No. 2007-5175

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PEOPLE OF BIKINI, BY AND THROUGH THE
KILI/BIKINI/EJIT LOCAL AND GOVERNMENT COUNCIL,

PLAINTIFFS-APPELLANTS,

v.

UNITED STATES,

DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN 06-288C
JUDGE CHRISTINE ODELL COOK MILLER

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS PEOPLE OF BIKINI

JONATHAN M. WEISGALL
JONATHAN M. WEISGALL CHARTERED
1800 M St. NW
Suite 330N
Washington, DC 20036
(202) 828-1378 (phone)
(202) 828-1380 (fax)

PATRICIA A. MILLETT
THOMAS C. GOLDSTEIN
ROBERT K. HUFFMAN
DUNCAN N. STEVENS
MONICA P. SEKHON
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 887-4000 (phone)
(202) 887-4288 (fax)

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND LEGISLATIVE HISTORY

REGULATIONS

FEDERAL RULES

In Homer's *Odyssey*, Penelope thwarted would-be suitors by promising to marry only after she finished a tapestry, which she then wove during the day, but unraveled during the night, ensuring it would never be completed. *The Odyssey*, Book II, lines 91-105 (R. Lattimore trans. 1965). So too the government long ago acknowledged its "continuing moral and humanitarian obligation * * * [to] provide any assistance required" to "compensate any victims" of nuclear testing in the Marshall Islands. 131 Cong. Rec. S15568 (Nov. 14, 1985) (Sen. McClure). Yet promises and representations of remediation woven by the government at one stage of this litigation have been unraveled in the next, rendering illusory for 27 years the Constitution's promise of just compensation for the destruction of the Bikinians' homes and land.

Both logic and precedent demand rejecting that strategy and the fundamentally flawed legal propositions on which it rests. First, with respect to the timeliness of the claims, the government's position, at bottom, is that there is no point at which a timely complaint could have been filed. That is wrong. The Bikinians have diligently pursued their claims at every turn. Nothing about the Bikinians' exhaustion of the Nuclear Claims Tribunal process – required by the government and

directed by this Court – changed that. Indeed, it would be perverse to hold that pursuing court-mandated proceedings could result in the forfeiture of constitutional rights.

The government's invocation of the political question doctrine on the ground that foreign relations are involved lacks merit. The Bikinians' claims are fundamentally domestic, arising out of domestic activities of the government against its domestic wards – individuals to whom the United States is uniquely affiliated, to whom it admittedly owes fiduciary duties, and many of whom are U.S. citizens. The land that was taken was not in a foreign territory, but within U.S. territory – territory that, even now, the United States Code defines 27 times as a "State." And the Bikinians brought that claim not against a foreign government, but against the government that continues to exercise final control and governmental authority in the Marshall Islands over defense matters from which both claims arise. The government cannot have it both ways, treating the Bikinians and their land as subject to its domestic authority when it benefits the government, but casting them off as "foreigners" under the "political question" doctrine when the government wishes to avoid its legal responsibilities.

Finally, the government's argument that Tucker Act jurisdiction was withdrawn never comes to grips with controlling Supreme Court precedent, which recognizes two distinct types of withdrawal. There is, first, the displacement of the Tucker Act as the ordinary mechanism for redressing alleged takings. Here, the Tribunal stepped into that initial role. But even when the Tucker Act has been displaced as the initial compensation mechanism, Tucker Act jurisdiction remains to redress any constitutional shortfalls in that remedial mechanism, unless there is clear, convincing, and unambiguous evidence that Congress consciously determined to *prevent* full constitutional redress. That evidence is missing here.

ARGUMENT

I. THE CLAIMS ARE TIMELY.

A. The Claims Were Not Filed Too Late

The Bikinians filed their claim seeking compensation for the taking of their claims before the Tribunal (Count I) in 2006, well within six years of the Tribunal's award in 2001 and its announcement in 2002 that the Bikinians would receive less than one half of one percent of the compensation due to them. The government now contends (Br. 45) that

Count I was filed too late because the Compact became effective in 1986, and all challenges pertaining to the Tribunal had to be brought within six years of that date without awaiting any Tribunal action. That argument lacks merit.

First, the argument is nonsensical. The Bikinians do not challenge the mere existence of the Compact or the Tribunal. Instead, the Bikinians' claims arise out of the staggering shortfall in compensation resulting from the Tribunal process – the forum designated by the United States to determine the Bikinians' claims. That unredressed shortfall is the constitutional injury. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). And that claim "did not accrue until [the Bikinians] w[ere] denied just compensation," *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999), which happened in 2002, not 1986.[1]

Second, the argument defies precedent. Had the Bikinians attempted to file suit in 1986 or anytime before the Tribunal award, the

[1] With respect to their land-based claim (Count V), the Bikinians timely filed suit in 1981. *See* U.S. Br. 48 n.8; *Castro v. United States*, 500 F.2d 436, 441-442 (Ct. Cl. 1974). The Compact diverted that claim to the Tribunal, which did not render just compensation, causing the Bikinians to repair to court again in 2006.

