name
18 here.

19 MR. D'AMATO: No, I'm sorry, not Gilbert Hare.
20 Yes, Gilbert Hare, page 41 of the brief, Count 85, Hare left
21 behind their house and Buick automobile, furniture, silver,
22 china, art work, crystal, oriental rugs, antiques and
23 jewelry. All of which were later confiscated and removed by
24 the Japanese. So a lot of people in the Philippines had
25 built up, over the years, substantial assets of

1 considerable worth.

2 But I also want to argue, Your Honor, and I
3 thought about this a lot before I came here, how to put it.

4 And that is, you might say, well, the Constitution doesn't
5 have a clause in it that says if the government takes your
6 life, it has to give you fair compensation.

7 THE COURT: It talks about private property. Some
8 of the briefings says "personal property," but that's not
9 correct. It's private property.

10 MR. D'AMATO: Right, but that would include a
11 house and personal property.

12 THE COURT: The phrase "life, liberty and
13 property," and I thought in some of your briefing, and maybe
14 you could discuss this with me a little bit, that you were
15 moving into the private property, which occurs in the last
16 clause of Amendment 5, "the life, liberty and property"
17 concepts, which are in the due process clause that just
18 precedes it.

19 MR. D'AMATO: That's right. That's quite right
20 because in the factual part of the brief, and everything
21 leading up to the counts, I was setting the stage for all
22 six of those counts.

23 THE COURT: Right, but I also saw, when you were
24 in Count 6 that you seemed to be thinking about the time
25 lost, some of those kinds of things within the concept of

1 private property.

2 MR. D'AMATO: Yes, and that's the point I want to
3 get to right now. And that is, there's two ways of reading
4 "property" in the Constitution. One is to say it applies
5 only to property and that lives or liberty taken by the
6 United States for public purposes is noncompensable. Only
7 property is compensable under the takings clause. That's
8 one way to read it.

9 But another way to read it is to say that, that
10 would be a strange construction of the Constitution. If
11 somebody at the constitutional convention had asked James
12 Madison, well, what about if the government were to take
13 life, shouldn't that be included? I think his answer would
14 be that's assumed.

15 I mean, when the government can't take your
16 property away, obviously, they can't take your life away.
17 It's just that we wouldn't put that in there because if we
18 did, the Constitution would say if the government ever takes
19 the citizen's lives, liberty or property for a public
20 purpose, they must pay compensation. Other countries,
21 looking at the constitution, or other people even thinking
22 of ratifying it would say, you mean the government has in
23 mind taking a person's life away. It's so extravagant that
24 you wouldn't bring that up. You wouldn't put it in.

25 Rather, if property has to be compensated, a

1 fortiori, killing a person is taking away his property. His
2 property in his body and his future earnings. I think
3 that's necessarily assumed.

4 THE COURT: The general measure of takings damages
5 is fair market value, if the taking is permanent and rental
6 value if it's temporary. How would you apply that?

7 MR. D'AMATO: What you would do is you look at the
8 statistics, Lexus and other companies that say what is this
9 person's future earnings, discounted at the present moment.
10 That's his property, in a sense, what he's going to earn
11 over the course of his lifetime and that's several hundred
12 thousand dollars.

13 THE COURT: So these are basically tort measures
14 type?

15 MR. D'AMATO: That's right, yes. Because that is
16 really the only thing we can say a life is worth. We can
17 hardly say, like Immanuel Cant, that a life is of infinite
18 worth. But we can, and we always do, put some kind of
19 property or numerical evaluation on it.

20 THE COURT: I'm trying to fit that into the
21 concept of -- the takings has a concept of a moment in time
22 when the taking occurs the valuation is made.

23 MR. D'AMATO: Right.

24 THE COURT: What's the moment in time in this
25 case?

1 MR. D'AMATO: Well, like the flood waters, the
2 moment in time is when the Japanese entered these people.
3 That's when their property was taken. So the whole thing
4 was consummated at that point, but the Plaintiffs had no
5 idea that they were set up by the United States. That's our
6 statute of limitations argument.

7 THE COURT: Okay, why don't you turn to that?

8 MR. D'AMATO: Our people obviously knew that they
9 were tortured, killed and everything by the Japanese and
10 they were outraged. But it never occurred to them that the
11 United States could have set them up for a grander political
12 sacrifice; namely, to get the United States into war. And
13 commendable, though, that might have been. I'm not arguing
14 that it wasn't. I said that Roosevelt had an alternative,
15 which was to break his promise, but either way was
16 commendable. We had to do it. We couldn't let Hitler take
17 over the world.

18 Nevertheless, these people, when they began to get
19 an inkling that they may have been set up, they came to me.

20 And we have a letter in the affidavit that we sent in. So
21 my argument on the statute of limitations is to say that the
22 government -- if you're saying that I or someone else should
23 have come up with that argument sooner, what you're really
24 saying is that an argument that nobody has ever come up with
25 is defeatable when somebody comes up with it. Because you

1 can always say that somebody should have done it sooner.

2 I think that puts a tremendous chilling effect on
3 innovation on the part of lawyers. I mean, I wouldn't have
4 come up with this argument by reading the books because it's
5 been suppressed. It's all been covered up and hidden. The
6 official historians have said nothing about it. The
7 government documents, you'd have to search far and wide to
8 find little pieces of this argument and nobody ever put it
9 all together. So if somebody does it for the first time,
10 how can that be too late?

11 THE COURT: Is the fact that something is
12 classified, does that constitute fraudulent concealment?
13 That was the last question on this. If you know at some
14 point that there's this series of tapes and they've been
15 archived fairly in archives in terms of time and subject
16 matter, and I'm not talking about what the content of an
17 individual transcript or intercept is. I'm talking about
18 the concept of telephone logs.

19 MR. D'AMATO: I don't think so, Your Honor. I
20 looked over the entire list that the government provided and
21 there was nothing about Roosevelt or presidential talks or
22 correspondence. It was never mentioned. They say we should
23 have studied the classification. It's not classified. It's
24 not in there. It's been totally suppressed.

25 THE COURT: It's your briefing, however, calls out

1 that segment. You say in your briefing very clearly, and
2 I'm just trying to understand the moving targets here, that
3 in, and then you mention a particular classification series.
4 I forget the number, 216, that there is your smoking gun or
5 some similar language.

6 MR. D'AMATO: That's right.

7 THE COURT: Is that fraudulent concealment, the
8 fact that it's classified?

9 MR. D'AMATO: It's alleged.

10 THE COURT: I mean, that's what your briefing
11 says.

12 MR. D'AMATO: To the best of our information, it
13 was in 216. Now they've come forward and said this is the
14 content of 216 and it has nothing about it in there. Now my
15 guess is that they could find it if they wanted to, but we
16 couldn't. It would take me 30 years of arguing with
17 bureaucrats at the National Archives to find something where
18 they're going to say we're not going to do a search for you.

19 If you can't tell us where it is, we don't know about it.
20 But there must be somebody there who knows about this

21 Because if you look at inventory from the National
22 Archives, it was given as part of the government's appendix,
23 we find that nearly all the dates are from 1942 to 1945 --
24 '43 to '45. Very few have anything to do with 1941. In
25 other words, that whole year that I'm talking about is not

1 even in here. But when there is a mention of it, for
2 example, in item 43, it says "source materials to deleted
3 obsolete reports below 3000 were destroyed." In other
4 words, in 1941, '40 and '41, perhaps, the first 3000 items
5 were destroyed. And so since source material for censorship
6 daily reports 1941 to '45 begins with item 3003, which
7 already puts us into 1942. So the destruction of government
8 records, I think, is fraudulent concealment.

9 THE COURT: Let me just ask you to give your Bates
10 or page number, if you have it, that you're referring to
11 now.

12 MR. D'AMATO: The government's brief has a long
13 title "Defendant's Motion to Stay Discovery or For
14 Protective Order Pending Resolution of Defendant's Motion to
15 Dismiss." It has an appendix to it and the appendix has
16 "Declaration of Stephen Tilley," and then in tab B it has
17 "Guide to the National Archives of the United States." And
18 on page 24 as numbered by the Defendant as appendix page 24,
19 there is this item 43 that says, "source materials to
20 deleted, obsolete reports below 3000 were destroyed."

