No. 09-498

IN THE

Supreme Court of the United States

ISMAEL JOHN, JACKSON ADING, JAMES GIDEON, KUNEO JOSEPH, HARRY JACKSON, BOAZ DAVID, SAM LEVAI, BALIKEN JACKSON, DAVID OBET, KOSIMA JOHANNES, JINET LANGRUS, EBEL JOSEPH, GEORGE YOSHITARO, ISAHO LUTHER, BIKENJI PAUL, NEPTALI PETER, AND MOSES ABRAHAM, FOR THEMSELVES AND FOR A CLASS CONSISTING OF THE PEOPLE OF ENEWETAK,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners represent the people of Enewetak Atoll in the Marshall Islands, a former trust territory of the United States. The people of Enewetak were removed from their homes and deprived of their property for more than thirty years so that the United States could conduct atomic-weapons testing there. Petitioners pursued claims for just compensation in the federal courts, but their cases were dismissed when the United States and the Marshall Islands government entered into an agreement that those claims should be resolved by an alternate tribunal. That tribunal awarded petitioners more than $385,000,000 in compensation, but the United States has failed to pay more than a token amount. Petitioners renewed their efforts to seek just compensation from the United States in federal court, but the Federal Circuit ruled that petitioners' constitutional takings claims were jurisdictionally barred by the agreement between the U.S. and the Marshall Islands, and that under the political question doctrine the court could not examine the validity of what it referred to as that agreement's "settlement" and "espousal" of those claims.

The questions presented are:

1. Whether Congress validly barred the courts of the United States from exercising jurisdiction over petitioners' constitutional claims for just compensation.

2. Whether, under the political question doctrine, the court of appeals could not even consider petitioners' contention that the jurisdictional bar is not valid as a "settlement" or "espousal" of petitioners' claims.

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The opinion of the United States Court of Federal Claims (App. 11a) is reported at 77 Fed. Cl. 788. The opinion of the United States Court of Appeals for the Federal Circuit (App. 1a) is reported at 554 F.3d 996.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2009. A timely petition for rehearing was denied on May 27, 2009. On July 28, 2009, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 24, 2009, and on September 14, 2009, the Chief Justice further extended the time for filing to October 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES

1. The Fifth Amendment to the United States Constitution provides in relevant part: "...nor shall private property be taken for public use, without just compensation."

2. The following are set forth in the appendix:

a. The Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (App. 117a);

b. The Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association (App. 261a); and

c. The Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665 (1947) (App. 281a).

STATEMENT

This case presents an issue essential to the security of all property owners: whether the government may evade the constitutional guarantee of just compensation for the taking of private property by stripping the courts of jurisdiction over any claim that it has not provided just compensation for the taking. In the decision below, the Federal Circuit ruled that it had been deprived of statutory jurisdiction to entertain petitioners' constitutional claims for just compensation, notwithstanding this Court's decisions stressing that the constitutional requirement of just compensation for a taking is self-executing and that it is for the judiciary to decide whether compensation for a taking is constitutionally adequate. The Federal Circuit further suggested that petitioners' constitutional claims were barred by a "settlement" and refused to examine the validity of that settlement under the "political question" doctrine, even though petitioners themselves never entered into any such settlement and the only agreement to dismiss petitioners' claims was between the United States government and one of its own territories. Without this Court's review, the government will have effectively insulated itself from the fundamental constitutional requirement that it pay just compensation for the taking of property.

A. The U.S. Government Removes The People Of Enewetak From Their Property

Petitioners are inhabitants of Enewetak Atoll, one of several atolls and islands making up the Marshall Islands, located in the central Pacific Ocean. Enewetak Atoll includes 40 islands and encloses a lagoon of roughly 388 square miles. C.A. App. 79, 86 (¶¶17, 39).

The Marshall Islands were occupied by the United States during World War II. Together with the rest of Micronesia, in 1947 the Marshall Islands were brought into the United Nations trusteeship system with the United States as administering authority. The Trusteeship Agreement gave the United States "full powers of administration, legislation, and jurisdiction" over the Trust Territory. App. 282a-283a (Art. 3). It also recognized, in Article 6, that the United States bore fiduciary obligations to the people of the Trust Territory to "protect the inhabitants against the loss of their land and resources" and to safeguard their "rights and fundamental freedoms." App. 284a. The Trusteeship Agreement further recognized the Marshallese as U.S. nationals, providing that the United States "shall afford diplomatic and consular protection to inhabitants of the trust territory when outside the territorial limits of the trust territory or of the territory of the administering authority." App. 287a (Art. 11).

Shortly thereafter, the United States government identified the Marshall Islands as sites for atomic weapons testing. In December 1947, the government removed all of the people of Enewetak from their homes and transferred them to Ujelang Atoll, the most isolated of the inhabited atolls in the Marshall Islands.[1] Despite government assurances that their forced removal would be temporary, the people of Enewetak spent the next 33 years on Ujelang. During that time,

[1] The government also removed the inhabitants of the Bikini Atoll to another island so that it could conduct atomic weapons tests on Bikini. The residents of Bikini have brought a case similar to this one, and in the same opinion that disposed of the Enewetak case, the Federal Circuit disposed of the Bikini case. The Bikini plaintiffs have filed a separate petition for certiorari.

their only contact with the rest of the world was through infrequent visits from supply ships, and they suffered (in the words of the Interior Department) "grave privations, including periods of near starvation." C.A. App. 95-98 (¶¶63-75); *see also* App. 329a (decision of Nuclear Claims Tribunal) (noting that petitioners had undergone "famine and hunger, near starvation and death from illness, food shortage and the limitations of the environment on Ujelang (fishing/collecting), the polio epidemic, the measles epidemic, [and] the rat infestation").