claim would have been unripe. Indeed, in 1989, this Court specifically ruled that "we are unpersuaded that judicial intervention is appropriate *at this time* on the mere speculation that the [Tribunal] remedy may prove to be inadequate." *People of Enewetak v. United States*, 864 F.2d 134, 136 (1988), *cert. denied*, 491 U.S. 909 (1989) (emphasis added). The Court accordingly affirmed the Court of Federal Claims' holding that the challenge to the "adequacy" of the Tribunal in 1987 "was premature." *Id.* at 136-137. The government's argument that the claim accrued in 1986 thus is foreclosed by circuit precedent. *See Phonometrics, Inc. v. Economy Inns of America*, 349 F.3d 1356, 1363-1364 (Fed. Cir. 2003), *cert. denied*, 541 U.S. 1010 (2004). The government's argument is also barred by collateral estoppel because the prematurity of the just compensation claims was litigated and actually decided in *Enewetak* and *Juda v. United States*, 13 Cl. Ct. 667 (1987). *See Allen v. McCurry*, 449 U.S. 90, 94 (1980).[2]

---

[2] The government stresses (Br. 47) that the Court "was not addressing the statute of limitations" in *Enewetak*. But that is only because the statute of limitations is irrelevant until a just compensation claim accrues and is ripe. *See, e.g.*, *Friedman v. United States*, 310 F.2d 381, 385 (Ct. Cl. 1962), *cert. denied*, 373 U.S. 932 (1963).

The government's argument (Br. 47) that exhaustion was not mandatory likewise misses the mark. The Fifth Amendment itself "require[s] that one seeking compensation must 'seek compensation through the procedures the [government] has provided for doing so' before the claim is ripe for review." *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 312 n.6 (1987). Consequently, where government "provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson*, 473 U.S. at 195.[3]

Third, the government's argument flatly contradicts its position before this Court in *Enewetak*. There, the government argued that (i) the Fifth Amendment claim was "premature"; (ii) the claim would not accrue until the Tribunal process had "run its course"; (iii) there was "no basis to presume that the Agreement will fail to provide a just and

---

[3] *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478 (Fed. Cir. 1994), stands for the unremarkable proposition that, in the absence of any alternative procedure, a takings claim must be brought within the Tucker Act's limitations period. *See id.* at 1481-1482.

adequate remedy" until the process had been "allowed to operate"; and (iv) "[e]xhaustion of the statutory remedy is necessary to determine the extent of the taking that has occurred." A0363, A0370. Those arguments are irreconcilable with the government's contention now that exhaustion was optional and that the claims were ripe for adjudication in 1986.

Judicial estoppel precludes the government from obtaining a favorable legal judgment based on one argument and then, having enjoyed the benefits of that ruling, making an inconsistent argument once its interests have changed. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *San Carlos Irrigation & Drainage Dist. v. United States*, 111 F.3d 1557, 1567 (Fed. Cir. 1997). That principle applies with equal force to the government, *see New Hampshire*, *supra*, which also bears a unique obligation of fair dealing in litigation, *Berger v. United States*, 295 U.S. 78, 88 (1935). For a court, at the government's behest, to dismiss a timely filed constitutional claim for failure to exhaust, and then to declare re-assertion of the claim post-exhaustion untimely on the ground that there was no duty to exhaust in the first place would accomplish the very "perversion of the judicial process" that

judicial estoppel was designed to prevent. *In re Cassidy*, 892 F.2d 637, 641 (7th Cir.), *cert. denied*, 498 U.S. 812 (1990).

B. The Claims Were Not Filed Too Early

Like the Court of Federal Claims, the government would leave the Bikinians whipsawed between filing too late and filing too early, asking this Court to hold that there is *no time* that their constitutional rights could have been vindicated. That is as wrong as it sounds.

First, the government contends (Br. 60-61) that Congress's failure to provide just compensation – its failure to act – does not give rise to a claim under the Fifth Amendment. But the Fifth Amendment does not forbid taking property; it forbids taking property "without just compensation." U.S. CONST. AMEND. V; *see Williamson*, 473 U.S. at 194. The very essence of the constitutional violation is the government's failure to pay and thus the government's *inaction*. That is why the Supreme Court has twice held that unreasonable delay in the payment of compensation itself violates the Just Compensation Clause. *See Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491 (1931) (compensation cannot "be indefinitely postponed until the Congress made some other provision"); *Cherokee Nation v. Southern Kansas Ry.*,

135 U.S. 641, 660 (1890) (payment must be "within a reasonable time"). The government's brief ignores those holdings. [4]

Second, the government argues (Br. 32-33) that judicial action might "embarrass[]" Congress by signaling a belief that it will not act. But the purpose of the Fifth Amendment is not to protect the government from embarrassment. Furthermore, the same Executive Branch that today asks this Court to await congressional action previously told Congress it should not act on the petition. A0884-A0888. The government cannot have it both ways.