21 So as I said, it would take me 30 years, and
22 probably with no result, to try to find this. But there
23 must be somebody in there who knows precisely what we're
24 talking about because these have been concealed by the
25 government. And you say why is it fraudulent? Because

1 there is no legitimate reason to conceal them anymore. All
2 the players are dead.

3 This is not a matter of like spying or something
4 like that where somebody who can be brought to account
5 anymore of something they did. This is concealment for the
6 purpose of keeping these allegations from the American
7 public. It's too shameful. It's too shameful to say that
8 we set up citizens to do something like this. And nobody
9 wants to own up to it and the only way I can through light
10 on this is to go to court and sue, which is what I'm doing.

11 Perhaps, the government would come back and show
12 me that I'm wrong. But I think there's a smoking gun there
13 and I think it almost had to be because Churchill and
14 Roosevelt were in such close consultation over the entire
15 issue, as I try to lay it out in the historical part, that
16 they were coordinating, as they coordinated throughout the
17 entire war, their military strategies.

18 Churchill was constantly importuning Roosevelt to
19 get into the war. Get the Germans off our backs. Please
20 come. And Roosevelt kept saying I can only do this if
21 there's a provocation. Well, the Germans did not oblige.
22 The United States, for example, blew up some of the German
23 ships on the Atlantic and Hitler didn't even protest. He
24 certainly would have. He could have said, look, you've
25 violated your neutrality. That's an act of war and dah,

1 dah, dah. Instead, he just bit his lip and went on because
2 he didn't want to fight the United States. It was the wrong
3 foe at that time for him.

4 THE COURT: We'll be coming back to this, but why
5 don't you come to the conclusion of this 30 minutes and tie
6 up.

7 MR. D'AMATO: Just to tie it up with one more
8 sentence is that Roosevelt must have said to Churchill, I
9 think it's a reasonable inference, that we'll get into the
10 war. We will help you out, but we have to do it a different
11 way. We can't do it through Germany. We'll have to do it
12 through Japan, and we'll have to do it by getting the
13 Japanese troops out of the north that the Soviet Union can
14 do the main job of wearing down Hitler's armies and we will
15 divert the Japanese.

16 So if that wasn't discussed, one can't imagine
17 what they were talking about. And that's why I think
18 there's a presumption here that those records are there.
19 They can be brought to light. They should be. We should
20 own up to our history. We shouldn't continue to conceal.
21 The American public aren't children. We should know about
22 these things because they're part of what we did and maybe
23 it'll make us better people in the future if we know about
24 it. Have I done my 30 minutes?

25 THE COURT: You've done your 30 minutes.

1 MR. D'AMATO: All right, thank you.

2 THE COURT: Maybe even 31, professor. I don't
3 know.

4 MR. D'AMATO: Thank you.

5 THE COURT: We'll talk to you in a little while.

6 MS. BLEECHER: May it please the Court, this whole
7 argument by Professor D'Amato serves to demonstrate, from
8 our point of view, why this action does not belong in this
9 Court. This Court is not a body that should hear
10 speculation and hypotheses about history and try and help
11 Mr. D'Amato and the Plaintiffs rewrite history based on what
12 their view of some facts and lots of speculation is. This
13 Court is a court of narrow jurisdiction. The Court's
14 jurisdiction is defined clearly and the Court can only
15 listen to actions that give rise to money damages. And as
16 we've argued in our brief, the only claim that potentially
17 could be before this Court is the takings claim. And that
18 claim can only be as it relates to taking of personal
19 property.

20 THE COURT: What about real estate?

21 MS. BLEECHER: Yes, real estate is property.

22 However, there could be an argument that this gets into the
23 merits, but even if the United States had evacuated the
24 Plaintiffs, it's questionable, what, if anything, could have
25 been done about physical property that had to be left

1 behind. But that's a question for another day that I don't
2 think will be aired in this Court.

3 But the Constitution does make clear that the
4 deprivation of life, liberty and property is protected by
5 due process and there are legal remedies for that, but not
6 in this court and the case law is very clear on that. That
7 only the taking of personal property without just
8 compensation gives rise to a claim in this Court.

9 THE COURT: Private property.

10 MS. BLEECHER: Private property, thank you.
11 Excuse me. The Federal Circuit and the Supreme Court have
12 repeatedly endorsed the limited -- I know the Court doesn't
13 like the government's view, but our argument is that this
14 Court has limited jurisdiction. It's well-defined and it's
15 been well-defined.

16 THE COURT: The reason the Court sometimes
17 bristles is because there is no such thing, except possibly,
18 the court of Pharaoh that is not a court of limited
19 jurisdiction.

20 MS. BLEECHER: I agree with that, Your Honor.
21 Courts have the authority that Congress has given them. And
22 Congress has clearly defined the jurisdiction of this Court
23 as opposed to other courts. And in this Court the
24 Plaintiffs may have a takings claim for their personal
25 property and real estate that was destroyed or taken by the

1 Japanese in the second world war. But first of all, we
2 don't think the Plaintiffs are alleging a proper takings
3 claim. And if they are, it's clearly barred by the statute
4 of limitations.

5 THE COURT: Well, let's focus on the Buick.

6 MS. BLEECHER: On the Buick, okay.

7 THE COURT: The Hare family lost their Buick in
8 the service of World War II.

9 MS. BLEECHER: Yes, and as Mr. D'Amato admitted
10 and the complaint and the pleadings are clear, the Japanese,
11 if anybody -- now I don't if anybody could say the Buick was
12 lost.

13 THE COURT: Well, there is a line of takings
14 authority that the United States can do something that
15 allows a third party to act and the third party's actions
16 are essentially instrumental. That's a theory. The United
17 States, the hand of the constable or the GSA or Army Corps
18 of Engineers does not have to be the hand that actually
19 takes the thing.

20 MS. BLEECHER: That's correct. And in fact, there
21 are cases even closer, I'd point, like the Langenegger Case
22 where they looked at where another foreign government has
23 done the taking. And there, the question becomes where the
24 United States Government had sufficient, direct and
25 substantial involvement so as to hold the United States

1 responsible for the taking and for just compensation. And
2 we say that's not present here.

3 That the actions, although, I didn't hear
4 Mr. D'Amato plainly address what actions the United States
5 took to effect the takings, it appears that the actions that
6 they're talking about are putting restrictions on travel,
7 which we believe the United States Government clearly had
8 the authority to do. And it was making policies --

9 THE COURT: Well, let me tell you where the case is
10 from my viewpoint at the moment. I understand the
11 Plaintiffs to have conceded in the prior argument that all
12 of the actions that deal with the restrictions on travel, et
13 cetera, are all illegal actions. So that we are left with
14 the thing that we began here talking about, which is the
15 instrumentality. If I've misstated, which is very possible,
16 Professor D'Amato, you'll have that opportunity to correct
17 the conclusion that the Court drew.

18 But my Question 4 has taken out -- we know that
19 takings actions can only be actions that are authorized in
20 the general sense. Sometimes technically illegal. Turning
21 the dam on at 3:00 o'clock in the afternoon when you're only
22 allowed to turn it on at 4:00, nevertheless, of the type of
23 action that you were authorized to do, which means all of
24 the things that are described in Counts 1 through 5 of the
25 complaint are, in my view, based on the prior colloquy out

1 of the case because of the very strong view of the Circuit
2 and the Supreme Court that we are not providing a taking
3 remedy for actions which are tortious or violations of the
4 authority of the United States.

5 MS. BLEECHER: I agree.

6 THE COURT: So the only action is now the action
7 of the Japanese.

8 MS. BLEECHER: The action of the Japanese
9 physically taking or destroying the Plaintiffs' personal
10 property in an act of war. Because it's our strong view
11 that the taking of life and liberty by the Japanese is not
12 even -- cannot even, as a matter of fact, be attributed to
13 the United States, but as a matter latter cannot give rise
14 to a just compensation claim.