Between April 1948 and August 1958, Enewetak was the site of 43 atomic and hydrogen bomb tests, which devastated the islands and lagoon, left massive amounts of radioactive material on them, and contaminated much of the Atoll. During the 1960s and 1970s, Enewetak was also used for missile testing, which scattered toxic beryllium over one of the Atoll's principal islands. C.A. App. 98-100 (¶¶76-82).

In 1972, the United States announced that it would return Enewetak Atoll to its people. In October 1973, the Atomic Energy Commission published a radiation survey and proposed a nuclear cleanup operation for the Atoll. From 1972 to 1977, various federal agencies engaged in studies and planning for radiological cleanup and rehabilitation programs. From May 1977 to April 1980, the government attempted to remediate Enewetak Atoll. C.A. App. 102-103 (¶¶89-91). In October 1980, the people of Enewetak were finally permitted to return. C.A. App. 103 (¶91). Much of the Atoll, however, remains uninhabitable, and some of it was completely vaporized by the weapons testing. *See* App. 290a.

B. The People Of Enewetak Seek Just Compensation In The Federal Courts

In September 1982, the people of Enewetak brought an action in the Claims Court seeking compensation for the taking of the Atoll and stating claims for the breach of an implied-in-fact contract. The Claims Court dismissed the takings claim as time-barred,[2] but declined to dismiss one of the contract claims. *See Peter* v. *United States*, 6 Cl. Ct. 768 (1984).

While that suit was pending, the United States and the government of the Marshall Islands—over which the United States at that time retained control as trust administrator—negotiated a Compact of Free Association ("Compact"). The Compact recognized the Republic of the Marshall Islands (RMI) as self-governing in some respects, but retained for the United States "full authority and responsibility for security and defense matters in or relating to the Marshall Islands." App. 222a-223a (§ 311(a)). Congress approved the Compact in a joint resolution (the "Compact Act") in December 1985, the President signed the Compact Act in January 1986, and the Compact took effect on October 21, 1986. *See* Pub. L. No. 99-239, 99 Stat. 1770 (1986); C.A. App. 86 (¶38); App. 117a-260a.

In Section 177(a) of the Compact, the United States "accept[ed] the responsibility for compensation owing to citizens of the Marshall Islands ... for loss or damage

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[2] The people of Enewetak appealed the Claims Court's conclusion that this claim was untimely. Separate Brief of Appellants, *People of Enewetak* v. *United States*, No. 88-1208 (Fed. Cir. Apr. 15, 1988). The Federal Circuit affirmed the Claims Court on other grounds, and did not address the question of timeliness. *People of Enewetak* v. *United States*, 864 F.2d 134, 136 n.4 (Fed. Cir. 1988).

to property and person ... resulting from the nuclear testing program." 99 Stat. 1812, App. 204a. Section 177(b) provided for the United States and the Marshall Islands government to enter into a separate agreement (the "Section 177 Agreement") for several purposes, including the "just and adequate settlement" of all "claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise." *Id.*

The "Section 177 Agreement" between the United States and the Marshall Islands government terminated all jurisdiction in United States courts over the Marshall Islanders' claims based on nuclear testing and channeled all such claims to an alternative tribunal, the Nuclear Claims Tribunal (NCT). The NCT was empowered to "render final determination upon all claims ... which are based on, arise out of, or are in any way related to the Nuclear Testing Program," including claims for injury, death, and damage to property. App. 271a (Art. IV, § 1(a)). The Section 177 Agreement designated $45.75 million for "whole or partial payment" of NCT awards. App. 267a (Art. II, § 6(c)).

Article X of the Section 177 Agreement, titled "Espousal," provided that the Agreement "constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program ... including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions." App. 276a-277a. Article XII, titled "United States Courts," provides that "[a]ll claims described in Articles X and XI of this Agreement shall be

terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed." App. 278a. Section 103(g)(1) of the Compact Act contains similar provisions, *see* 99 Stat. 1782, App. 144a ("any such claims shall be terminated and barred except insofar as provided for in the Section 177 Agreement"), and Congress expressly "ratified and approved" the Section 177 Agreement in Section 103(g)(2) of the Compact Act, 99 Stat. 1782, App. 144a.[3]

In light of the Compact, the Compact Act, and the Section 177 Agreement, the Claims Court determined that Congress had withdrawn its jurisdiction over the Enewetak people's claims, but left open the possibility that they could return to court to challenge the adequacy of the compensation received through the NCT process. *Peter* v. *United States*, 13 Cl. Ct. 691, 692 (1987). The Federal Circuit affirmed the dismissal of the Enewetak claims solely on the ground that the Section 177 Agreement withdrew all federal court jurisdiction over those claims and channeled them into the alternative tribunal. *People of Enewetak* v. *United States*, 864 F.2d 134, 136 (Fed. Cir. 1988). The Federal Circuit concluded that "appellants' attack on the 'adequacy' of the alternative procedure provided by Congress for compensation of their claims was *premature*" and that it was "unpersuaded that judicial intervention is appropriate *at this time* on the mere speculation that the alternative remedy may prove to be inadequate." *Id.* (emphases added).