The government's argument also defies reality. The Changed Circumstances petition has been pending for eight years without any action by Congress. The hearing that the government cites (Br. 5, 32) proves the point: it was convened and attended by one – and only one – congressional representative, a *non-voting delegate* from American Samoa. *See Hearing Before the Subcomm. on Asia, the Pacific, and the Global Env't of the House Comm. on Foreign Affairs*, 110th Cong., 1st

---

[4] In any event, Count I alleges governmental action in creating the Tribunal to be the administrative process by which *the United States* would fulfill its constitutional obligation to the Bikinians and in providing its exclusive source of funding.

Sess. 1 (July 25, 2007). No bills to appropriate additional funds for the Tribunal have been introduced in Congress in the eight years since the petition was filed or the seven years since the Tribunal's award. Particularly when the "odds of success" are so "low" – indeed, non-existent – a "takings claim [cannot] be kept at bay from year to year." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 740-741 (1997).

II. THE CLAIMS ARE JUSTICIABLE.

Resolution of the Bikinians' just compensation claims is a quintessentially judicial function. "It does not rest with [Congress] to say what compensation shall be paid, or even what shall be the rule of compensation. * * * [T]hat is a judicial inquiry." *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 327 (1893). The government's contention that the just compensation claims raise foreign policy issues and thus implicate non-justiciable political questions is wrong both logically and legally .

First, the Bikinians' claims are fundamentally domestic, not foreign. Many of the Bikinians are U.S. Citizens suing *their* government. A1017. Moreover, at the time the government destroyed their homes, the Bikinians were domestic dependents of the United

States, living on land exclusively occupied by and under the complete sovereign control of the United States. The government promised to treat the Marshall Islands as "an integral part of the United States," A0974, and to "accord[] [the Bikinians] all rights which are the normal constitutional rights of citizens under the Constitution," A0974-A0975**.** The United States thus did not take the land of "foreigners"; it took the land of its own domestic subjects – dependents to whom it owed special trust and fiduciary duties. *See Juda*, 13 Cl. Ct. at 677. And the Bikinians asserted their just compensation claim in 1981 not against a "foreign" government, but against *their* ultimate governmental authority – the United States, which still controlled them and the Marshall Islands. *See Ramirez de Arellano v. Weinberger,* 724 F.2d 143, 155 n.18 (D.C. Cir. 1983) (Scalia, J.) (claims by peoples of the Trust Territory do "not [concern] claims by foreign[ers] * * * with regard to action outside the jurisdiction of the United States"), *vacated on other grounds*, 745 F.2d 1500 (1984) (en banc), *en banc decision vacated on other grounds*, 471 U.S. 1113 (1985); *Ralpho v. Bell*, 569 F.2d 607, 619 (D.C. Cir. 1977) (Fifth Amendment applies to Micronesians as "American subjects").

The Compact of Free Association in 1986 did not transform the Bikinians into foreign strangers stripped of constitutional protections. To begin with, where, as here, "the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 328 (2002).

Beyond that, the Bikinians and U.S. government remained integrally interconnected both legally and practically. Both the Compact and the Section 177 Agreement were passed by Congress as *domestic laws*, *see* 48 U.S.C. § 1901 note, not as treaties or international agreements implemented unilaterally by the Executive Branch. *See* 131 Cong. Rec. H11787 (Dec. 11, 1985). Aid to the Marshall Islands is managed by the Department of the Interior, rather than the State Department. A0173.

Even more tellingly, the Compact requires the Marshall Islands to "consult" with the United States in conducting its foreign affairs, and allows the U.S. to act on the Marshall Islands' behalf in foreign relations. Pub. L. No. 108-188, Part 3, § 123, 117 Stat. 2797 (2003).

Given the United States' continued superintendence of the Marshall Islands' international relations, the government's protestations that the Bikinians' claims could adversely impact its "foreign" relations with the Marshall Islands rings hollow.[5]

In 2003, Congress reaffirmed "the special relationship that exists between the Republic of the Marshall Islands and the United States." Pub. L. No. 108-188, *supra*, § 211(a), 117 Stat. 2809. No fewer than 27 times, the U.S. Code expressly defines the Marshall Islands as a "State" and applies domestic law to them.[6] Environmental protections apply "as if the Republic of the Marshall Islands were the United States." *Id.* § 161, 117 Stat. 2803. Marshall Islanders serve in the U.S. military, 10 U.S.C. § 503 – including in Iraq and Afghanistan.[7] The Marshall Islands uses U.S. currency, Pub. L. No. 108-188, *supra*, § 251, 117 Stat.

---

[5] Ratification of the 1979 Constitution did not change the Marshall Islands' status (U.S. Br. 40). The trusteeship continued, and the U.S. High Commissioner remained in control of "all laws," the budget, and all foreign relations. A0976-A0977.

[6] *See* 2 U.S.C. § 812; 7 U.S.C. §§ 3103, 6802, 7802; 10 U.S.C. §§ 503, 1153; 16 U.S.C. §§ 470w, 718j; 20 U.S.C. §§ 1409, 5602, 5802, 6103, 7801, 9122, 9172; 40 U.S.C. §§ 525, 553, 554, 3501, 6101; 42 U.S.C. §§ 300m, 300x-64, 300ff-88, 3122, 9877, 10903; 50 U.S.C. § 438.