15 So what we're left with is the Japanese taking and
16 destroying property as an act of war. And if we can't look
17 at the acts that the United States took that the Plaintiffs
18 claim were illegitimate and lead to them being left in
19 harm's way, then I don't know what's left.

20 I think Mr. D'Amato had trouble coming to grips
21 with being able to say that the United States actions were
22 lawful because they obviously believe that they were
23 unlawful or they were improper or immoral or illegitimate or
24 whatever word you might put. That, that's again our reason
25 why we say this isn't a takings case.

1 This is a tort. This is an attempt to rewrite
2 history. This is something but it's not a takings case
3 because the government's action, if anything, were political
4 and military decisions, which this Court certainly can't
5 review. Otherwise, there's really no direct, substantial or
6 it's hard to even say what action the government took that
7 put them in harm's way.

8 Can the government use someone's property as bait
9 in order to bring about some action that some other foreign
10 government takes their property? Again, you have to look
11 at, as a takings, the nature of the government's action.
12 Here the nature of the government's action were effecting
13 travel restrictions and making military strategy decisions
14 that, first of all, don't constitute a takings. And second
15 of all, they're political questions beyond this Court's
16 jurisdiction to review. So straight to the bare bones, it's
17 sort of like the analysis that Judge Bashir did in the El-
18 Shifa Case where if the Plaintiffs want to argue that the
19 government's actions were illegitimate that they did this
20 horrendous thing. And it would have been horrendous to use
21 citizens and their property as bait in order to entice an
22 enemy to attack us. Then it's not a taking by the very
23 words of the complaint it's taken it out of the takings
24 juris prudence.

25 But, if the government's military strategic

1 decisions are what resulted in what the Plaintiffs claim was
2 the harm done to them by the United States, then those are
3 political questions and perhaps issues of military necessity
4 that are beyond the view of this Court. So either way this
5 case should not be in this Court and certainly, it should
6 not be in this Court at this time.

7 THE COURT: The Plaintiff has, I think, got us
8 into this discussion about the 216 series in the
9 classification of documents. Give me a hornbook, if you
10 will, on how the Court should think about concealment and
11 documents classified documents and what types of showing it
12 would take to make available to the Plaintiff the types of
13 documents which the Plaintiff believes exists? These would
14 be executive; namely, the Prime Minister of Great Britain to
15 executive; namely, the President of the United States,
16 conversations of a strategic nature.

17 MS. BLEECHER: Certainly, it's beyond legal
18 dispute that the United States Government has the authority
19 to make decisions with regard to national security,
20 including classification of documents. And this Court, nor
21 any court, has the authority to question that, to override
22 that or to direct the government to somehow declassify
23 documents that the executive, in its authority, has
24 determined to be classified.

25 THE COURT: So you're saying that if I were to

1 look at that classification that was entered into under the
2 memo, the classified executive writes a memo to President
3 Truman after Roosevelt's death and President Truman signs
4 off on a memo which says the classification of a document
5 series which, for the purposes of discussion is presumed to
6 include documents that would evidence some of the claims
7 that the Plaintiffs have made, that those can only be made
8 available publicly per order of a president.

9 MS. BLEECHER: Yes, Your Honor.

10 THE COURT: Now is there any circumstance under
11 which this Court could obtain those documents? Do you have
12 to make formal claim of executive privilege to protect?

13 MS. BLEECHER: Yes.

14 THE COURT: Has the United States done that here?

15 MS. BLEECHER: No.

16 THE COURT: Why or why wouldn't you?

17 MS. BLEECHER: Well, first of all, Plaintiffs have
18 made no showing of whether these documents even exist. We
19 certainly know that there were communications between
20 President Roosevelt and Winston Churchill. And we know, by
21 history, some of the nature of the topics that were
22 discussed, but the conversations that Mr. D'Amato attributes
23 to the president and the prime ministers he was just talking
24 about at the end of his argument are really nothing more
25 than his saying, well, this happened and that happened. I

1 don't accept the official explanation of why. So I'm going
2 to believe that something different happened. And that's
3 really just mere speculation.

4 And one thing we haven't talked about here is the
5 presumption of good faith on the part of the government.
6 And even in a pleading on a motion to dismiss, the Plaintiff
7 has to come up with something more than just speculation to
8 survive a motion to dismiss on those kinds of allegations,
9 the government fraudulently concealed information or that
10 the government took some wrongful action.

11 As a matter of fact, President Clinton issued an
12 executive order that directed the National Archives to
13 declassify certain World War II documents. And had a list
14 attached of some of those documents. I apologize. This
15 isn't in the pleadings. It's public record. I can give you
16 the executive order. Attached to that executive order, and
17 again, this is in 1995, two years before the statute of
18 limitations ran on this case and eight years before the
19 complaint was filed, attached to that was a list of
20 documents that were covered by the executive order. And one
21 of those was Record Group 216.

22 Now after that it said Record Group 216, a
23 thousand pages or 1200 pages or some number of pages, which
24 it looks like is significantly less than the number of
25 pages, including the reels of microfilm that are identified

1 in the NARA documents that we've submitted to the Court. So
2 as I understand NARA's position, there's some question
3 exactly what that meant.

4 THE COURT: For the record, NARA is N-A-R-A and
5 it's the National Archives of American Administration.

6 MS. BLEECHER: Thank you, Your Honor. In fact, no
7 one, to the best of my understanding, has come to the
8 Archives in light of the executive order and said we want to
9 see those declassified documents. And because of the large
10 task involved in going through the huge volume of
11 declassified documents covered by that executive order,
12 generally, and by Record Group 216 and particular in the
13 Census Office and so forth, that hasn't been undertaken to
14 date.

15 So while Mr. D'Amato speculates that somebody at
16 NARA must know that these documents exist, I don't believe
17 that's true because of the large volume of documents. There
18 is a potential for some of these documents to be made
19 publicly available, but there hasn't been any request to
20 have that done. So we don't know whether, first of all,
21 precisely what this executive order applies to and whether
22 there are any such transcripts and if there are, whether
23 they're within that group or anywhere else.

24 So it's all a lot of speculation. But in fact, to
25 go way back in answer to your question, there's a

1 possibility that the Court wouldn't have to direct the
2 government to do anything. And there's a possibility we
3 wouldn't have to declare state secrets because at least some
4 documents in that group where Mr. D'Amato seems to think the
5 transcripts he believes exist reside, there's some
6 possibility that some of those documents should no longer be
7 classified. There may also be, however, other reasons why
8 those documents would be kept from the Public Privacy Act
9 and other reasons. Those are decisions NARA would make at
10 the appropriate time.

11 THE COURT: There are a couple of things I want to
12 ask about. One of them is the one that was mentioned at the
13 beginning of Mr. D'Amato's remarks; namely, in his
14 housekeeping comments actually, which is, this is a motion
15 to dismiss and how does the evidence that we've looked at
16 and of course, the briefing play into that.

17 Then I'll ask you, under our rules, whether this
18 is from your view a 12B1 or a 12B6, whether it's
19 jurisdictional. I would like you to talk about how you see
20 the case from that point of view procedurally.

21 Before we turn to that, just so you know that's in
22 the background, you just mentioned a sort of standard.
23 Maybe you can give me some authority or where I should look
24 for it, a standard about what the Plaintiff needs to achieve
25 in its pleadings in order to overturn the presumption of

1 good faith on the part of the government.

2 MS. BLEECHER: Well, it's a question that I know
3 for a fact the Circuit struggles with in totally other
4 context where a plaintiff has a burden of showing -- the law
5 is that the plaintiff has the burden of establishing
6 jurisdiction based on the well-pleaded complaint. And a
7 well-pleaded complaint includes at least alleging the
8 various elements of whatever their claim is.

9 And one way to look at it would be the plaintiff
10 has to at least put forth enough evidence, which, if proven,
11 would meet their burden of proof in order to survive a B6 or
12 even a B1 motion to dismiss. That a plaintiff just can't
13 make up things out of whole cloth and speculate as to
14 something that happened or why it happened and expect to
15 survive a motion to dismiss without anything that could
16 possibly support that.