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[3] Section 175 of the Compact also states that the Section 177 Agreement "shall have the force of law." 99 Stat. 1812, App. 203a.

C. The People Of Enewetak Seek Just Compensation In The Alternative Tribunal

In 1990, the people of Enewetak filed a claim in the NCT, as provided for by the Section 177 Agreement. C.A. App. 111 (¶122). Over ten years later, the NCT issued a final decision awarding $385,894,500, of which $244 million was for the past and future loss of Enewetak Atoll, $107.81 million was for restoration costs for a radiological cleanup of the Atoll, and $34,084,500 was for hardships suffered as a result of the forced relocation to Ujelang. C.A. App. 113-118 (¶¶128-146). The award included an offset for prior compensation paid by the United States. C.A. App. 116 (¶141).

In 2002 and 2003, the NCT paid the people of Enewetak a total of $1,647,483. That amount represents less than 1% of their actual award. The NCT has not made a payment since February 2003, and has exhausted the $45.75 million earmarked in the Section 177 Agreement. C.A. App. 119 (¶¶148-151). In January 2003, former Attorney General Richard Thornburgh prepared a report on the NCT in which he concluded that "the $150 million trust fund initially established in 1986 is manifestly inadequate to fairly compensate the inhabitants of the Marshall Islands." C.A. App. 120 (¶¶152-154).

Article IX of the Section 177 Agreement provides that the Marshall Islands government may petition Congress for additional funds for the NCT based on changed circumstances. App. 276a. The Marshall Islands government presented a "changed circumstances" petition to Congress in September 2000, seeking additional funds principally based on new radiation standards adopted by the United States that lowered the recommended level of exposure. C.A. App. 120-124

(¶¶155-164). In January 2005, the State Department recommended rejection of the petition. Congress has taken no action to date. C.A. App. 125 (¶¶166-168).

D. The People Of Enewetak Return To The Federal Courts To Seek Just Compensation

In light of Congress's manifest failure to provide the residents of Enewetak with just compensation for their property, petitioners filed suit in the Court of Federal Claims in 2006. Two counts of the complaint seek to revive the original claims for the taking of Enewetak and for breach of implied contract that were brought in 1982 but were dismissed on the assumption (which proved illusory) that Congress had created an adequate alternate tribunal. Two other counts seek just compensation for the taking of those original taking and contract claims, based on the fact that Congress diverted those claims into the NCT process but then failed to provide adequate funding for the NCT award.[4] The Court of Federal Claims dismissed all of the counts on various grounds. App. 77a-96a.

The Federal Circuit affirmed the dismissal. The panel concluded that Congress had deprived it of jurisdiction to entertain the Enewetak people's claims, including their takings claims, despite Congress's manifest failure to provide more than token funding for those claims. The court also held that the Section 177

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[4] A fifth count, based on the taking of Enewetak, similarly alleges that the NCT process into which the underlying claims were diverted failed to provide constitutionally adequate compensation, and a sixth seeks damages for breach of fiduciary duties created by an implied-in-fact contract for just compensation established in the Compact Act and its related agreements.

Agreement constituted an unreviewable "settlement" of petitioners' claims related to nuclear testing in the Marshall Islands, even though petitioners were not party to any such settlement. App. 7a, 9a.

In concluding that it lacked statutory jurisdiction to hear petitioners' claims, the court found controlling and unambiguous language in the Section 177 Agreement directing that "[n]o court of the United States shall have jurisdiction to entertain such claims" (relating to the atomic testing programs). App. 6a-8a. Even though this Court has stressed that the constitutional guarantee of just compensation is self-executing and that Congress may not set arbitrarily low ceilings on the amount of compensation due for such takings, *see Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349, 368 (1936); *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 327 (1893), the Federal Circuit still found that its jurisdiction over petitioners' takings claims had been withdrawn, and it declined to construe the Section 177 Agreement in a manner that would have avoided the constitutional question raised by such a ruling. App. 8a.

The Federal Circuit also noted that "this case involves a settlement negotiated between the United States and the Government of the Marshall Islands." App. 9a. Although petitioners are not parties to any settlement of their claims against the United States, the court stated that "[t]he power to conduct foreign relations includes ... the authority to enter into an international claims settlement on behalf of nationals." *Id.* (citing *United States* v. *Pink*, 315 U.S. 203 (1942)). The court also referred to the "settlement" of petitioners' claims as an "espousal" of those claims (between the U.S. and Marshall Islands governments) and ruled that "the validity of that espousal ... raises a political

question beyond the power of this or any court to consider." *Id.* (again citing *Pink*). The court reached that conclusion even though, when the Marshall Islands government entered into the Section 177 Agreement with the United States, it was not a foreign sovereign but remained under the control of the United States. Finally, the court remarked that, although "its sense of justice, of course, makes it difficult to turn away from a case of constitutional dimension," nonetheless "this court cannot act without jurisdiction," and "this court cannot hear, let alone, remedy a wrong that is not within its power to adjudicate." *Id.*

REASONS FOR GRANTING THE PETITION

More than 100 years ago, this Court remarked that "in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 324 (1893). This case demonstrates the enduring wisdom of that observation. Petitioners, deprived completely of the use and enjoyment of their ancestral lands for more than 30 years, have sought only the just compensation for that taking to which the Fifth Amendment entitles them. The government has responded by providing only token payment for petitioners' property—less than one percent of its true value—and has precluded petitioners from seeking any judicial remedy for the remainder.