[7] *See* http://foreignaffairs.house.gov/110/36989.pdf, at 8.

2819, receives the services of the Department of Transportation, Postal Service, and the Department of Homeland Security, *id.* § 211, 117 Stat. 2815, is eligible for federally subsidized student loans, 10 U.S.C. § 504(b)(ii); 20 U.S.C. § 1091, and block grants, *see* 42 U.S.C. §§ 300w-300w-10, 300x-300x-9, 701-709, 1841; 45 C.F.R. § 97.12, and has a U.S. zip code, http://www.usps.com. Grants are monitored as if the Marshall Islands were a State. Pub. L. No. 108-188, *supra*, § 213(a), 117 Stat. 2813. And citizens of the Marshall Islands are automatically entitled to enter, work, and reside in the United States. *Id.* §§ 141, 117 Stat. 2798.

The Bikinians (many of whom are citizens) and their claims thus bear no resemblance to the claims against *foreign governments*, like the Soviet Union or Iran, on which the government relies. *See* Br. 29-32 (citing *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942); *Belk v. United States*, 858 F.2d 706 (Fed. Cir. 1988); *see also Medellin v. Texas*, 128 S.Ct. 1346, 1371-1372 (2008) (*Belmont* and *Pink* "involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments"). Having recognized time after time, in law after law, the unique domestic nexus between the Marshall Islands and

the United States, and having enjoyed the strategic benefits of that relationship, the government cannot suddenly and selectively declare the Bikinians to be foreign strangers solely to evade its constitutional responsibilities.[8]

Second, and relatedly, the Bikinians' claims arise out of the defense activities of the United States in the Marshall Islands. Those are functions that the United States has retained for itself under the Compact. The U.S. government has the authority to prohibit other Nations' access to the Marshall Islands, to use military bases at its discretion, and to invite foreign armed forces to use those military facilities. Pub. L. 108-188, Part 3, §§ 311, 315, 117 Stat. 2820-2821, 2822. The Marshall Islands has no military force of its own, and must "refrain from actions which the Government of the United States determines, after appropriate consultation * * * to be incompatible with its authority and responsibility for security and defense matters." *Id.*

[8] The political question discussion in *Belk* was *dicta*, because this Court held that the plaintiffs had not stated a takings claim. 858 F.2d at 710.

§ 313, 117 Stat. 2820.[9] Thus, the United States has withheld from the Marshall Islands any semblance of independence in defense matters.

The just compensation claims that the Bikinians assert for harm caused by nuclear testing thus pertain directly to an aspect of governmental authority in the Marshall Islands that remains squarely in the U.S. government's hands. Having specifically reserved for itself governmental control over such defense matters, the government cannot now protest that claims related to that authority implicate "foreign" relations.

Third, the government's argument fundamentally misunderstands the political question doctrine. A political question does not arise just because foreign affairs or international agreements are implicated. In *Medellin*, the Supreme Court addressed, without any political question qualms, the lawfulness of a Presidential directive that was issued pursuant to the Executive's foreign-relations power and adopted to enforce the United States' obligations under an international treaty and a ruling by the International Court of Justice. 128 S. Ct. at

[9] For example, the United States prevented the Marshall Islands from signing the South Pacific Nuclear Free Zone Treaty. A0980.

1368-1372; *see Dames & Moore v. Regan*, 453 U.S. 654 (1981) (addressing presidential agreement resolving disputes with Iran).

Nor does a political question arise just because an international treaty or Executive Order might be construed contrary to the views of the Executive Branch or in a manner that causes some international "embarrassment" or "friction" (U.S. Br. 32, 39). *Medellin* rebuffed the President's exercise of his constitutionally vested foreign affairs authority to resolve an ongoing international dispute with Mexico. 128 S.Ct. at 1372; *see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 437-439 (2006) (requiring government to permit the importation of controlled substances, contrary to treaty obligations). Neither is the prosecution of a just compensation claim by a foreign alien against the United States a political question. *See Russian Volunteer*, 282 U.S. at 492.

Instead, a political question arises only when the precise *issue* presented for adjudication falls so far beyond the judicial ken that it is not capable of being resolved in a judicial forum. "The doctrine * * * is one of 'political questions,' not one of 'political cases.'" *Department of Commerce v. Montana*, 503 U.S. 442, 456-457 (1992). The government,

however, has failed to identify any specific legal issue the Bikinians present that the courts are constitutionally forbidden or institutionally unequipped to resolve. Determining the monetary value of the land taken from the Bikinians and directing that compensation be paid would not "involve the exercise of a discretion demonstrably committed to the executive or legislature." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Nor would resolution of those issues "turn on standards that defy judicial application." *Ibid.* Courts routinely adjudicate such claims, and doing so here would not entail the resolution of foreign policy questions or the exercise of political judgment. Quite the opposite, there is a "textually demonstrable constitutional commitment" of those issues to the judicial branch. *Id.* at 217; *see Monongahela, supra.*

The most the government can muster is an unsubstantiated assertion (Br. 39) that permitting the suit to proceed would cause "friction" with the Marshall Islands. But the government fails to explain why the Marshall Islands government would take offense if the United States compensated the Bikinians for harm the United States caused. Indeed, the submission of the Changed Circumstances petition by the Marshall Islands government seeking, *inter alia*, additional

Tribunal funding proves the opposite. In any event, the government cannot seriously contend that the provision of long-delayed monetary relief would occasion anything remotely close to the "friction" caused by Texas's impending execution of a Mexican national, over the protests of the Mexican government and in defiance of the United States' international treaty obligations – a matter that is plainly justiciable. *See Medellin*, *supra*.

