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

REPLY BRIEF FOR PETITIONERS

DAVOR PEVEC
Bishop Street Tower
700 Bishop Street
Suite 2100
Honolulu, HI 96813
(808) 599-5655

SETH P. WAXMAN
PAUL R.Q. WOLFSON
Counsel of Record
MICAH S. MYERS
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

CRAIG ESTES
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

Blank Page

The Federal Circuit, at least, when it refused jurisdiction over this case, "observe[d] that its sense of justice, of course, makes it difficult to turn away from a case of constitutional dimension." Pet. App. 9a. But the government, it seems, has no such qualms; it sees no constitutional issue in this case at all. In its view, the United States may deprive persons of their property for decades and then get away without paying compensation by foisting the problem onto another government that has no money to pay and that supposedly waived the property owners' right to sue the United States in court.

For more than sixty years, the government has played a shell game with the constitutional rights of the People of Enewetak, who have patiently pursued every possible remedy afforded by our system of justice. The government first promised petitioners that they would be accorded the constitutional rights of U.S. citizens.[1] It then removed petitioners from their property, promising they would be returned "someday." When petitioners sought compensation in the courts for the loss of their property, the government strenuously resisted their efforts to do so. Then, when it created the largely (but not entirely) self-governing Republic of the Marshall Islands, the United States solemnly acknowledged *its own* obligation to provide compensation,[2] but required that petitioners proceed through a special tribunal rather than the courts. Now that the tribunal has

---

[1] *See* Pet. 16-17 n.5.

[2] "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) (Pet. App. 204a).

ruled that petitioners are entitled to compensation, the government says that actually paying is someone else's problem, and that, when it created the Republic of the Marshall Islands, the government of the United States effectively washed its hands of the whole affair.

This repudiation of the fundamental constitutional obligation to pay just compensation for the taking of private property is "hardly worthy of our great government."[3] This particular case may involve people and property in our Nation's peripheral vision, but there should be no mistaking what is at stake. If the government is correct that it can insulate itself from its constitutional obligation to pay just compensation simply by closing the doors of its courts, then the constitutional right to just compensation is insecure indeed.

I. CONGRESS MAY NOT BAR JURISDICTION OVER PETITIONERS' TAKINGS CLAIMS

1. The government does not deny, nor can it, that petitioners have thus far received grossly inadequate compensation for the deprivation and destruction of their property.[4] Although Congress may require pri-

---

[3] *See Bayer* v. *United States Dep't of Treasury*, 956 F.2d 330, 335 (D.C. Cir. 1992) (R.B. Ginsburg, J.) (quoting *Brandt* v. *Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)).

[4] The government also notably does not argue that petitioners are not protected by the Just Compensation Clause of the Fifth Amendment. Although the government states that "[p]etitioners are citizens of [the Republic of the Marshall Islands]" (Opp. 5) and that "Trust Territory inhabitants were not United States citizens" (Opp. 16 n.8), it nowhere denies that at least *some* petitioners have U.S. citizenship and that Trust Territory residents were U.S. *nationals* entitled to the constitutional right of just compensation (Pet. 16-17 n.5).

vate property owners to pursue alternative compensation remedies before turning to the courts, petitioners have done so but have obtained next to nothing for the loss of their land. There is also no prospect at present that the government will provide petitioners with any (much less just) compensation outside the court system.

In these circumstances, petitioners have a right to return to the courts. This Court has repeatedly stated that Congress may not evade the obligation to pay just compensation by closing the courts or manipulating the remedy that is available. "The 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); *see* Pet. 13-15. Moreover, this Court has expressed "grave doubts" about reading a statute so as to deprive property owners of a judicial remedy to challenge the adequacy of compensation established by a special statutory process. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134, 139 & n.24 (1974). To avoid the constitutional violation that would result if petitioners were denied their just compensation remedy altogether, the Section 177 Agreement should not be read to close the courts to petitioners; but if it is so read, then the Agreement is unconstitutional as applied here, where the result would be to deny petitioners compensation.

The government suggests (Opp. 22-23) that, even where (as here) it does have a constitutional obligation of just compensation, the Constitution does not require that such obligation be enforced through the courts under the Tucker Act. But it surely must be enforceable *some* way, and the Tucker Act was enacted precisely

for situations like the present one, where the government *will not pay* for the property it has taken.[5] Indeed, if access to the courts for a compensation remedy did not have a constitutional dimension, then it is difficult to see why this Court would have cautioned against interpreting statutes to preclude a Tucker Act remedy. *See Preseault* v. *ICC*, 494 U.S. 1, 14 (1990) (requiring a "clear and unmistakable" intent to withdraw jurisdiction). If Congress had enacted adequate provision for petitioners' compensation, then access to the courts might not have been necessary, but Congress did not, and it is for that reason that the courts remain open.[6]

---

[5] *See Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893) ("The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.").

