S. HRG. 106–585

FORMER U.S. WORLD WAR II POW'S: A STRUGGLE FOR JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

DETERMINING WHETHER THOSE WHO PROFITED FROM THE FORCED LABOR OF AMERICAN WORLD WAR II PRISONERS OF WAR ONCE HELD AND FORCED INTO LABOR FOR PRIVATE JAPANESE COMPANIES HAVE AN OBLIGATION TO REMEDY THEIR WRONGS AND WHETHER THE UNITED STATES CAN HELP FACILITATE AN APPROPRIATE RESOLUTION

JUNE 28, 2000

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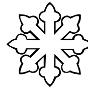

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FORMER U.S. WORLD WAR II POW'S: A STRUGGLE FOR JUSTICE

WEDNESDAY, JUNE 28, 2000

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:33 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Grassley, Sessions, and Feinstein.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. I am pleased today to welcome a distinguished group of witnesses to enlighten the committee on a very important issue, namely the struggle for compensation of American POW's once held and forced into labor by and for private Japanese companies.

I apologize for starting this hearing half an hour too late, but we had two votes right in a row and that takes precedence over everything else. So I apologize to you.

On April 9, 1942, Allied forces in the Philippines surrendered Bataan to the Japanese. Ten to twelve thousand American soldiers were forced to march some 60 miles in broiling heat, in a deadly trek known as the Bataan Death March. Following a lengthy internment under horrific conditions, thousands of POW's were shipped to Japan in the holds of freighters known as hell ships. Once in Japan, many of these POW's were forced into slave labor for private Japanese steel mills and other private companies until the end of the war. During the war, over 27,465 Americans were captured and interned by the Japanese. Only 16,000 of them made it home.

Let me say at the outset that this is not a dispute with the Japanese people and these are not claims against the Japanese Government. Rather, this is a hearing, the purpose of which is to determine whether those who profited from the slave labor of American POW's have an obligation to remedy their wrongs, and whether the United States can help to facilitate a resolution.

Let me also say to the veterans who are here today on behalf of this committee, the Congress, and the American people, we thank you. As has often been expressed, POW's experience a wide range of emotions concerning their captivity. I am here to tell you today that you are all heroes. You are heroes for your bravery on the battlefields and, of course, in the prison camps themselves, heroes for

the innumerable displays of compassion and love for your fellow men, heroes for your perseverance through circumstances most of us can barely imagine. You are living testaments to the indomitable human spirit that is the fabric of this great Nation, the United States of America, and everyone here living in freedom owes you a tremendous debt of gratitude.

Unfortunately, global, political, and security needs of the time often overshadowed your legitimate claims for justice, and you were once again asked to sacrifice for your country. Following the end of the war, for example, our Government allegedly instructed many of the POW's held by Japan not to discuss their experiences and treatment. Some were even asked to sign nondisclosure agreements. Consequently, many Americans remain unaware of the atrocities that took place and the suffering our POW's endured.

Through the years, various efforts have been made to offer some compensation for POW's held in Japan. Under the War Claims Act, our Government has made meager payments of $1.00 a day for missed meals and $1.50 per day for lost wages. Clearly, in the eyes of most, this is inadequate.

Following the passage of a California statute extending the statute of limitations for World War II claims until 2010, and the recent litigation involving victims of the Holocaust, a new effort is underway by the former POW's in Japan to seek compensation from the private companies which profited from their slave labor.

One issue for the committee to examine is whether the POW's held in Japan are receiving an appropriate level of advocacy from the U.S. Government. In the Holocaust litigation, the United States played a facilitating role in the discussions between German companies and their victims. The Justice Department also declined to file a Statement of Interest in the litigation, even when requested by the court. The efforts of the administration were entirely appropriate and the settlement was an invaluable step toward movement forward from the past.

Here, in contrast, there has been no effort by our Government, through the State Department or otherwise, to open a dialog between the Japanese and the former POW's. Moreover, in response to a request from the court, the Justice Department did, in fact, file a Statement of Interest which was very damaging to the claims of the POW's, stating in essence that their claims were barred by the 1951 Peace Treaty with Japan and the War Claims Act.

This contrasting treatment raises the legitimate questions of whether this administration has a consistent policy governing whether and how to weigh in during these World War II-era cases. What, if any, are the criteria used to decide whether or not to intervene? Have those criteria been fairly applied in this case?