17 THE COURT: Where does the motion, in your view,
18 on the statute of limitations fall?

19 MS. BLEECHER: As a B1. The statute of
20 limitations is a further limitation on the Court's
21 jurisdiction. And unless the Plaintiffs can bring the case
22 within the statute or give grounds for towing, if towing's
23 available. And we've argued that it's not under 2501. But
24 assuming it is, the towing requirements which we've argued
25 in our brief, they have not.

1 THE COURT: State the arguments. I want might
2 want to turn to this with Mr. D'Amato in the next round.
3 Would you address the statute of limitations defense that
4 they United States has here and tell me if that result in a
5 dismissal with prejudice?

6 MS. BLEECHER: Yes, it certainly should. Our
7 argument is that it's obviously long pass six years since
8 the events giving rise to the claim. The only claim that
9 survives is a takings, as the Court mentioned. The cause of
10 action accrues when the taking occurs, whether it can be
11 towed. It's our position that the Plaintiffs had more than
12 sufficient evidence in the public records in addition to
13 their own personal knowledge of what happened to them with
14 respect to traveling and comments that were made.

15 That the fact that Congress had extensive hearings
16 after the end of the war looking into the motives of the
17 president behind getting us into the second world war. And
18 the fact that people have been speculating, as the record
19 shows, since December 8, 1941, that the president set up
20 Pearl Harbor to fall to entice Japan and get us into the
21 war, just changing the words to "the Philippines" just isn't
22 that big of a stretch. And that the Plaintiffs, based on
23 both the historical evidence and historical speculation out
24 there that they could have and should have come up with
25 their theory sooner.

1 In fact, their case works just like it's suppose
2 to work. They knew of the harm and they knew who did the
3 harm to them. They knew the Japanese actually inflicted the
4 harm, but they knew that the United States had taken certain
5 actions that they now believe resulted in their being stuck
6 -- well, they knew they were stuck in the Philippines. They
7 didn't know why. But they knew that by actions of the
8 United States they were not allowed to leave the Philippines
9 according to their argument.

10 I'm just assuming these facts to be true for the
11 purposes of the motion. So they knew that because of the
12 United States actions they were not allowed to leave the
13 Philippines. So they knew that the subsequent harm, which
14 is their argument, befell because they were stuck there. So
15 it wasn't until Ms. Achenbach, apparently, according to her
16 affidavit, had some thought that maybe the United States
17 bore some responsibility that she sought out a historian and
18 she sought out Mr. D'Amato after first going to the library
19 and looking up the 1946, '47, '48 transcripts of
20 congressional hearings.

21 And then, Mr. D'Amato looked back at historical
22 documents that had been out there for decades and jimmied up
23 this theory that he has about why certain events in history
24 happened. That could have been done earlier. The Supreme
25 Court case in the Korematsu Case, which is a medical

1 malpractice case, and a federal tort claims act case, and
2 obviously, different on the facts, but they said in that
3 case there's nothing in the record to show that they
4 wouldn't have gotten the same advice had they undertaken
5 their obligation earlier.

6 And the law is clear in this Circuit that the
7 obligation on the Plaintiff is due diligence and that the
8 Plaintiff can't just sit, knowing about the harm and knowing
9 about the cause of the harm, they can seek out legal help to
10 find out if that amounts to a cause of action. And they did
11 that here and they should have done it decades earlier.

12 Thank you.

13 THE COURT: Thank you. I don't have further
14 questions at this time. I think we're in a round in which
15 we might want to turn to the statute of limitations and some
16 of those other questions. So I thank you and we'll speak
17 again.

18 MS. BLEECHER: Thank you.

19 THE COURT: Mr. D'Amato, does that raise some
20 issues that you'd like to address?

21 MR. D'AMATO: Thank you, yes. Well, just picking
22 up on the last point that we could have done this earlier,
23 and the concession that there has to be due diligence, we
24 accept that standard. But if there was ever a case of due
25 diligence, it's a case where nothing, no individual,

1 including all the professional historians who have been over
2 this material have ever suggested that the people in the
3 Philippines were set up by President Roosevelt.

4 Yes, there was a lot of talk about Pearl Harbor,
5 but that deflected the issue. It's wasn't Pearl Harbor. It
6 was the Philippines that was the main effect. As I said,
7 Pearl Harbor was a surprise to the president.

8 THE COURT: How does the so-call morale argument,
9 which has been, obviously, around since the '40s, interact
10 with this? This is, we don't want to look like we're
11 running.

12 MR. D'AMATO: That's right. And if that had any
13 credibility, we wouldn't have removed the wives and the
14 dependents of every service person in the island. We would
15 have said, obviously, they're there and the soldiers are
16 there and they're going to be protected. But we pulled all
17 those people out because we knew that a war was coming and
18 we didn't want those people exposed. So anybody looking at
19 it from the Philippines point of view would have said, well,
20 if you're evacuating the wives and children of your own
21 service personnel, that's much significant to us than if
22 you're not evacuating a bunch Americans who chose to come
23 here in the first place, after all.

24 THE COURT: Let me ask you to make that argument
25 again. There's something a little counter-intuitive about

1 saying that it's not good for morale to leave the civilians
2 there. Wouldn't that be the best thing for morale?

3 MR. D'AMATO: Well, if morale was important. I
4 don't think there's any evidence that President Roosevelt
5 cared at all about the Philippines. He said they're a pain
6 in the neck. The sooner we get rid of them the better. He
7 wasn't trying to boost up the morale of the Filipino people
8 by leaving 10,000 Americans on the island.

9 And as I say, it contradictory to his policy of
10 pulling out all the dependents of the service people who
11 were staying there. Many of them were wives, children,
12 elderly, who were stationed there because the troops were
13 there for a very, very long periods of time and brought
14 their families with them. All those people were shipped
15 out, but these people were not. And to say that the
16 Plaintiffs knew that by the United States' action they were
17 not allowed to leave the Philippines, as Ms. Bleecher said,
18 I think is completely wrong. The Plaintiffs were given the
19 runaround. It was a bureaucratic thing.

20 They said, well, yes, you can leave if you have
21 your passport. But we can't give you your passport because
22 the Secretary of State in Washington has to tell us that.
23 Well, suppose they finally get it. Well, there has to be a
24 visa on it. And if somebody actually go to the trouble of
25 doing that, the boats that were leaving were military boats.

1 We can't take civilians.

2 So the bureaucratic runaround was done to
3 perfection here, but it was all orchestrated by the United
4 States so the U.S. wouldn't be in a position where somebody
5 could say to them you forced these people to stay there. In
6 fact, there were exceptions. If you were a business person
7 having business in the United States, you could have gotten
8 a visa to go. So the government was really saying, we don't
9 care if a couple of people leave the island. The ones who
10 make the most noise. The ones who can yell and scream in
11 the papers. As long as we leave some several thousand
12 people there, that's enough.

13 So this isn't speculation. I've cited things in
14 the brief like, for example, we did not warn Sumatra and
15 Java, Americans on those islands. We didn't warn them to
16 leave because they were south of the Philippines. And if we
17 had warned them to leave, the people in the Philippines
18 would say, hey, you're warning people who are even farther
19 away from Japan than we are. So why aren't you warning us.

20 So we didn't warn them. I mean, it was that carefully
21 done. That little scrap of paper that I found in the
22 government records probably was a mistake for the government
23 to have let it in. Because clearly, the government went
24 through and redacted and pulled out everything having to do
25 with this subject. It just can't be found.

1 And when you say, well, anybody could have looked
2 it up, we are in an information glut in this country. If
3 you say you can look something up, the question is, what
4 question do you ask? No one ever asked this question
5 because I had a client who wanted to know and I'm trying to
6 be doing due diligence to my client, then I begin to search
7 the record with a different question in mind, one that had
8 never been asked before.

9 Then I begin to find tiny little tantalizing
10 scraps, like we didn't warn Borneo and Sumatra because they
11 were south of the Philippines. But we didn't warn Hong
12 Kong. We didn't warn China. We did get Americans out of
13 all of those other countries, but not out of the Philippines
14 for that very reason. It begins to look like an
15 orchestration. I don't know how much more the government.