The Federal Circuit's decision—that Congress may bar the courts from entertaining constitutional claims for just compensation—cannot be correct. At a minimum, that decision raises grave constitutional questions fundamental to the protection of property rights,

which could and should have been avoided through statutory construction. The Federal Circuit's decision is all the more important because that court has exclusive jurisdiction over appeals from decisions of the Court of Federal Claims, *see* 28 U.S.C. § 1295(a)(3), which in turn has exclusive jurisdiction under the Tucker Act over virtually all claims that the United States has taken property without just compensation, *see id.* § 1491(a)(1). Absent review by this Court, the Federal Circuit's conclusion that Congress can by statute bar judicial consideration of a constitutional just compensation claim will effectively be the last word.

The court of appeals' decision is no less problematic because it concluded that the jurisdictional bar was based on a "settlement" or "espousal," the validity of which it declined to examine as a "political question." That reasoning itself raises serious constitutional concerns and warrants this Court's review. Petitioners never signed any settlement with the United States; the only relevant agreement was one between the United States government and an entity then under its control, the Marshall Islands government. To rule, as the Federal Circuit did, that the validity of this supposed "espousal" is nonjusticiable is to hold, in effect, that the United States government may insulate itself from constitutional claims by negotiating with its own dependency. This Court's review is warranted to make clear that the Fifth Amendment's command of just compensation may not be evaded in this manner.

I. THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT CONGRESS MAY NOT STRIP THE COURTS OF JURISDICTION OVER CONSTITUTIONAL TAKINGS CLAIMS

A. The Right To Just Compensation May Not Be Eliminated By Statute

The Constitution requires the United States to pay just compensation whenever it takes private property for public use. U.S. Const. amend. V ("...nor shall private property be taken for public use, without just compensation"). This Court has never suggested that the government may avoid that constitutional command by refusing to pay the full amount of just compensation due and barring the courts from enforcing its obligation to do so. To the contrary, this Court has made clear that "[t]he just compensation clause may not be evaded or impaired by *any form* of legislation." *Baltimore & Ohio R.R Co.* v. *United States*, 298 U.S. 349, 368 (1936) (emphasis added).

This Court has repeatedly stressed that the right to just compensation arises from the Constitution itself. That right requires no additional statutory enactment and admits no possibility of statutory nullification. "Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute." *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 304 (1923). It is not even necessary for the government to waive sovereign immunity for the courts to entertain just compensation claims, for it has long been recognized that the constitutional requirement of just compensation is "self-executing." *See First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 315 (1987); *United States* v. *Clarke*, 445 U.S. 253, 257 (1980); *see also Jacobs* v. *United States*, 290 U.S. 13, 16 (1933) ("Statutory recognition was not

necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment."). "[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *First English*, 482 U.S. at 315 n.9.

Just as Congress may not eliminate the protections of the Just Compensation Clause directly, it may not do so indirectly by jurisdiction-stripping. The government may not cloak itself with immunity for its unconstitutional actions by barring judicial review of that conduct. This Court has frequently recognized this principle when it has cautioned against any reading of a statute that would deprive the courts of authority over constitutional claims. *See, e.g., Webster* v. *Doe*, 486 U.S. 592, 603 (1988); *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974); *see also Graham & Foster* v. *Goodcell*, 282 U.S. 409, 431 (1931) (stressing that, if "Congress did not have the authority" to reach a particular substantive result, "it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy").

Other courts of appeals have recognized that the government may not insulate its unconstitutional conduct through jurisdictional bars. "In considering the constitutional issue, it is important to recall that, in the entire history of the United States, the Supreme Court has never once held that Congress may foreclose all judicial review of the constitutionality of a congressional enactment." *Bartlett* v. *Bowen*, 816 F.2d 695, 704 (D.C. Cir. 1987). Thus, when presented with that very question, the D.C. Circuit had "little doubt that such a limitation on the jurisdiction of *both* state and federal courts to review the constitutionality of federal legislation ... would be [an] unconstitutional infringement of

due process." *Id.* at 703 (internal quotation marks omitted; alterations in original).

Similarly, the First Circuit has observed that, while Congress has "the power to regulate the jurisdiction of the lower federal courts ... and the Supreme Court has not found constitutional difficulties in congressional abrogation of certain remedies *as long as others are left intact* .... Congress probably cannot nullify rights guaranteed in the Constitution by prohibiting all remedies for the violation of those rights." *Aguilar* v. *Immigration & Customs Enforcement Div.*, 510 F.3d 1, 17-18 (1st Cir. 2007) (emphasis added). And the Second Circuit has stressed that "the exercise of Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty or property without due process of law or to take private property without just compensation." *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948); *see also Arreola-Arreola* v. *Ashcroft*, 383 F.3d 956, 963 (9th Cir. 2004), *overruled on other grounds by Morales-Izquierdo* v. *Gonzales*, 486 F.3d 484, 497 (9th Cir. 2007) (en banc).

