Judge Christine Miller held oral argument on Monday, April 23, on the U.S. government's motion to dismiss the Bikinians' lawsuit as well as the lawsuit brought by the people of Enewetak. The oral argument lasted from 10:00 a.m. until after 3:30 p.m., with a one-hour lunch break. Judge Miller was totally prepared for the argument. She knew the law and was very familiar with the facts of both cases. She actively questioned all the lawyers and she frequently spoke about her own views of the case and the issues she was grappling with. She is a very smart judge, and I sense that she was struggling to find the right decision. She felt bound by the lower courts' rulings in these cases from the 1980s, one by a trial judge like her (Judge Harkins) and one by the appellate court, called the Federal Circuit Court of Appeals. She made clear that she feels bound by the Federal Circuit's decision, but figuring out exactly what that decision now means was the subject of much debate.

It is difficult to summarize the entire day, and it is very hard to explain some of the key points without going into great detail about the law, so the following is designed to be just a summary of the argument and the ruling:

- The Bikinians' basic argument is that the failure of the United States to adequately fund the Nuclear Claims Tribunal prevented it from paying them just compensation on their claims and that this action therefore constituted a "taking" of their property (their Nuclear Claims Tribunal claim) under the Fifth Amendment to the U.S. Constitution.
- The first court that looked at this issue – Judge Harkins in the Court of Claims in 1987 – concluded that it was "premature" to decide the constitutionality of the agreement until the alternative remedy provided in the Section 177 Agreement (the Tribunal) had been exhausted, at which point it would be possible to determine whether just compensation had been paid. He wrote: "Whether the settlement provides adequate compensation cannot be determined at this time. This alternative procedure for compensation cannot be challenged judicially until it has run its course."
- The next year, the appellate court, called the Federal Circuit, affirmed Judge Harkins' ruling:. "We are unpersuaded that judicial intervention is appropriate at this time on the mere speculation that the alternative remedy may prove to be inadequate."
- The Bikinians, I argued, have now exhausted that alternative remedy, and the earlier lawsuit left the door open for them to return to the U.S. Court of Federal Claims if the Nuclear Claims Tribunal failed to award them just compensation.
- From the U.S. government perspective, the argument was equally clear: Even if the Tribunal failed to award the Bikinians just compensation, the doors of the U.S. courts are

closed under Article XII of the Section 177 Agreement, which states: "No court of the United States shall have jurisdiction to entertain [claims arising from the nuclear testing program in the Marshall Islands], and any such claims pending in the courts of the United States shall be dismissed."

- During the morning session, the U.S. Government made this argument: The Nuclear Claims Tribunal had paid just compensation for the Bikinians' claims, they said, and the court no longer had jurisdiction to hear the Bikinians' case.
- Judge Miller made clear that she didn't agree with that argument, and I followed up by arguing that although the United States can take property under its sovereignty, Congress can't decide how much just compensation to pay for that property; that's the job of the courts. She seemed to agree with that as well, and at the end of the morning session any observer would have said that she was going to deny the government's motion to dismiss the case.
- After the lunch break, the U.S. Government pushed hard on another argument. They pointed Section 177 Agreement and Section 103(g)(1) of the Compact, which states that "it is the intention of Congress… that the provisions of the Section 177 Agreement constitute a full and final settlement of all claims," and said that the Compact and the Section 177 Agreement represent a full and final international agreement between two sovereigns, and that Congress can set the price for such a settlement. Under this argument, this isn't really viewed as a Fifth Amendment takings case but rather an international agreement that was designed to lead to the recognition and sovereignty of the Marshall Islands. Judge Miller was more attracted to this argument. She asked at one point that if claimants in international agreements could always come back to sue, how could the United States ever settle claims with foreign countries?
- At the end of the day, Judge Miller told both sides to submit briefs on two questions:
    - What should be the role of U.S. courts in reviewing the adequacy of the relief provided by international tribunals in light of the statement the appellate court had made in cases in the 1980s, when the Compact had just been enacted, that a court should not intervene in Nuclear Claims Tribunal process "on the mere speculation that the alternative remedy may prove to be inadequate"?

- What did the appellate court mean in the 1980s when it referred to the $150 million in the Section 177 Agreement as an "initial sum"?

- Each side is to file their briefs on May 23. Enewetak can also file a brief.
- The judge said she would rule on the cases by June 23.
- I obviously don't know what the judge is going to say, but she said several times that she is inclined to rule as if Judge Harkins' decision from 1987 – suspending the case until the Nuclear Claims Tribunal had ruled – has now been unfrozen and has come alive again now that the Bikinians have exhausted their alternative remedy and obtained their Tribunal ruling. However, she also said that she is not going to enforce the Tribunal's award, but will instead move the case ahead "de novo," which means "from the start," so we will need to start over again, with appraisers and scientists and other witnesses. We will also be bound by U.S. Court of Federal Claims rules of evidence and legal precedent on how to compute just compensation, which may be stricter in U.S. courts.
- On three separate occasions she said that the case should be settled, and she urged the Enewetak and Bikini lawyers to sit down with the government lawyers to talk about an offer to settle the cases. She said that neither party is going to like her ruling. For the government it will be embarrassing to re-litigate "claims about vaporized islands," while for the Bikinians the trial will take a long time, the damages will probably be lower, and if she is reversed by an appellate judge after a lengthy trial, the entire award will go away and the Bikinians will receive nothing. And she added that the odds of winning the case were not certain.
- If she takes up the cases where they were in the 1980s, the Enewetak case may be in trouble, because Judge Harkins had ruled in the 1980s that the statute of limitations had run on their takings claim, leaving them only with breach of contract claims. Jon van Dyke, the lawyer for Enewetak, argued that Section 177 (a) of the Compact itself, which provides: "The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands . . . for loss or damage to property . . . resulting from the nuclear testing program. . . ." Those words, he said, had effectively overruled Judge Harkins' decision and that Congress had effectively waived the statute of limitations and opened itself up to compensation for any claim, even ones that might be barred by the statute of limitations. The government counter-argued that

Congress would not have intended to bring about a "full and final settlement" of all claims and, at the same time, open up the U.S. Government for new liabilities.

- I have ordered a copy of the transcript, and I will send out another summary next week of some of Judge Miller's points.
- On balance, I think that Bikini will move to the next step of the case, because in the end I think that Judge Miller is going to deny the government's motion to dismiss the case. That, however, is just my own view. The next steps will be to file our brief on May 23, look at what the government says, and wait until she rules.