16 THE COURT: What was the question that you were
17 asking that you thought hadn't been asked before?

18 MR. D'AMATO: The question was, were these people
19 deliberately sacrificed to bring on the war. That question
20 was never asked. I don't know of any historian who has ever
21 asked that question. If a professional historian hasn't
22 asked it, it simply shows that the government has been very
23 successful in diverting attention away from that subject.

24 The early historians who wrote about this, and
25 when the government says, well, we quoted all people from

1 1994, '45 -- well, if we quoted recent people, they would
2 say but those are official historians. Those are
3 revisionists. So I'm going back to the real source. I'm
4 talking about the people who wrote the official histories of
5 the U.S. Army, the official State Department documents, all
6 those things that were official sources. Those are the ones
7 I've quoted. On those, I think, we have presented a
8 circumstantial evidence case that's overwhelming, not
9 speculative. Although, everything in the world is
10 speculative. Legal argument, by nature, is speculative.
11 But we've presented overwhelming, circumstantial evidence
12 case that could be enough, I think, to convince this Court
13 that the burden has shifted to the Defendant.

14 But if this Court is not convinced, then we're
15 saying in the government's possession we believe are the
16 exact statements that would prove it. The smoking gun idea.

17 We think they have those statements and getting them out of
18 the government is not any different than getting them out of
19 Enron or getting them out of Worldcom or those companies.
20 The Defendant has the records. We're entitled to them.

21 THE COURT: Let me just ask, what does President
22 Roosevelt and Prime Minister Churchill, what does their
23 conversation add to the facts here? And the facts are the
24 following -- that the Hares and Ms. Achenbach's family and
25 others had this horrible experience of being quite a long

1 way from their home country, although, it's U.S. territory
2 at that point. People being, basically, unable to leave and
3 not advised that it would be smart to leave. And then,
4 terrible things happen all in a period of time of in the
5 '30s and '40s.

6 Now they know those things. Those two bad things,
7 they didn't get out and they didn't get advice about getting
8 out, which they know.

9 MR. D'AMATO: That's been proven, I think,

10 THE COURT: Your records are not in dispute. So
11 if that doesn't constitute, what more does having
12 conversation add to it. Isn't that the taking? Isn't that,
13 on the ground, what happened? I'm trying to understand what
14 history adds to this; particularly, since in the takings
15 context, there aren't bad acts. Taking, no matter how bad
16 it is, that happens to you when the sand builds up on your
17 front porch such that you can't get out your front door
18 because of something the Corps of Engineers is alleged to
19 have done. No matter how bad your unhappiness in the
20 takings world, I'm not talking about the due process world.
21 I'm talking about the takings world, no matter how much
22 unhappiness befalls you, it was for a public purpose. It
23 was authorized, for the purpose of taking, legitimate,
24 legal. I don't see what a bad act, even if one were proven
25 by Prime Minister Churchill in cahoots with our President

1 what difference that would make.

2 MR. D'AMATO: Okay, because in an inverse
3 condemnation cases, the courts have tended to want to proof
4 deliberate action, deliberate as opposed to inadvertent or
5 negligence. And it's conceivable that the government could
6 have argued here that all the passport controls and
7 restrictions were just the way things happened in those days
8 and there was no plan behind it. It just happened that way.
9 There were travel restrictions all over the place and
10 military ships couldn't take on individuals and citizens.
11 And the one commercial carrier had certain restrictions and
12 it was not deliberate.

13 I'm suggesting we have enough proof, I think, for
14 an inference for you to infer from all this that it was a
15 deliberate taking. I think we've said enough. But if you,
16 the judge in this case, as the factfinder now, not as the
17 giver of law, but sitting as the jury, you might say. As
18 the factfinder in this case, if you are not convinced that
19 the circumstantial evidence proves the government's more.

20 THE COURT: We don't have guilt in takings. We
21 have cause and effect. One of the difficulties I have with
22 the case in terms of trying to help us articulate it here
23 today, is why I'm asking these questions about taking
24 because that's where I think the case goes if it goes
25 forward, is to try to get it into the juris prudence of taking.

1 MR. D'AMATO: Right, let's leave the guilt out.

2 THE COURT: There are two things that need to
3 disappear from this case if it goes forward as a takings
4 case. One of them is bad acts and the other is guilt.

5 MR. D'AMATO: Let's leave those things out, but
6 let's just talk about intentionality. Was this an
7 intentional act on the part of the government to bring about
8 a --

9 THE COURT: Intentional is not necessary. Keep in
10 mind your dam example, which I quite agree with you. They
11 turn on the dam at 4:00 o'clock. The people who are
12 downstream lose their crops because they haven't got their
13 gates closed because always on every other day it was turned
14 on at 6:00 o'clock. So now they've lost their stuff. I
15 mean, it can be, in that sense, unintentional. They intend
16 to open the dam. They don't intend that somebody lose their
17 entire lily-planted field.

18 MR. D'AMATO: And like I said, the Japanese forces
19 are like the waters that flood out of the dam. They're the
20 foreseeable harm causers, but the question is, who invited
21 them in. And if the United States precipitated World War II
22 with Japan by starting this act of war as the Defendants
23 call it, then we can't exclude that. If the United States
24 brought on the act of war, it would be like opening the dam.
25 And these people then, under the 5th Amendment, can make

1 the claim that it was for a public purpose. Yes, President
2 Roosevelt felt that the largest purpose here -- I mean, he
3 wasn't a killer. He wasn't a bad person. None of that's in
4 the case.

5 He simply had a larger purpose in mind, which was
6 to get this country into the war as soon as possible to stop
7 Nazism and to stop Japanese fascism and these people were
8 the sacrifice that he decided were necessary to do that. So
9 the taking was for a public purpose. All we're saying is
10 that there has to be compensation and that it never occurred
11 to anyone that the U.S. was responsible for this
12 compensation because if it had occurred to someone, the
13 government by now would have cited some historian or
14 somebody else who has said this, but nobody said it. So it
15 when it comes up for the very first time to say that it's
16 too late, it's never too late when it's the first time and
17 that's the best you can do.

18 If I were around in 1950 as a lawyer, I was a kid
19 playing World War II games in my backyard, but if I were a
20 lawyer, I still wouldn't have looked up this aspect unless
21 somebody came to me with a case. That's how the legal
22 system works. It's triggered by somebody who says I think I
23 might have a claim against the U.S. Government, I think.

24 I don't know, but I'm beginning to think,
25 especially, with these slave labor cases on the West Coast

1 and some of the agitation and all the holocaust things were
2 people for many years did nothing about holocaust claims and
3 lately, it's all come to the forum. Now this is something
4 that's very much in the air. These people said maybe we
5 have a claim, and I said, well, let me see. I'll look it up
6 and see if you do. I'm not going to jump in and sue just
7 because you say you have a claim. But as I read the
8 circumstantial evidence, to me, it's convincing.

9 I would like to see how the government would rebut
10 this evidence except by the way their doing it, which is to
11 say it's all speculative. I think that's not a rebuttal at
12 all. But if they want to say that anything that I've said,
13 factually, is not true, then I'd like to hear what that is.

14 It seems to me that I've given a deliberate motive for the
15 incarceration of these people on the Philippines and keeping
16 them in harm's way.

17 And what I don't have is the actual statement by
18 Roosevelt that this was his deliberate motive. I infer
19 that, but I think the case would be a lot stronger if we had
20 that deliberate statement because then it takes away the
21 possibility that this was just a bureaucratic snafu of
22 gargantuan proportions. So for that reason, we should.

23 You ask what the action of the United States here
24 was, a question I didn't get to. The actions of the United
25 States was passport control, visa control, use of military

1 ships, pressure on this one civilian carrier not to take
2 people even from the Philippines to Singapore. You couldn't
3 even get to the United States triangularly.

4 And the control over all these facilities
5 orchestrated by the State Department, through Ms. Kitter's
6 office in the Philippines that we cited. She wrote 5000
7 letters for people who wanted to get out for one reason or
8 another, telling them that they didn't have this or they
9 didn't have that. She had a lot of work to do in creating
10 this bureaucratic tangle.