From a moral perspective, the claims of those forced into labor by private German companies and private Japanese companies appear to be of similar merit. Yet, they have spurred different responses from the administration. Why? There may be legitimate reasons for the differences, but we need to ask the questions.

The Statement of Interest filed by the Justice Department in the lawsuits against Japanese companies also raises a number of questions because of its silence concerning a number of important treaty provisions and concepts of international law. The committee has

a duty to ensure the thoroughness of the work the Justice Department submits to the court, and we will explore some of those issues here today.

Our first panel of witnesses will address these questions to the administration. We are pleased to have representatives from the Departments of Justice and State. We are then fortunate to have the benefit of hearing from a number of POW's themselves who can tell us of their experiences and their struggles for recognition and compensation from the private companies that held them.

In the end, I hope we can elevate the discussion concerning where we go from here. I am not sure agreement on this issue will be easy. What can the United States of America, the country these men sacrificed for, do to resolve these matters in a fair and appropriate manner?

Here in the Senate, we are doing what we can. With the help of Senator Feinstein, we have moved through the Judiciary Committee Senate bill 1902, the Japanese Records Disclosure Act, which would set up a commission to declassify thousands of Japanese Imperial Army records held by the U.S. Government, after appropriate screening for sensitive national security information and the like.

The Senate is also doing what it can to fulfill our Government's responsibility to these men by including a provision in the DOD authorization bill which would pay a $20,000 gratuity to POW's from Bataan and Corregidor who were forced into labor. Such payment would be in addition to any other payments these veterans may receive under law, and thus would not compromise any of the claims asserted in the litigation against the Japanese companies.

Ultimately, I do not know where we will come out on the precise meaning of the treaty. Regardless of how the technical legal issues are resolved, which the courts will determine in light of the moral imperative and interests of simple fairness, we must ask ourselves can Congress do more? Can the executive branch do more? I am open to ideas and hope that this hearing begins a dialog to discuss what can be done in light of all the moral, legal, national security, and foreign policy interests which are at play.

We are delighted to have one of our colleagues here today from New Mexico, Senator Bingaman, and we will turn to him for his testimony at this time. However, I may interrupt at any time if the ranking member comes and cares to make a statement himself.

So, Senator Bingaman, we will take your statement at this time. I understand that the Honorable Max Cleland may be here shortly. If he comes, we will certainly take his statement along with yours.

STATEMENT OF HON. JEFF BINGAMAN, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator BINGAMAN. Thank you very much, Mr. Chairman. I will just take a very small amount of time here from the committee to speak specifically about S. 1806, which is a bill I introduced and you referred to. It is now included in the defense authorization bill.

We introduced this last October, with Senators Coverdell and Domenici and Hollings and Cleland as cosponsors with me on the bill. It would provide an honorarium of $20,000 to qualified veterans or their surviving spouses, and by "qualified" I mean those who

were made to perform slave labor to support the Japanese war effort.

I introduced the bill for a variety of reasons. You went through many of those in your opening statement. Clearly, these veterans were not adequately recognized and compensated for their contributions. Part of the settlement between the United States and the Government of Japan provided for compensation to American prisoners of war in 1952. That settlement, however, never compensated American prisoners who were made to perform slave labor while they were in captivity.

We sure are well aware, many of our veterans, many survivors of the Bataan and Corregidor episodes were shipped on so-called death ships to Japan and worked in shipyards, mines, and factories to support the Japanese war effort. Some of those ships unfortunately were actually sunk by our own forces, who were unaware that they had human cargo of Americans on board.

This came to my attention, frankly, because a good friend of mine, Nick Cintas, who is a former prisoner of war, a Bataan veteran who lives in my town of Silver City, called it to my attention a year or so ago. He pointed out then that he didn't think our Government was doing what it should. In particular, he pointed to the fact that the Government of Canada had recently approved a honorarium to Canadian prisoners of war from Hong Kong who were enslaved by the Japanese, and that award did not prejudice in any way other attempts to obtain compensation. Instead, it was an expression of support and appreciation by the Canadian Government. We then put together this legislation that I have referred to, with the clear view that we should do at least as well by our veterans, our Bataan and Corregidor veterans, as the Canadian Government had done.

Clearly, the heroism of these individuals is well documented. There is no question that this is a worthwhile effort to compensate them for this slave labor that was performed. I wanted to particularly just call the committee's attention to this legislation as we continue to work on the defense authorization bill on the Senate floor, and solicit active support of any additional Senators who are anxious to support this.