This Court has also long made clear that, "when [a property owner] appropriately invokes the just compensation clause, he is entitled to a *judicial* determination of the amount." *Baltimore & Ohio R.R. Co.*, 298 U.S. at 368 (emphasis added). Although Congress may require claimants to pursue their claims for just compensation in the first instance before an alternate tribunal, property owners have the right, under the Constitution, to seek a judicial remedy should the compen-

sation awarded by that tribunal be inadequate. Thus, this Court has long insisted that Congress may not fix the amount that a property owner will receive in compensation and has reserved that determination for the courts. "The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." *Monongahela Nav. Co.*, 148 U.S. at 327; *see also St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51-52 (1936).

Under these settled principles, the federal courts were obligated to take jurisdiction over petitioners' claims. The United States government took petitioners' property, and they were entitled to just compensation for it. Although Congress formally acknowledged the responsibility of the United States to compensate petitioners for the taking of their property, *see* pp. 5-6, *supra*, and although Congress set up an alternate tribunal in which petitioners might present their claims for compensation, the government has refused to make any provision for payment of that tribunal's award beyond a token amount. The government's refusal to pay compensation to petitioners, combined with its decision to bar the courts of the United States to petitioners, surely constitutes a violation of the Fifth Amendment no less than the government's refusal to pay interest on a compensation award, *see Jacobs*, 290 U.S. at 17, or its refusal to pay for one of the sticks in the bundle of rights that it has taken, *see Monongahela Nav. Co.*, 148 U.S. at 328-329 (right to collect tolls).[5]

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[5] The government argued in the Federal Circuit that petitioners could not invoke the Just Compensation Clause because this case supposedly involves foreign-owned property located outside the United States. Gov't C.A. Br. 51-58. The court of appeals

B. The Court Of Appeals Could, And Should, Have Avoided The Constitutional Question Here Through Statutory Construction

The court of appeals' decision that Congress permissibly closed the courts to petitioners' constitutional takings claims is all the more unfortunate because the Federal Circuit could easily have avoided such a ruling.

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did not address that contention, which is clearly wrong. First, several petitioners have U.S. citizenship. Second, the people of Enewetak were U.S. nationals when they were removed from their property in 1947, when they first presented their federal claims for the taking of their property, and when the Section 177 Agreement terminated their takings claims pending in the U.S. courts in 1986. Enewetak was under U.S. jurisdiction at all of those times. At a minimum, therefore, petitioners have a substantial connection to the United States that allows them to invoke the Just Compensation Clause—as the Claims Court previously held. *See Juda* v. *United States*, 6 Cl. Ct. 441, 458 (1984); *see also Nitol* v. *United States*, 7 Cl. Ct. 405, 415 (1985) (citing *Juda* and noting that "[i]t was there concluded that the just compensation clause of the Fifth Amendment would extend to include a taking that resulted from the United States nuclear testing program in the Marshall Islands."); *cf. Atamirzayeva* v. *United States*, 524 F.3d 1320, 1328-1329 (Fed. Cir. 2008) ("In *Juda* and *Nitol*, the court found that the plaintiffs were covered by the just compensation clause ... based on the 'unique relationship' between the United States and the Trust Territory Government and the relationship between the United States and the plaintiffs."). Third, at the very outset of the trusteeship period, the United States acknowledged its obligation to extend constitutional rights. *See* Memorandum for the President, David E. Lilienthal (Nov. 25, 1947), C.A. App. 143-144 ("[T]o insure that the United States meets fully its international obligations under the Charter of the United Nations and in connection with the Trusteeship Agreement ... special provisions will be made for local inhabitants as follows: 1. They will be accorded all rights which are the normal constitutional rights of citizens under the Constitution, but will be dealt with as wards of the United States for whom this country has special responsibilities.").

This Court has repeatedly made clear that interpretations that call into question the constitutionality of an Act of Congress are to be avoided if at all possible. "[I]f a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided, a court should adopt that construction." *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979).

That principle of avoiding constitutional questions has particular force when the jurisdiction of the federal courts is at stake. *See INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001). Even when interpreting statutes with seemingly sweeping limitations on jurisdiction, this Court has adopted interpretations preserving jurisdiction over constitutional questions. *See Weinberger* v. *Salfi*, 422 U.S. 479, 762 (1975); *Johnson* v. *Robison*, 415 U.S. at 366-367. And specifically in the context of the Just Compensation Clause, the Court has stressed that congressional enactments should not be interpreted as barring a claimant's judicial remedy whenever a reading preserving that remedy is possible. *See Preseault* v. *ICC*, 494 U.S. 1, 11-17 (1990); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-136 (1974).

Had the court of appeals heeded these principles, it readily could have avoided a reading of the Section 177 Agreement that precludes jurisdiction over petitioners' claims. Although the court of appeals dismissed concerns about constitutional avoidance by insisting that "[t]he language of the Section 177 Agreement presents no ambiguities whatsoever" (App. 8a), in fact, the statutory language at issue here is no more clear-cut than language that has elsewhere been found not to deprive federal courts of jurisdiction over constitutional claims. Article XII of the Section 177 Agreement provides that "[a]ll claims *described in Articles X and XI of this Agreement* shall be terminated," and that "[n]o court of

the United States shall have jurisdiction to entertain *any such claims*[.]" App. 278a (emphasis added). Article X, in turn, refers to all claims "which are based upon, arise out of, or are in any way related to the Nuclear Testing Program." App. 276a.