[6] In suggesting that a judicial remedy is not required to ensure just compensation when the government does not willingly pay, the government misreads *Langford* v. *United States*, 101 U.S. 341 (1880). That case held only that the jurisdiction of the Court of Claims did not then extend to cases where the government did *not* act as though it were taking private property for its own use, but rather asserted its own prior and superior title—in effect, the Court of Claims could not hear quiet-title cases against the United States. But this Court specifically declined to hold there that the Court of Claims could not entertain just compensation claims based on a professed taking of private property, *see id.* at 344, and in *Great Falls* the Court held that it could—three years before the Tucker Act was enacted. *See United* States v. *Great Falls Mfg. Co.*, 112 U.S. 645, 656-658 (1884). In any event, as the government concedes (Opp. 23 n.13), property owners could at that time bring injunctive claims against federal officers to force the government to bring an eminent domain action to recover for the uncompensated taking of private property. *See United States* v. *Lee*, 106 U.S. 196, 220-221 (1882).

The issue in this case is not whether Congress may establish a non-judicial forum to assess compensation in the first instance. Such alternate forums are permissible, if they ensure "reasonable, certain and adequate provision for obtaining compensation." *Regional Rail Reorganization Act Cases*, 419 U.S. at 124-125 (internal quotation marks omitted). Here, that alternate forum has been tried and found utterly wanting, yet still the government refuses to pay. Under these circumstances, the courts remain open as a matter of the "constitutional duty of the government, as well as [of] common justice," to ensure compensation. *United States* v. *Great Falls Mfg. Co.*, 112 U.S. 645, 657 (1884); *see First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 315 (1987).

2. The Federal Circuit incorrectly concluded that saving constructions of the contested language of the Section 177 Agreement could not be considered. In so doing, the Federal Circuit deviated from the settled principle of reading statutes to avoid, rather than create, a constitutional doubt.

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This rule applies with particular force to statutes arguably withdrawing Tucker Act jurisdiction over just compensation claims. Only "an unambiguous intention to withdraw the Tucker Act remedy" will suffice. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019 (1984).

The pertinent language here is not so unambiguous as to preclude an interpretation avoiding the grave constitutional questions that would arise from denying petitioners any forum for their constitutional claims. *See* Pet. 18-19. Indeed, the Federal Circuit itself, when it first had occasion to review that language, recognized that judicial intervention might become necessary should the Nuclear Claims Tribunal (NCT) fail to provide adequate compensation. *See People of Enewetak* v. *United States*, 864 F.2d 134, 136 (Fed. Cir. 1988); *see also Antolok* v. *United States*, 873 F.2d 369, 378 (D.C. Cir. 1989). Likewise, Chief Judge Wald concluded that such language did not demonstrate an unambiguous intent to withdraw federal court jurisdiction. *See Antolok*, 873 F.2d at 395 (Wald, C.J., concurring). The courts thus recognized that petitioners might well have judicially cognizable takings claims should the NCT process be proven inadequate, as in fact happened. The government identifies no explicit withdrawal of jurisdiction over *those* claims that the courts somehow missed when petitioners' takings claims were first diverted into the NCT process.

II. THE FEDERAL CIRCUIT'S RELIANCE ON A PURPORTED "SETTLEMENT" RAISES CONSTITUTIONAL ISSUES INSTEAD OF RESOLVING THEM

1. The government contends that no serious constitutional issue is presented here because the Enewetak people's claims were "settled." Opp. 15. It further argues that the authority of the government of the Marshall Islands (before independence) to settle petitioners' claims constitutes a nonjusticiable political question. Far from rendering this case cut and dry, the Federal Circuit's (and the government's) adoption of this position raises another serious constitutional issue:

may a governmental entity subordinate to the United States "settle" or "waive" individuals' constitutional claims against the United States, without their express consent? Whatever the answer, the question is surely susceptible of, and appropriate for, a judicial resolution.[7]

The government does not suggest that the Marshall Islands was a sovereign foreign country when the Compact was negotiated. Although the Marshall Islands had a popularly elected government at that time that was competent to enter into agreements with the United States—as remains true of the fifty States, the District of Columbia, and the Territories—it remained under the control of the United States as part of the Trust Territory of the Pacific Islands, for which "all executive, legislative, and judicial authority" was "vested in such person or persons and ... exercised ... through such agency or agencies as the President of the United States may direct or authorize." 48 U.S.C. § 1681(a). Indeed, at that time, if a Marshall Islands resident had a claim against a *foreign* nation, responsibility for espousing it was vested in the government of the *United States*. *See* Pet. App. 287a.