Fourth, unable to summon any real foundation for its political question argument, the government attacks a straw man, insisting that the Bikinians' claim is a challenge to the United States' recognition of the Marshall Islands government and the purported espousal of the Bikinians' claim. Br. 26. But the Bikinians are making no such argument. And that is for a good reason: the government's argument begs the very question presented here, which is whether the Compact and Section 177 Agreement conclusively foreclosed judicial review of the Tribunal process for constitutional compliance. If they did not – which is what the Bikinians *are arguing* here – then no question of espousal arises. That argument does require construction of the terms of the Compact Act and the Agreement, but that is not a political question.

See, e.g., *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006). Thus, because the Bikinians can prevail on the terms of the Agreement and Compact without challenging the espousal, no political question is "inextricably present" in this case. *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1362 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).[10]

III. THE COURT HAS JURISDICTION OVER THE BIKINIANS' CLAIMS.

A. Tucker Act Jurisdiction Remains To Redress Constitutional Shortfalls In The Tribunal Process

In the absence of "clear and unmistakable congressional intent" to the contrary, the Tucker Act is available to enforce a Fifth Amendment just compensation claim. *Preseault v. ICC*, 494 U.S. 1, 14 (1990). Only "an unambiguous intention to withdraw the Tucker Act remedy" will

---

[10] The Bikinians did raise espousal below, but only as an alternative ground for relief. *See* A1001-1002. In any event, the question of espousal is justiciable because it is a "purely legal question" (U.S. Br. 36) that turns upon whether a newly created government had the authority to resolve claims that arose when the claimants were not yet its citizens. Invalidating the espousal would not invalidate the entire Compact or Agreement. *See* A0164; *see also* 131 Cong. Rec. H. 11787 (Dec. 11, 1985) (Rep. Seiberling) (adjudication of claims would not pose a political question).

suffice. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984). That rigorous standard has not been satisfied here.

The government's argument to the contrary (Br. 18-23) fails to understand that there are two distinct types of Tucker Act withdrawal. The first is withdrawal of the Tucker Act, as the ordinary, default remedial mechanism for an alleged taking. *Ruckelshaus*, 467 U.S. at 1016. That is what happened here when the Compact and Agreement made the Tribunal the required administrative mechanism for determining the Bikinians' just compensation claims.

But even when the Tucker Act has been withdrawn as the initial forum for obtaining compensation, the Tucker Act routinely remains available for the limited purpose of redressing any constitutional shortfall arising from the alternative remedial mechanism. Withdrawal in the latter context would raise substantial constitutional questions concerning Congress's ability (or not) to legislate itself out of the Fifth Amendment's Just Compensation Clause. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). Accordingly, only the clearest and most unequivocal evidence of a deliberate congressional determination

"to *prevent* such [constitutional] recourse" will suffice. *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 126 (1974).

That second-stage withdrawal of Tucker Act jurisdiction did not happen here. Indeed, the case is on all fours with *Blanchette*. There, the Rail Act established a specialized scheme for judicial review of railroad claims, expressly directed that "[t]here shall be no review of the decision of the special court," and imposed a specific cap on payments by the United States. 419 U.S. at 109-110, 119 & nn.5 & 6. While those limitations were sufficient to displace the Tucker Act as the primary mechanism for determining disputes, they were insufficient to withdraw jurisdiction over a just compensation claim when the statutory remedial scheme fell short. The Supreme Court explained that, although such explicit jurisdictional restrictions and the cap on federal funding could be read as withdrawing Tucker Act jurisdiction, such provisions "at least equally support the inference that Congress was so convinced that the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims." *Id. at* 128. Given the canons against repeals by implication and in favor of construing

statutes to avoid constitutional invalidation, *id*. at 133-134, and the absence of any statutory provision "dealing with the [Tucker Act] remedy," the Court held that the "Tucker Act remedy is not barred" and remains "available to provide just compensation" for any "constitutional shortfall" in remediation, *id*. at 136, 148.

That same analysis controls here. ***First***, only specific consideration by Congress of the Tucker Act issue and affirmative evidence that Congress fully intended "to *prevent* such [constitutional] recourse" will completely foreclose Tucker Act relief. *Blanchette*, 419 U.S. at 126. But neither the Compact nor the Section 177 Agreement "mentions the Tucker Act," *Preseault*, 494 U.S. at 12, discusses "the interaction between [those statutes] and the Tucker Act," *Monsanto*, 467 U.S. at 1017, or otherwise "deal[s] with the [Tucker Act] remedy," *Blanchette*, 419 U.S. at 136.