Several of petitioners' claims, however, do not "arise out of," and are not "based on" or "related to," the Nuclear Testing Program itself.[6] Rather, they arise from the government's failure to provide adequate funding to pay the NCT's award to petitioners—an award made after petitioners in good faith invoked the alternate remedy provided by Congress, presented their case to that tribunal, and received a decision that they were entitled to compensation for the decades-long loss of their property. Petitioners' claims based on the nuclear testing program were presented to and decided by the NCT, which determined that those were valid, compensable claims. What petitioners seek now in Counts III, IV, and V of their complaint is not compensation for the government's taking of their *land* during the nuclear testing program, but compensation for the government's taking of their *claims*, decades after the nuclear testing program ended, when the government closed the federal courts to those claims and refused to pay the NCT's award.

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[6] "Related to" is broad terminology, but it is not unlimited. *See N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). That is especially true where, as here, it is used in conjunction with two other, narrower terms ("based on" and "arising out of") and thus presumably was intended to share their characteristics. *See, e.g., United States* v. *Williams*, 128 S. Ct. 1830, 1839-1840 (2008).

This case thus resembles the *Regional Rail Reorganization Cases*, where the Court considered whether two sets of provisions in the Regional Rail Reorganization Act ("Rail Act") took the property of certain railroads' creditors and, if so, whether they were entitled to seek compensation in the Court of Claims under the Tucker Act for any constitutional deficiency in the compensation they received through a special process set up under the Rail Act. The Court concluded that the Rail Act did not deprive the creditors of an ultimate Tucker Act remedy, in significant part because "[t]here are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself." 419 U.S. at 134; *see also id.* at 149.

Moreover, two circuits—including the Federal Circuit itself—previously indicated that the language at issue here would allow the people of Enewetak and others similarly situated to return to the federal courts to challenge the adequacy of the compensation received through the alternative process. *See People of Enewetak*, 864 F.2d at 136; *Antolok* v. *United States*, 873 F.2d 369, 378 (D.C. Cir. 1989) ("If there is an uncompensated or inadequately compensated taking, then plaintiffs' remedy is in the Claims Court.").

The court of appeals' reading also places the Section 177 Agreement in conflict with itself. Section 177 of the Compact—the very provision that the Section 177 Agreement is designed to implement—not only unambiguously assigns responsibility for the loss or dam-

age to property to the United States government,[7] but explicitly states that the purpose of the Section 177 Agreement is to provide for "the just and adequate settlement of all such claims which have arisen." Compact § 177(b), App. 204a. The interpretation of Article XII adopted by the court of appeals thus undermines the central purpose of Section 177. The court should have rejected an interpretation of an agreement that is irreconcilable with the congressional purpose behind it. *See Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001).

II. THE GOVERNMENT CANNOT AVOID JUDICIAL CONSIDERATION OF PETITIONERS' CONSTITUTIONAL CLAIMS BY INVOKING THE POLITICAL QUESTION DOCTRINE OR LABELS SUCH AS "SETTLEMENT" OR "ESPOUSAL"

There is some indication in the Federal Circuit's decision that it viewed the Section 177 Agreement as comprising not just a jurisdictional bar but also a "waiver" or "settlement" of petitioners' claims. *See* App. 8a (stating that the Section 177 agreement "represents not only the United States' removal of its consent to be sued in the courts over these claims but also the claimants' waiver of their right to sue over these claims in any U.S. court."). The court of appeals also relied on the fact that Article X of the Section 177 Agreement labeled the bar to petitioners' claims an "espousal." *See* App. 9a. The court declined to question the "validity of that espousal" under the political question doctrine. *Id.*

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[7] "The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands ... for loss or damage to property and person of the citizens of the Marshall Islands." Compact § 177(a), App. 204a.

This reasoning cannot justify a bar to judicial consideration of petitioners' current claims. Petitioners were not parties to the settlement supposedly reflected in the Section 177 Agreement, and to read that Agreement as precluding petitioners from pursuing their just compensation claims now would be contrary to the "deep-rooted historic tradition that everyone should have his own day in court." *Martin* v. *Wilks*, 490 U.S. 755, 761 (1989) (internal quotation marks omitted). Moreover, the government cannot avoid the constitutional questions raised by the jurisdictional bar to petitioners' constitutional claims by placing the label of "espousal" on that bar and declaring it immune from scrutiny under the political question doctrine. "No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts." *INS* v. *Chadha*, 462 U.S. 919, 941-942 (1983). To hold otherwise, as the court of appeals did, is to rule that the U.S. government may permanently insulate itself from constitutional claims by negotiating a settlement of such claims with another government, even if it is the government of one of its own territories, and even if the U.S. government never intends to honor that settlement.