11 And yet, the person who assured them, Commissioner
12 Sanger, who assured his closest friends that they were in no
13 trouble, he, at the same time, was looking to get out and he
14 did. He escaped with his life and his family, but he left
15 all his friends and all those innocent people behind. And
16 similarly, McArthur, when he saw that he was undermanned, he
17 took off for Australia. The situation that the leaders were
18 looking out for themselves and their dependents.

19 And in those days, they didn't care that much for
20 the wives of American citizens. I think we care a lot more
21 now. I think since the holocaust cases, we've come to
22 realize the trauma a lot people have felt. And this is a
23 miniature holocaust kind of case. I think that these
24 people, it's not that many, but these people are civilians.
25 They're like anybody. They could be me. They could be

1 you, anyone who happened to be there, who began to think
2 that maybe they were in a danger zone and their government
3 wouldn't let them out for all kinds of bureaucratic reasons.

4 To me, that's enough to be an inverse condemnation. But it
5 would be strengthened by actual proof of the matter, not
6 only in this Court but on appeal if after a trial, an
7 appellant court said, well, the judge below was willing to
8 accept circumstantial evidence but we're not.

9 We want to see -- so, yes, I do want to enlarge
10 the record and they're sitting on it. And when they say
11 that national security is a complete barrier and gives the
12 Court no authority for U.S. Courts to question documents
13 that are held for national security purposes, that's a
14 misstatement. What about the Pentagon Papers case? The
15 claim was national security and the court said no. The
16 Supreme Court said you don't hide behind the national
17 security tag. I mean, that's just a tag like speculation is
18 a tag. I mean, these are tags. They're not arguments.

19 THE COURT: When you finish the sentence, that
20 sounds like actually a fairly good place to return to the
21 United States. I actually didn't hear them say national
22 security, but I'll let Ms. Bleacher --

23 MR. D'AMATO: I wrote down that they said that
24 there's no authority for U.S. Courts to question the
25 classification of these documents.

1 THE COURT: I'll let her address that in a little
2 more detail.

3 MR. D'AMATO: All right, but I certainly think an
4 order by this Court is the only way to get this information.
5 Now they can come back and say this would endanger living
6 people. All right, let them say that. Let them say who is
7 living now and who is going to be endangered by the release
8 of this information.

9 But if they don't have, national security is --
10 we're three wars away from that war already. The only
11 people who are suffering are like Gil Hare who was just in
12 the hospital the other day for complications extending from
13 his childhood experiences in the camp. They're still
14 suffering, but everything else is history. And I think they
15 have a right to go to court and say I want my day in court.

16 I want to be able to prove this thing so that I can get
17 payment for the sacrifice that was extracted from me by the
18 U.S. Government in order to achieve a public purpose.

19 THE COURT: One more question, why isn't this
20 reparation political movement?

21 MR. D'AMATO: A reparation's bill?

22 THE COURT: Yes.

23 MR. D'AMATO: Well, it would not be inappropriate
24 to have a reparation's bill, but who's going to sponsor it?
25 They hardly paid my car fare here. I mean, these people are

1 very, very poor. You need a lobbying effort of immense
2 proportion.

3 THE COURT: I mean, not unlike the 40-some years
4 elapsing between Korematsu and reparations and the Civil
5 Rights Act of '88.

6 MR. D'AMATO: The difference was in Korematsu the
7 Congress, the President and the military all determined that
8 these people were a security risk and that issue was
9 adjudicated by the Supreme Court in that case. So they were
10 done. They had done everything that the could at the time
11 and they lost. We haven't even had Day One yet on this
12 issue. And since we haven't and since it wasn't a Supreme
13 Court case, there's no public outcry about this. People are
14 more worried about Iraq than they'll ever be about what
15 happened in World War II.

16 A court is a legitimate forum for bringing claims
17 of this type, whether Congress, through a private bill and
18 reparations, is an additional forum is something that is
19 always open to people. But I think I can stand before you
20 and claim that we have a right to be compensated and a right
21 that we are attempting to exercise in this Court.

22 Now we may also have a claim for a favor. We may
23 go to Congress and say, do us a favor. But that's the
24 difference between Congress and courts. Courts are to
25 adjudicate claims of right. And so, whether that

1 alternative exists or not, whether it's practical or not,
2 seems to me to be no reason why a court should decline to
3 give jurisdiction when there's a claim of right properly
4 presented.

5 THE COURT: Thank you. Let me turn again to
6 Ms. Bleecher and then back to you for a closing.

7 MR. D'AMATO: I'm sorry?

8 THE COURT: I'm going to turn to Ms. Bleecher now
9 and then I'll turn back to you for a closing.

10 MR. D'AMATO: Good, thank you.

11 MS. BLEECHER: Thank you, Your Honor. Mr. D'Amato
12 just made a very interesting point that I have not
13 understood from their briefs. He said that they can prove
14 their case based on the record that they've put forth in
15 their complaint and they don't really need that controlling,
16 circumstantial evidence and they don't really need these
17 alleged transcripts to prove their case.

18 So if we take the concealment angle out of the
19 case, then that gives even more strength to our towing
20 argument. That because, as a matter of fact, what they did
21 was go back through annals of history and pull together this
22 fact and this theory and come up with the theory that they
23 were harmed and are entitled to some kind of relief. So
24 that only strengthen our argument that this case should
25 be towed.

1 Mr. D'Amato also said it's never too late to bring
2 a claim, and that's simply not the law. Congress clearly
3 established a six-year limitation. And the law in Tolman
4 clearly shows that the defendant doesn't have to wait until
5 the plaintiff can prove their case or even until they know
6 that they have a cause of action. As long as the plaintiff
7 knows the harm that was done to them and by whom, they can
8 seek out legal advice, as they did here, to determine
9 whether that constitutes a cause of action. So that also is
10 just simply inconsistent with the law.

11 In addition, on the concealment issue, no, we have
12 not invoked national security. We were addressing the
13 Court's Question 8 about whether classification of documents
14 constitutes concealment and we say it does not. The fact
15 is, as far as we know, these Plaintiffs never attempted to
16 get those documents, if they even exist.

17 So, I mean, they certainly had the avenue of FOIA
18 and they could have gone to NARA. And if NARA had said, no,
19 these documents are clearly out of reach because of national
20 security, then maybe they had some sort of action under FOIA
21 or something else. Or at least, they have a strong claim to
22 say that the government is keeping these documents from us
23 and have an obligation to turn them over now. So that also,
24 in our view, undercuts their argument.

25 In answer to your question, and to Mr. D'Amato, we

1 think clearly this is a reparations case. We think that if
2 Plaintiffs have any remedy at all at this point in time,
3 based on the allegations, regardless of why they were
4 harmed, one thing I want to make clear to Mr. D'Amato and
5 his clients and the Court is the United States, in defending
6 against this action, in no way is trying to demean or
7 belittle the serious harm and trauma and the tragic
8 circumstances that these Plaintiffs endured on behalf of the
9 American public. But we do, based on the law and based on
10 the facts as alleged, strongly believe this case should not
11 be in this Court at this time.

12 But the Plaintiffs do have an alternative remedy
13 and they could go to Congress and seek some sort of
14 reparations. In fact, I believe that a couple of years ago
15 there were some hearings in front of Congress talking about
16 prisoners of war in the Philippines. And as far as I know a
17 bill was introduced, but nothing went forward. I'm not
18 clear. That may have just been for military personnel that
19 were held, and it may have been in response to the slave
20 labor claims that went forward.

21 I don't really know the genesis of it. But I know
22 that some people have raised the issue with Congress and
23 there was some attention paid to it. Who do the Plaintiffs
24 go to? They go to their own congresspeople. Who better to
25 represent them? That's the whole way that our system works.

1 But our system also works that claims in this Court, first
2 of all, they're clearly defined claims that can be brought
3 to this Court and Plaintiffs have not alleged such a claim
4 and that they must be brought within a particular time
5 period, which Plaintiffs have failed to meet. So for those
6 reasons we think the matter should be dismissed. Do you
7 have questions?