The government relies (Br. 16) on the language withdrawing jurisdiction over claims arising from nuclear testing. But *Blanchette* and its progeny make clear that statutory language expressly foreclosing judicial review and channeling claims into an alternative remedial scheme by itself – no matter how emphatic it may appear at

first blush – is insufficient to permanently withdraw the Tucker Act as a constitutional backstop. *See Preseault*, 494 U.S. at 12-13 (funding cap does not preclude Tucker Act claim outside that limit); *Monsanto*, 467 U.S. at 1018 (statute providing that individuals "shall forfeit the right to compensation" insufficient); *Blanchette*, 419 U.S. at 110 (monetary cap and provision that "[t]here shall be no review of the decision" insufficient). Such language "does not withdraw the possibility of a Tucker Act remedy, but merely requires that a claimant first seek satisfaction through the statutory procedure." *Monsanto*, 467 U.S. at 1018. *See also Blanchette*, 419 U.S. at 128, 136.

Here, likewise, the better reading of the relevant text is that the withdrawal is limited to claims arising from the nuclear testing program, and not to claims arising out of the Tribunal process itself, *see* Bikini Br. 59-64, especially since the provision withdrawing jurisdiction omits from its coverage claims arising under Article IV, which creates the Tribunal, defines the determinations it can render, and addresses "disputes arising from distributions." *Id.* at 61. Seven out of seven judges who considered that question contemporaneously with the Agreement's enactment adopted that natural reading of the Agreement

and left open the opportunity for subsequent constitutional review under the Tucker Act. *See Enewetak*, 864 F.2d at 136; *Antolok v. United States*, 873 F.2d 369, 378 (D.C. Cir. 1989); *Juda*, 13 Cl. Ct. at 689. It is highly doubtful that all seven of those judges endorsed an interpretation of the Agreement that is not even "plausible." U.S. Br. 18.[11]

Second, also like *Blanchette, Monsanto,* and *Preseault*, nothing in the legislative history evidences Congress's intent to prevent a Tucker Act claim as a constitutional backstop to the Tribunal process. To the contrary, what little consideration the question received supports continued Tucker Act jurisdiction. *See* 131 Cong. Rec. H11787, 11838 (Dec. 11, 1985) (Rep. Seiberling) ("But a legacy of the unique relationship of the United States to the Marshall Islanders * * * will be the pending constitutional questions with respect to their rights, questions which cannot be foreclosed from court review."). And because the Compact Act and the Agreement were enacted after the Supreme

[11] The government's attempt (Br. 25) to distinguish *Blanchette* as concerned only with whether compensation could be paid in the form of stock is without merit. The Court was largely agnostic on the form of compensation required by the Constitution. 419 U.S. at 134, 150-152.

Court's decisions in *Blanchette* and *Monsanto* established the high level of specificity needed to withdraw Tucker Act jurisdiction completely, the absence of statutory or historical support for foreclosing all constitutional review speaks volumes. *See Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993) (presuming congressional awareness of relevant Supreme Court decisions when drafting laws).

Third, the government stresses (Br. 4) that the United States provided a large sum of money under the Compact and Agreement. But such appropriations *support* continued Tucker Act review because Congress may well have been "so convinced that the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims." *Blanchette*, 419 U.S. at 128; *see Preseault*, 494 U.S. at 15. That, in fact, is exactly how the United States portrayed the Compact and Agreement in its brief to this Court in *Enewetak*, arguing that the funds, investment plans, and the availability of further congressional appropriations together were intended to "provide continuous funding to *resolve*, not avoid, th[e] consequences" "of the nuclear testing program." A0359. And that is why the government

described the initial payment as "cornerstone funding," A0359, rather than the ceiling on funds that the government now asserts (Br. 27-28). *See Enewetak*, 864 F.2d at 135 ("initial sum"); *id.* at 136 ("initial amount").

Fourth, well-established rules of statutory construction compel the conclusion that Tucker Act jurisdiction remains. The Compact and Agreement, like the statutes in *Preseault*, *Monsanto*, and *Blanchette*, were enacted after the Tucker Act, and thus the government's argument runs headlong into the "cardinal rule * * * that repeals by implication are disfavored." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003). The government cannot overcome that presumption here because the two statutory schemes are not in "irreconcilable conflict," *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-142 (2001), nor is there a "positive repugnancy" between the statutory provisions, *Blanchette*, 419 U.S. at 134. To the contrary, the Tucker Act and the Compact and Agreement "are capable of co-existence" if the Tucker Act serves as a constitutional backstop to the Tribunal process, *id.* at 133, and so "it is the *duty* of the courts * * * to regard each as effective," *id.* at 133-134 (emphasis added).