A. The Jurisdictional Bar Cannot Be Upheld As A Waiver Or Settlement Of Petitioners' Claims

There is no question that parties can compromise their constitutional claims in litigation, *see Town of Newton* v. *Rumery*, 480 U.S. 386 (1987), but that is not what happened in this case. Rather, at a time when it was under the control of the United States government

and seeking independence, the Marshall Islands government agreed with the United States government to bar United States courts from hearing those claims. This abrogation of petitioners' claims, in an agreement between the U.S. government and an entity under its control and supervision, does not solve the constitutional problems in this case; if anything, it exacerbates them.

First, the notion that petitioners' takings claims could be waived or settled by someone other than themselves, especially a governmental entity, is highly doubtful. "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party[.]" *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 529 (1986); *cf. Taylor* v. *Sturgell*, 128 S. Ct. 2161 (2008) (rejecting "virtual representation" theory of preclusion). Although some cases have suggested that a governmental entity litigating in a *parens patriae* capacity can dispose of "the common *public* rights" of its citizens, *see City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 340-341 (1958) (emphasis added), no decision of this Court suggests that a government may negotiate away personal, individual rights to seek redress in the courts of the United States for constitutional violations.

Second, even if in some circumstances a governmental entity could "waive" its citizens' constitutional claims, the position of the Marshall Islands government at the time of the Section 177 Agreement makes it impossible to conclude that such a "waiver" here could be valid. Only *sovereign* entities may prosecute civil litigation in a *parens patriae* capacity that would be binding on their citizens. *See City of Rohnert Park* v. *Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979). The Marshall Islands government was not sovereign when it pur-

portedly negotiated away the rights of the residents of Enewetak. Although the Marshall Islands at that time had been granted a modicum of self-government, it remained under the control of the United States government as part of the Trust Territory of the Pacific Islands, for which "all executive, legislative, and judicial authority" was vested in "such agency or agencies as the President of the United States may direct or authorize." 48 U.S.C. § 1681(a). Given these circumstances, the jurisdictional bar to petitioners' constitutional claims erected by the Section 177 Agreement between the United States and Marshall Islands governments cannot be upheld under the transparent fiction that *petitioners* ever agreed to settle their claims against the United States.

B. The Jurisdictional Bar Is Not Immune From Judicial Review Under The Political Question Doctrine

The court of appeals also stated that the political question doctrine barred it from considering the validity of the preclusion of petitioners' constitutional claims. App. 9a. In so concluding, the court noted that Article X of the Section 177 Agreement refers to the jurisdictional bar as an "espousal."[8] *Id.* The court also

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[8] It is doubtful that the concept of espousal has any relevance here. Espousal is a concept of inter-sovereign relations in international law. It is the mechanism by which one sovereign state exercises its right of diplomatic protection of its nationals by asserting (and in some cases settling) "the private claims of its nationals against another sovereign." *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984); *see also Dames & Moore* v. *Regan*, 453 U.S. 654, 679 (1981) ("International agreements settling claims by nationals of one state against the government *of another* 'are established international practice re-

stated that "[t]he power to conduct foreign relations includes the power to recognize a foreign sovereign and the authority to enter into an international claims settlement on behalf of nationals." *Id.*

That statement is unexceptionable by its terms, but it has no bearing on this case. Petitioners are not challenging the United States government's recognition of the Republic of the Marshall Islands. Nor does this case involve a situation in which the United States arranged for the disposition of claims that its citizens were pursuing against a foreign sovereign. Rather, in this case, petitioners are challenging the United States government's attempt to dispose of *constitutional* claims that had been brought against it—and that had been brought against it by people who were nationals of the United States.

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flecting traditional international theory.'" (quoting Louis Henkin, *Foreign Affairs and the Constitution* 262 (1st ed. 1972)) (emphasis added)). When the Section 177 Agreement was negotiated, the Marshall Islands' relation to the United States was not that of a foreign sovereign. *See, e.g., People of Saipan* v. *Department of Interior*, 356 F. Supp. 645, 653, 655 (D. Haw. 1973) (Article 3 of the Trusteeship Agreement allows the United States "in practical effect the exercise of full sovereign power."), *aff'd*, 502 F.2d 90 (9th Cir. 1974); *World Communications Corp.* v. *Micronesian Telecommunications Corp.*, 456 F. Supp. 1122, 1123-1124 (D. Haw. 1978) (holding that Trust Territory of the Pacific Islands was not a foreign state for purposes of diversity jurisdiction statute). Rather, the Marshall Islands remained under the control of the United States, although with limited rights of self-government. Indeed, the Trusteeship Agreement recognized the Marshallese as U.S. nationals at this time, providing in Article 11 that the United States "shall afford diplomatic and consular protection to inhabitants of the trust territory when outside the territorial limits of the trust territory or of the territory of the administering authority." App. 287a.

For those reasons, *United States* v. *Pink*, 315 U.S. 203 (1942), on which the court of appeals relied, is inapposite. *Pink* involved a claims-settlement agreement between the United States and the Soviet Union in which the U.S. was seeking to protect its claims and the claims of U.S. nationals "against *Russia or its nationals*." *Id.* at 227 (emphasis added); *see also Medellin* v. *Texas*, 128 S. Ct. 1346, 1371 (2008) (noting that *Pink* "involve[d] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals"). Moreover, the U.S. government's recognition of the Soviet Union was directly relevant because that recognition retroactively validated the Soviet Union's nationalization of property, from which the United States' own claims derived. *See Pink*, 315 U.S. at 223. No Fifth Amendment problem arose in *Pink* because the private claimants opposed to the United States' assertion of ownership over a Russian company's U.S. property pursuant to an assignment from the Soviet government had no Fifth Amendment rights in the property they were claiming. They were merely foreign creditors of the Russian company whose claims did not arise from the transactions of its New York branch. The effect of the United States' acceptance of the Soviet government's nationalization and assignment was merely to permit the use of the Russian company's U.S. property to satisfy American claims against Russia for other nationalizations, leaving the foreign creditors of the Russian company to seek satisfaction by other means. *See id.* at 226-228; *id.* at 228 ("[T]he Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors.").