8 THE COURT: I don't.

9 MS. BLEECHER: Thank you.

10 THE COURT: Thank you, Ms. Blecher. To close,
11 Mr. D'Amato?

12 MR. D'AMATO: Well, I, in turn, Your Honor, am
13 surprised by something new. Two things, there were some
14 hearings a couple of years ago that mentioned the
15 Philippines. There were some reclassification by President
16 Clinton, both of which the attorney for the government
17 believes occurs, but doesn't know much about. Well, that's
18 what we need a trial for. Let's find out what was said.

19 If this part of their legitimate argue at this
20 stage to convince the Court that their motion should be
21 granted, they're introducing new evidence that I haven't had
22 a chance to look at and this Court hasn't had a chance to
23 look at. We have to take their say-so on it. So I think
24 that, that's just a reason to have a new trial.

25 Similarly, they said we first need to know from

1 the Archives before we can bring this case. Well, the
2 Archives is not going to give us the convenient answer that
3 Ms. Bleecher suggested; namely, it's here but we can't show
4 it to you or something like that. They're going to say we
5 have no idea whether it's here or not, just because their
6 classification scheme itself says they have no idea.

7 All I know is that many historians have said that
8 both England and the United States took transcripts of these
9 hearings and have never released them. But I don't know
10 whether they're in 216 or somewhere else in a basement
11 somewhere in a cubby hole.

12 And she says I don't believe there is anybody in
13 the National Archives that knows about this. Well, her
14 belief is what, testimony? Are we at a trial now? Why is
15 her belief as to whether such a person exists or not have
16 anything to do with the legal argument here. It may have
17 something to do with a case record, cross examine her and
18 say, well, if you're being a witness and you say you know of
19 no one there, let's get some other witnesses, maybe they
20 would know of somebody there. But to say this is a legal
21 argument at this stage, seems to me to be just totally
22 inappropriate for a motion to dismiss; especially, a motion
23 to dismiss on jurisdiction.

24 Now she made a good point when she said, well,
25 surely, if this case could be based on circumstantial

1 evidence, it could have been brought sooner if we don't need
2 this so-called smoking gun. But that wasn't my contention.

3 I said, Your Honor, you may feel that you need a deliberate
4 statement or the Court of Appeals may feel it needs a
5 deliberate statement. And I'm asking for a trial to be able
6 to bring out a deliberate statement or at least some good
7 reason why it isn't there.

8 I can't just say that it's a slam dunk that what
9 I've written in this brief is enough circumstantial
10 evidence. It may be to me, but after all, I'm partial.
11 Will it be that way to an independent court, both at the
12 trial and appellant level? I don't know. I would like to
13 bolster the case by finding that which the government has in
14 its possession.

15 Similarly, to say that this case could have been
16 proven earlier, I think is a dangerous, dangerous idea for
17 the future. Now that we have Google and other search
18 engines that have zillions of documents out there waiting to
19 be retrieved, it's very possible that any case from now on
20 somebody can say, you know what, if you had done the right
21 Google search, you would have found all that stuff.

22 How can you possibly be -- look at the DES Case.
23 You didn't know who the manufacturers were, so you didn't
24 sue back in 1940 because no one knew who they were taking
25 the pills from. Many, many years later, people sued on the

1 basis of the market share theory. That whatever share in
2 the market the drug company contributed to at the time,
3 that's the extent of their liability. A wholly new theory
4 of tort wasn't thrown out because of the statute of
5 limitations. It wasn't thrown out because a Google search
6 might have found additional evidence.

7 As I said before, we are in an information glut
8 and to say that somewhere out there a person could have
9 pieced all this together and that's the good reason for
10 discouraging anybody from ever trying to do it for the first
11 time seems to me not what the statute of limitations is all
12 about. It's about resting on one's claim. It's about
13 having knowledge, which could have been gotten by due
14 diligence to bring forth a case.

15 And when they say, well, due diligence, after all,
16 the people in the Philippines, some of them knew that they
17 weren't being allowed to leave the island. That's true, but
18 they didn't know why. They thought it was a bureaucratic
19 snafu. It was part of the bureaucracy. They had no idea.
20 It never occurred to anyone, no historian, that Roosevelt
21 may have deliberately set them up to achieve a higher
22 purpose, which was to get this country into a war. That
23 they were the sacrificial persons.

24 They would have known this if it hadn't been for
25 Pearl Harbor. Then it would have come out and Roosevelt

1 would have said, well, it was a bureaucratic snafu. He
2 probably had a good story for that, but the public would
3 have been galvanized and his purpose would have been served.

4 THE COURT: And would a takings case have been
5 brought at that time or a reparations movement in the
6 Congress? What would have happened?

7 MR. D'AMATO: Is this an alternative? I'm not
8 understanding.

9 THE COURT: You've just given a hypothetical,
10 which is, if there were no Pearl Harbor, the Philippines
11 would have been the subject of intense focus in the '40s,
12 you believe.

13 MR. D'AMATO: People would have asked why were
14 those citizens there. That's right. They would have asked
15 that question and therefore, there had to be either cover
16 story or excuse or they might have said what difference does
17 it make. They were attacked. They're American citizens. I
18 mean, they could say, well, it was our dependent. We own
19 the Philippines.

20 THE COURT: Right

21 MR. D'AMATO: They haven't achieved independence
22 yet. So it just happened that a lot of people were there.
23 I don't know what the story was.

24 THE COURT: I'm trying to understand the
25 difference it makes, Mr. D'Amato, these events that befell

1 your clients, that these events were or were not part of a
2 bigger plan. I'm trying to understand what difference that
3 makes.

4 MR. D'AMATO: That allegation, which I'm making --

5 THE COURT: Yes. I'm trying to understand what
6 difference that allegation --

7 MR. D'AMATO: It goes to the intentionality of
8 what happened to these people.

9 THE COURT: What does the intentionality add here?

10 MR. D'AMATO: It adds that element of inverse
11 condemnation of their property. Our government clearly
12 didn't take their property away from them. It was the
13 Japanese, but the Japanese were like the flood waters. And
14 we opened that dam intentionally. It wasn't an Act of God.
15 It wasn't something that the dam walls just broke down. We
16 flooded the plain and even though we didn't intend to take
17 that farmer's house away. We didn't say, we hope the waters
18 will take your house away, nevertheless the courts have held
19 that's an inverse condemnation. I think that smacks within
20 what the government did here.

21 THE COURT: Nevertheless here however, in the
22 context of warfare, that this occurs.

23 MR. D'AMATO: Well, what they are --

24 THE COURT: Do you disagree with me that there are
25 no recoveries for those who are horribly victimized by the

1 fortunes of war?

2 MR. D'AMATO: No. I think there are two classes
3 who are victimized by war crimes do have a recovery,
4 clearly. War crimes gives rise to a tort. Those weren't do
5 not have -- You are right. So there's only been two wars in
6 the history of the world where war crimes have occurred and
7 that's Germany and Japan in World War II.

8 THE COURT: I thought you were going to go with
9 this to say that this is a war crime.

10 MR. D'AMATO: That what is?

11 THE COURT: That this case is a potential activity
12 or the presence of war crimes.

13 MR. D'AMATO: No, no, no.

14 THE COURT: But then there are only two cases.

15 MR. D'AMATO: If there was a recovery against Japan, I
16 thought your question was. Your question was a general one.
17 In the course of a war, does anybody have recovery? I
18 would say, yes, if the perpetrator has violated the laws of
19 war, then they were victims of a illegal act. But
20 destruction by the war itself, there's no recovery for
21 that.

22 THE COURT: Well, that's what happened here, isn't
23 it?

24 MR. D'AMATO: No, because here the United States
25 invited the Japanese to land on these people and round them

1 up and kill them.

2 THE COURT: But then, what you're saying is that
3 activity is authorized. That was our first colloquy. And
4 if it's authorized, then it's part of the conduct of war.

5 MR. D'AMATO: Because the Supreme Court has said
6 many times that the gravamen of the takings clause is that a
7 few people should not be made to pay for a benefit that
8 everybody enjoys. That's what there was imminent domain in
9 the first place. It's true that the government sometimes
10 has to take property, but the people who they take it from
11 shouldn't have to pay if the whole country benefits from it.