In addition, the "elementary" rule that "every reasonable construction must be resorted to[] in order to save a statute from unconstitutionality," *Gonzales v. Carhart*, 127 S. Ct. 1610, 1631 (2007), requires the Court to construe the Compact and Agreement as permitting Tucker Act review of the constitutional shortfall in the Tribunal's process. So do the well-established rules requiring the construction of such agreements against the United States and in favor of dependent wards of the government, to whom the government owes a fiduciary duty. *See* Bikini Br. 68-69. If the government's fiduciary obligations of trust and responsibility mean anything, they mean that, if the United States wants to cut off completely all constitutional recourse for harm it causes to dependent wards, the government must be up front and explicit about exactly what it is doing. It did not do that here.[12]

---

[12] The government's argument (Br. 11-14) that the Bikinians are collaterally estopped from litigating the withdrawal issue also lacks merit. The decisions in *Enewetak* and *Juda* specifically declined to address whether Tucker Act jurisdiction remained if constitutional shortfalls arose in the Tribunal process, deeming that question to be premature. *Enewetak*, 864 F.2d at 135-137; *Juda*, 13 Cl. Ct. at 689. And that was not dicta – that is all *Enewetak* decided.

B. The Government's Efforts To Escape Precedent Fail

The government's remaining arguments fare no better. ***First***, the government stresses (Br. 23) that *Blanchette* did not involve a settlement. True, but neither does this case. The suggestion that the Compact and Agreement "fully and finally settled" the Bikinians' claims (U.S. Br. 23) just repeats the same flawed statutory construction arguments about the scope of withdrawal and, indeed, the government's interpretation would withdraw jurisdiction over claims that the Agreement does not mention. Established principles of both statutory and contractual construction preclude adopting such a strained reading in favor of a drafter who bears fiduciary obligations to the disfavored party. *See, e.g.*, *Antoine v. Washington*, 420 U.S. 194, 200 (1975) ("liberal" construction of agreement with "wards of the nation" required); Bikini Br. 68-71.

Second, the government contends (Br. 23) that completely withdrawing the courts' jurisdiction over Fifth Amendment claims is a matter of no constitutional consequence. That could not be more wrong. *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (to "entirely preclude review of a pure question of law by any court would give rise to

substantial constitutional questions"); *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) ("serious constitutional question").

The government's argument, moreover, rests on the faulty premise that no court had jurisdiction to review just compensation claims prior to the passage of the Tucker Act. That is not correct. *See United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656-657 (1884); *United States v. Lee*, 106 U.S. 196, 219 (1882) (courts must "give remedy to the citizen whose property has been * * * devoted to public use without just compensation"); *id.* at 220 (Fifth Amendment rights "were intended to be enforced by the judiciary"); *Kohl v. United States*, 91 U.S. 367, 376 (1876); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 312 (C.C.D. Pa. 1795) ("[T]he legislature * * * cannot constitutionally determine upon the amount of the compensation, or value of the land."); *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696 (1949) (noting *Lee*'s "constitutional exception to the doctrine of sovereign immunity").[13] Indeed, the Supreme Court has made clear

---

13 The government mistakenly relies (Br. 24) on the concurring, not the majority, opinion in *Zoltek Corporation. v. United States*, 442 F.3d

(footnote continued on next page)

that the Fifth Amendment's Just Compensation Clause is "self-executing," *First English*, 482 U.S. at 315, so that "[s]tatutory recognition [i]s not necessary," *Jacobs v. United States*, 290 U.S. 13, 16 (1933).

Third, the government argues (Br. 50-56) for the first time on appeal that the Bikinians are not U.S. citizens and thus have no constitutional rights to assert. Because the government did not raise that argument below, it is waived. *See*, *e.g.*, *Optivus Tech., Inc. v. Ion Beam Applications, S.A.*, 469 F.3d 978, 992 (Fed. Cir. 2006); *In re Compagnie Generale Maritime*, 993 F.2d 841, 843 n.3 (Fed. Cir. 1993). The government attempts to evade waiver by casting its argument as one of "standing." But the Bikinians plainly have "standing" in the jurisdictional, Article III sense because they have suffered an "injury in fact" that was caused by the United States and would be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555,

---

(footnote continued from previous page)
1345 (Fed. Cir. 2006), *cert. denied*, 127 S. Ct. 2936 (2007) . *Langford v. United States*, 101 U.S. 341 (1880), is likewise inapposite because it involved the government's use of property under a claim of title, which was a tort, not a taking. *Id.* at 344; *see Great Falls*, 112 U.S. at 656-657.

560-561 (1992). Whether an individual's claim falls within the scope of a constitutional provision – whether the plaintiff enjoys the protections of the asserted right – is a question of substantive constitutional law, not standing, to be addressed through a Rule 12(b)(6) motion to dismiss. *See Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *Davis v. Passman*, 443 U.S. 228, 239 n.18 (1979); *Juda v. United States*, 6 Cl. Ct. 441, 455 (1984); *see generally Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-516 (2006) (distinguishing jurisdictional and non-jurisdictional questions).

In any event, the government's argument has no merit. Many of the Bikinians are U.S. citizens. A1017.[14] Beyond that, the Court of Federal Claims correctly held 24 years ago that the Bikinians enjoy the protections of the Fifth Amendment, because the United States' forcible displacement of its dependent subjects "created a relationship with plaintiffs that exceeded in both nature and degree the relationship normally taken with a 'foreign' country or by a trustee charged to protect the inhabitants against the loss of their lands and resources and to protect their health." *See Juda*, 6 Cl. Ct. at 458.