The question in *this* case, by contrast, is whether the United States government may bar its courts from reviewing the constitutionality of its own actions by securing the agreement of another government (here, the Marshall Islands) to that bar. Whatever the answer is, that question is surely a legal one and not a "political" one.[9] "'Courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.'" *Chadha*, 462 U.S. at 943 (quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)). This is particularly true in the context of the Fifth Amendment's guarantee of just compensation, which, this Court has held, is ultimately a matter for judicial, not political, enforcement. *See* pp. 15-16, *supra*.

This Court has never suggested that constitutional claims against the United States for just compensation in the wake of a claims-settlement agreement would be nonjusticiable. To the contrary, in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), where the petitioner argued that the President's suspension of claims against Iran in U.S. courts constituted a taking requiring just compensation, the Court did not even intimate that

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[9] Moreover, the answer is clearly "no." This Court has made clear that the political Branches cannot use international agreements to render the Constitution inapplicable where it would otherwise apply. *See Boumediene* v. *Bush*, 128 S. Ct. 2229, 2258-2259 (2008). "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid* v. *Covert*, 354 U.S. 1, 16 (1957). The takings context is no different; indeed, as discussed above, the Fifth Amendment mandates that claimants have the opportunity to challenge in federal court the adequacy of the compensation received for a taking.

such takings claims would be barred by the political question doctrine, but rather stated that "we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." *Id.* at 687-688; *see also id.* at 691 (Powell, J., concurring in part and dissenting in part) ("The Government must pay just compensation when it furthers the nation's foreign policy goals by using as bargaining chips claims lawfully held by a relatively few persons subject to the jurisdiction of our courts."). Moreover, the Court addressed on the merits the petitioner's attempt to enjoin the President from implementing a portion of the Algiers Accords that required dissolution of attachments obtained against Iranian assets, and that forced the petitioner to pursue compensation for claims against Iran before a claims-settlement tribunal. *See id.* at 668-688. *Dames & Moore* thus makes clear that the political question doctrine presents no obstacle to the resolution of the constitutional claims presented here.

That the political question doctrine poses no obstacle follows, not just from the Fifth Amendment's commitment of just compensation issues to judicial resolution, but also from the limited scope of the political question doctrine itself. Not "every case or controversy which touches on foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Indeed, even in circumstances touching far more directly on the political Branches' authority to conduct foreign and military affairs, the Court has not found a political question impediment to the adjudication of constitutional questions associated with governmental attempts to appropriate property. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *see also Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931). The fact that this case involves an agreement

between the U.S. government and the government of the Marshall Islands does not render the constitutional issues in this case immune from judicial consideration. Not only was the Marshall Islands a U.S. Trust Territory when the Compact and Section 177 Agreement were negotiated, but courts frequently determine the meaning and legal effect of treaties and other international agreements. *See, e.g., Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 353-354 (2006) (determining the meaning of treaties as a matter of federal law is a judicial responsibility); *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("[T]he courts have the authority to construe treaties and executive agreements."); *Reid* v. *Covert*, 354 U.S. 1 (1957) (assessing constitutionality of trials of civilians before courts-martial conducted pursuant to international agreements with Great Britain and Japan).[10]

Regardless of the terminology used to describe the agreement between the governments of the United States and the Marshall Islands in which the latter

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[10] The political question doctrine is inapplicable here for a further reason: Congress clearly contemplated that courts would scrutinize the "espousal" provision in Article X when considering whether the Section 177 Agreement validly extinguished petitioners' claims. Section 103(g)(2) of the Compact Act makes clear that the espousal in Article X and the withdrawal of jurisdiction in Article XII of the Section 177 Agreement stand or fall together. *See* 99 Stat. 1782, App. 144a ("the jurisdictional limitations set forth in Article XII [of the Section 177 Agreement] are not to be construed or implemented separately from Article X"); *see also Antolok*, 873 F.2d at 387-390 (Wald, C.J., concurring). By inviting courts to address the issue, Congress indicated that the issue is amenable to judicial resolution, and that it did not view judicial resolution of the issue as an encroachment on the authority of the political Branches.

government acquiesced in the United States' jurisdiction-stripping, the legal effect of that agreement is governed by the Fifth Amendment, which the federal courts have the power to interpret and enforce. Whether the Compact and the Section 177 Agreement can defeat petitioners' right to a judicial determination of just compensation—or whether, by contrast, the Fifth Amendment prohibits the United States from denying an ultimate judicial determination regardless of whatever non-party may have consented to the denial—is at base a question about what the Fifth Amendment guarantees. This is the type of question that the Constitution commits to the courts for resolution, and the Federal Circuit erred in refusing to address it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2009

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