This case therefore does not involve any question about the political branches' recognition of the official representative of a *foreign* nation. Likewise, it does not raise the question whether the political branches

---

[7] The government observes that the Compact of Free Association was approved by plebiscite in the Marshall Islands (Opp. 2), but the Section 177 Agreement was never put up to a popular vote, and in any event, "constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-737 (1964).

can make the determination to accept a foreign government's assertion that it has authority to take particular actions under its own law—the issue raised in *Doe* v. *Braden*, 57 U.S. (16 How.) 635 (1854). Rather, the issue here is whether the courts must accept the government's assertion that the constitutional claims of private individuals can be validly "settled" not by the claimants themselves but by an entity that is not sovereign, but is under U.S. government control.

The courts' deference to the political branches is not so sweeping in scope. The act of state doctrine—which requires the courts to accept the validity of a foreign government's acts, such as the Soviet nationalizations at issue in *United States* v. *Pink*, 315 U.S. 203 (1942), and the land grant annulments by the King of Spain at issue in *Doe* v. *Braden*—has never been applied to the acts of governments that are not foreign. Likewise, deference to the political branches' decisions about the foreign representatives with whom they will treat does not give the United States carte blanche to treat any entity as if it were a foreign sovereign. Clearly, the validity of an agreement, however labeled, between the United States and California purporting to "espouse" and "settle" Californians' claims against the United States would not constitute a political question. Nor would the courts decline to scrutinize the validity of an agreement between the United States and a foreign corporation that purported to waive its employees' individual claims against the United States—even if the agreement were called a "treaty" or an "espousal" and signed by a U.S. Ambassador. The government's *characterization* of an agreement and its counterparty cannot create a obstacle to judicial review.

2. On the underlying question whether the Marshall Islands government could "settle" petitioners'

constitutional just compensation claims against the United States without their express consent, the answer must be, and is, negative. A party to litigation may not have its claim disposed of by any other party. *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 529 (1986). And although a governmental entity litigating in a *parens patriae* capacity can dispose of its citizens' "common *public* rights," *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 340-341 (1958) (emphasis added), this Court has never held that even a sovereign government may negotiate away individual rights to seek redress in the courts of the United States for constitutional violations—much less when those violations occurred when the individuals were nationals of the United States.

The Section 177 Agreement, however it be read, cannot alter the fundamental principle that "[j]ust 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). That constitutional obligation does not disappear in a claims-settlement context. In *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), the Court explained that parties whose claims in U.S. courts were diverted into the Iran-U.S. Claims Tribunal under the claims-settlement provisions of the Algiers Accords would nonetheless retain a Tucker Act remedy following their exhaustion of the Tribunal process should the compensation received there prove constitutionally deficient. As the Court stated, "to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States

Court of Claims under the Tucker Act." *Id.* at 689-690; *see also id.* at 691 (Powell, J., concurring).[8] Here too, the courts remain open to petitioners' takings claims, notwithstanding the government's attempt to "settle" them away for next to nothing.

* * * * *

Justice Holmes once remarked that "[m]en must turn square corners when they deal with the Government." *Rock Island, A. & L. R.R. Co.* v. *United States*, 254 U.S. 141, 143 (1920). But as Justice Jackson observed, "there is no reason why the square corners should constitute a one-way street." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 388 (1947) (dissenting). Petitioners have done what the government demanded of them and more: they left their home islands for decades and relied on the government's promise to return them to their property; they pursued their compensation claims in the courts; when Congress established an

---

[8] The government suggests (Opp. 20-21) that in *Dames & Moore* the Court merely rejected the contention that the "treaty exception" to the Court of Claims' jurisdiction would bar any such action. The Court addressed that issue, however, only after making clear that the question of the availability of a Tucker Act remedy was ripe for review because of the constitutional imperative of a clear and certain judicial remedy at the time the taking was effected. *See* 453 U.S. at 689. Thus, the treaty-exception issue was addressed (and rejected) as a possible concern that a certain judicial remedy might not be available should the claimants eventually conclude that the Iran-U.S. Claims Tribunal had not provided them adequate compensation for their claims. Had the Tucker Act remedy been withdrawn, the case for invalidating the Algiers Accords, on the ground that they provided no ultimate assurance of just compensation for claims that were taken, would have been much stronger.

alternate remedy, they pursued that avenue of relief; and then they patiently waited for their compensation to be paid. They trusted the system to make them whole, but the government has paid them virtually nothing. This Court should grant review to make clear that the government's obligation to pay just compensation for property that it takes is real, and not insubstantial, for "[m]en naturally trust in their government, and ought to do so, and they ought not to suffer for it." *Menges* v. *Dentler*, 33 Pa. 495, 500 (1859).

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVOR PEVEC
Bishop Street Tower
700 Bishop Street
Suite 2100
Honolulu, HI 96813
(808) 599-5655

SETH P. WAXMAN
PAUL R.Q. WOLFSON
Counsel of Record
MICAH S. MYERS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

CRAIG ESTES
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

MARCH 2010

Blank Page