---

[14] Had the government raised this issue below, the existing record evidence could have been supplemented.

That holding that nonresident aliens have constitutional rights is amply supported by precedent. *See Russian Volunteer*, 282 U.S. at 489 ("alien friend[s]" enjoy "the protection of the Fifth Amendment"); *Ralpho*, 569 F.2d at 619 (Micronesians have due process protections as "American subjects"); *Turney v. United States*, 115 F. Supp. 457, 464-465 (Ct. Cl. 1953) (Takings Clause applies to the seizure of equipment owned by Philippine corporation); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-271 (1990).

Likewise, the Fifth Amendment's protection extends to property within American territories. *See Porter v. United States*, 496 F.2d 583, 591 (Ct. Cl. 1974) (Fifth Amendment applies "to takings of property outside the United States, even in the absence of Congressional extension of the Constitution to such foreign soil"), *cert. denied*, 420 U.S. 1004 (1975); *Fleming v. United States*, 352 F.2d 533 (Ct. Cl. 1965) (takings claim by Saipan citizens for land within Trust Territory).[15]

Finally, even if the Bikinians were required to show "substantial connections" to the United States (contrary to controlling precedent, *see*

---

15 *See also Castro*, 500 F.2d at 437 (property in trust territory of Saipan by citizen of trust territory); *Camacho v. United States*, 494 F.2d 1363, 1368 (Ct. Cl. 1974) (same).

El-Shifa, 378 F.3d at 1352), they would easily satisfy that test. The Bikinians' claims arise out of (i) their unique status as dependent wards and subjects of the United States, to whom that government bears fiduciary responsibilities, (ii) the United States' forcible displacement of them and exercise of complete dominion and control over them and their land; (iii) the United States' exercise of its continuing sovereign control over Bikinian defense and security matters; and (iv) decades of governmental promises and representations to provide full and fair compensation for the destruction of their land.[16]

* * * * *

While never denying responsibility for the destruction of the Bikinians' land or its legal and moral obligation to provide just compensation, the government has spent decades "nibbl[ing]" the Bikinians "to death on jurisdictional issues." A1073. It now stands

---

16 The cases on which the government relies (Br. 51) are inapt because they involved aliens in independent foreign nations, not U.S. subjects in U.S. trust territories. *See Atamirzayeva v. United States*, 77 Fed. Cl. 378 (2007) (Uzbekistan); *Ashkir v. United States*, 46 Fed. Cl. 438 (2000) (Somalia). Indeed, *Ashkir* cites residents of Trust Territories as a paradigmatic example of persons having "substantial connections." 46 Fed. Cl. at 444 & n.12. Likewise, the view of the Constitution expressed in the "insular cases" has been "largely repudiated." *Ashkir*, 46 Fed. Cl. at 440-441.

before this Court arguing that (i) the Bikinians' claims are at once both too early and too late; (ii) the Bikinians should be faulted for not pursuing claims in 1988 that the government told this Court, and this Court agreed, in 1988 were premature; (iii) this Court actually decided *sub rosa* substantial constitutional questions in 1988 that the face of the opinion expressly avoided addressing; and (iv) the Bikinians, to whom the United States confessed for decades that it owed unique trust and fiduciary obligations and promised compensation, and over whom it continues to exercise significant control should be cast out of court as foreign strangers with no significant connections to or legitimate claims on the United States. But to the plaintiffs – the descendants of fishermen who were forcibly displaced by the United States government and whose land was vaporized while the government left them stranded in starvation conditions – justice should not be a juridical shell game. "[T]he Government wins its point when justice is done in its courts." *Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963). That is what this case is about.

CONCLUSION

The judgment of the Court of Federal Claims dismissing Counts I and V of the Amended Complaint should be reversed and the case remanded for further proceedings.

Respectfully submitted,

Patricia A. Millett
Thomas C. Goldstein
Robert K. Huffman
Duncan N. Stevens
Monica P. Sekhon
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 887-4000 (phone)
(202) 887-4288 (fax)

Jonathan M. Weisgall
Jonathan M. Weisgall Chartered
1200 New Hampshire Ave. NW
Suite 300
Washington, DC 20036
(202) 828-1378 (phone)
(202) 828-1380 (fax)

April 25, 2008

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure (FRAP), the undersigned certifies that this brief complies with the type-volume limitations of FRAP 32(a)(7)(B).

1. Exclusive of the exempted portions identified in FRAP 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b), the brief contains 6,986 words. (The undersigned is relying on the word-count utility in Microsoft Word 2003, the word-processing system used to prepare the brief, consistent with Federal Rule of Appellate Procedure 32(a)(7)(C)(i).)
2. The brief was produced with Microsoft Word 2003 software in Century Schoolbook 14-point typeface.

_____

Duncan N. Stevens

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for Appellants was served by first class, postage pre-paid U.S mail on this 25th day of April 2008, upon the parties listed below:

Brian Simkin
U.S. Department of Justice, Civil Division
Commercial Litigation Branch
1100 L Street, Room 11048
Washington, DC 20530

_____
Duncan N. Stevens