12 So therefore, the takings clause was set up to put
13 a restraint on the government to say if you want this
14 property badly enough for a national purpose, and you may
15 very well want it for that you've decided, politically, that
16 you want it for that, you simply have to pay the people
17 their damages.

18 So here, if you want to get into war badly enough
19 that's going to help the entire American -- it's going to
20 save the United States, these particular Plaintiffs should
21 not have to pay to for that. You should pay them for their
22 damages because its the social good that you're promoting
23 and taking away their lives and their property and
24 everything else.

25 THE COURT: By damages, what do --

1 MR. D'AMATO: Damages, I mean property damages in
2 this case. What you said about real estate when they said,
3 well, it's not clear that even if the Plaintiffs had been
4 evacuated, they still might have lost their property.
5 That's not true. They would have sold their houses. They
6 had about 10 months to get off the island and they would
7 have put their houses for sale. They would have taken what
8 personal goods -- their rugs and their antiques with them,
9 just like anybody else. They wouldn't have had to lose it
10 all. So therefore, the market value was taken from them is
11 a property loss.

12 But I also argue, I don't want to let go of the
13 fact that a person's life has a property value as in the
14 tort damages cases. And to say that's not included in the
15 Constitution, it seems me that -- I was going to cite
16 Coulter v. Bull, the early case, 3 U.S. 386 on this point.
17 Judge Chase, at that time, said there were four things that
18 aren't exclusively in the Constitution that are clearly
19 unconstitutional for the government to do.

20 One is to make a law that punishes a citizen for
21 innocent action. There's nothing in the Constitution that
22 says you can't do that, but that would be unlawful. Or a
23 law that destroys the lawful, private contracts of citizens.
24 Or a law that makes a man a judge in his own cause.
25 There's nothing in the Constitution that says you can't do

1 it, but it's clearly implied. Or finally, a law that takes
2 property from A and gives it to B.

3 Now the 5th Amendment only says that property that
4 the government takes for a public purpose. Suppose the
5 government simply says Professor D'Amato, I'm taking your
6 house and I'm going to give it to our good, old friend so
7 and so from the State Department. The government then
8 hasn't taken my property for a public purpose and one could
9 argue that the government has the power to do that.

10 No, says Justice Chase, there are certain things,
11 like the four that he enumerated, that are presupposed by
12 the Constitution. We have a republic of limited governments
13 and these things are presupposed. So when the 5th Amendment
14 doesn't say that you can take lives, but you can't take
15 property without compensation, but you can take lives
16 whenever you want. Of course it doesn't say that. It has
17 to be read that a fortiori, if you take away a person's
18 property, you have to compensate him. If you take away his
19 life, you compensate him, too.

20 THE COURT: Let me just mention that given my
21 status as a trial judge, there are two things that you've
22 said that I know that I must disagree with. One from your
23 briefing, which is that the limitation on the 5th Amendment,
24 just compensation clause, is unconstitutional. That is way
25 above my pay grade to change, given the current state of the

1 law. There is a statute of limitations, whether it's
2 applicable in this case is what you bring to the Court, but
3 there is one.

4 The second is I'm not aware of any authority that,
5 as a trial judge, I can avail myself of to address the
6 question that you've raised about the value of life in the
7 context of the last clause.

8 MR. D'AMATO: Well, the only cases that I think
9 that are on it are those of the negligence cases where it
10 says property but not life.

11 THE COURT: I mean, those are matters which are
12 not matters of what I would regard as somewhat first
13 impression. I think the facts that you're bringing on the
14 circumstances of your clients and the experiences that
15 they've suffered in the Philippines.

16 MR. D'AMATO: Well, Your Honor, I believe and I
17 would imagine that you would agree that any legal and
18 relevant argument is not beyond the province of a trial
19 judge.

20 THE COURT: The decision on it is, to the extent
21 it's contrary to Preston.

22 MR. D'AMATO: But then, I may respectfully suggest
23 the decision should be couched in such a way as to say we
24 don't reach this question because we think it's beyond our
25 province. But we're not deciding it one way or the other.

1 We're saying that the question of, say, the
2 constitutionality of statute of limitation, for one thing,
3 is so beyond the purview of the trial judge that we are
4 simply putting it to one side. We're not deciding it one
5 way or the other.

6 THE COURT: No, it's been decided. The reason you
7 don't decide a question like that is because it has been
8 decided, just to be clear.

9 MR. D'AMATO: No, I had this argument last week
10 and the judge in the Court of Appeals in the Hare Case, she
11 said, no that has never been brought up. And this was
12 Judge Plager, with compensation. He's says I'm hearing it
13 for the first time ever, the argument that a statute of
14 limitations cannot be applied to a 5th Amendment takings
15 case. I said I wasn't insisting on that, but in that
16 particular case, I said at least the government has to say
17 we refuse to pay.

18 This case is even before that. This case is not
19 just that the government is refusing to pay. They're
20 refusing to own up to what I think the clear consequences of
21 what they did are. That, at least, should be ventilated. I
22 should have a chance to show that this was deliberate as
23 well as circumstantial.

24 THE COURT: Thank you, it's a nice place to close.

25 MR. D'AMATO: Thank you.

1 MS. BLEECHER: Very briefly, Your Honor, several
2 points. For one thing, with all due respect to Judge
3 Plager, the Federal Circuit in the East Port Steam Ship
4 Company Case specifically said, and this was on jurisdiction
5 in general, not necessarily on the statute of limitations,
6 but it says that monetary claims that cannot be brought
7 within the Tucker Act's jurisdiction are beyond the Court's
8 jurisdiction, even though they may intimately involve the
9 Constitution statutes and regulations.

10 So we strongly agree with the Court that this
11 Court's jurisdiction vis a vis both the subject matter and
12 the ability of the Plaintiff, after a certain period of
13 time, to bring the case are clearly established.

14 We also respond to Mr. D'Amato's attempt to
15 convince the Court otherwise where he said, well, then the
16 Court simply doesn't reach that issue because it's beyond
17 their province and that's exactly this case as far as we're
18 concerned. That it's barred by the statute of limitations.

19 That it's not a proper takings claim. That they're
20 alleging a tort at best. They're raising political
21 questions that aren't necessarily even relevant to a
22 determination as to whether there's a taking.

23 And in any event, it's way too late,
24 unfortunately, for these Plaintiffs to be seeking redress in
25 this Court or perhaps, any court, but of course, this Court.

1 So for all these matters and for all these reasons and the
2 reasons stated in our brief, we ask that the Court dismiss
3 this case for lack of subject matter jurisdiction. Or in
4 the alternative, if the Court believes that they have
5 alleged a proper takings claim and it survives the statute
6 of limitations, they've still failed to state a takings
7 claim upon which relief can be granted.

8 THE COURT: Thank you.

9 MR. D'AMATO: May have a rebuttal on something she
10 raised for the first time?

11 THE COURT: Certainly, Mr. D'Amato. We still have
12 time.

13 MR. D'AMATO: Very quickly, all Judge Plager said
14 was, not that there weren't cases that decided, as
15 Ms. Bleecher, has said, that's true. It says the question
16 was, was the issue ever brought up in that case about the
17 constitutionality of the statute of limitations? Was it
18 ever, in other words, considered by the Court? And he said
19 he doesn't know of any case that considered that issue that
20 way. Thank you.

21 THE COURT: Thank you very much. I very much
22 appreciate the attention of the parties to the Court's
23 interest for the subjects of the oral argument as well as
24 your preparation on all the issues. This is a case that
25 raises unusual issues. I agree with a statement that

1 Ms. Bleecher made that whatever the judgment of the Court
2 that the legal redress through the Court of Federal Claims,
3 whatever the result of that, that does not in anyway address
4 the experiences that the individuals who were on the
5 Philippines at the time the second world war have had. And
6 addressing those fully are matters beyond the competent of
7 any court. I have nothing further. The oral argument is
8 adjourned. Good day.

9 THE CLERK: All rise.

10 (Whereupon, at 10:45 a.m., the hearing in the
11 above-entitled matter was concluded.)

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