I think it would mean a great deal to those who are surviving, and there are fewer who are surviving each day. I know that there are a great many Bataan veterans who came from New Mexico, and the number who still survive is dwindling each month. So it is very important that we pass this legislation and that we do so this year.

I commend the committee for having this hearing, and I hope that in addition to this legislation, you can find some other ways to be of assistance.

The CHAIRMAN. Well, thank you, Senator Bingaman. We appreciate you being here and appreciate you taking time out of your valuable schedule. Thank you.

I notice that Senator Feinstein is here. Would you care to make opening remarks on behalf of the minority?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Just very quickly, if I might, Mr. Chairman, let me begin by thanking you for holding this hearing. I am particularly pleased that a constituent of mine, Dr. Lester Tenney, was able to come before the committee today and share his experiences.

As many of my colleagues know, Dr. Tenney has written a book detailing the brutality experienced by Americans at the hands of the Japanese Imperial Army and private Japanese companies that ran labor camps. I would like to commend him not only for enduring these conditions while held captive in Japan, but also for preserving a historical record from which future generations can learn.

Mr. Chairman, the veterans who have joined us today are all Americans who have served in Bataan and performed slave labor in Japanese mines, shipyards, and factories. As prisoners of war, they were subject to deprivation of liberty, to beatings, to starvation, and to other atrocities. Their endurance through all this symbolizes the sacrifice of all of the brave men who served during World War II.

I am hopeful that measures such as the bill I have introduced, the Japanese Imperial Army Disclosure Act, will assist in bringing to full disclosure evidence of use of chemical and biological agents, as well as atrocities that individuals have faced.

I think it is important that these classified records be released much as the German classified Holocaust-related records have been released. And I think by airing the light of day on much of this, we will be able to put this very terrible chapter behind us.

I thank you, Mr. Chairman. I look forward to the testimony.

The CHAIRMAN. Well, thank you so much, Senator.

Our first panel—now, if Senator Cleland comes, we will interrupt this panel, but on the first panel we are pleased to have Acting Assistant Attorney General for the Civil Division of the Department of Justice, David Ogden. Mr. Ogden supervised the preparation and filing of the Statement of Interest which has been filed in the POW litigation.

Deputy legal adviser at the State Department, Ronald Bettauer, also worked on the Statement of Interest, and advised Under Secretary of State Thomas Pickering on the legal issues involved. We did invite Under Secretary Pickering to appear himself to help explain the policy of when the State Department decides to intervene in these types of claims. We understand that he was the decision-maker at the State Department on whether to file something in this case.

Unfortunately, he declined our invitation. I think he has made a mistake. We will hear from him on this matter because he cannot avoid accountability on this matter, so I would like you to send that message back to the State Department. We believe it is incumbent on something as important as this that people come.

So we are pleased to have the two of you here, and we will take your statement first, Mr. Ogden.

PANEL CONSISTING OF DAVID W. OGDEN, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; AND RONALD J. BETTAUER, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE, WASHINGTON, DC

STATEMENT OF DAVID W. OGDEN

Mr. OGDEN. Mr. Chairman, Senator Feinstein, members of the committee, I appreciate very much the opportunity to appear before you to provide additional information concerning the United States' Statement of Interest in *Heimbuch* v. *Ishihara Sangyo Kaisha Ltd.,* a case brought by American prisoners of war of the Japanese against Japanese companies.

Based upon the chairman's letter to the Attorney General and my own discussions with committee staff, I understand that the chairman is seeking to ensure that the Department is applying consistent policy in its treatment of various World War II-related and prisoner of war-related matters, and in particular to assure that the Justice Department fulfilled its professional obligations and based its filing in *Heimbuch* on sound, thorough legal and historical analysis. I welcome the opportunity to address those questions, and as I will explain, I believe the Department has been both consistent and diligent in its representation of the United States in this matter.

Before turning directly to these questions, however, I would like to make some preliminary and somewhat personal observations. First, I consider it a singular privilege to represent the United States in our courts, and recognize that this privilege carries substantial obligations. Foremost among these, of course, is the attorney's responsibility to his client, to represent the United States' interests faithfully and diligently, consistent with the law.

Counsel for the United States is also an officer of the court and a servant of the American people. As such, there is a particularly strong obligation to help the courts correctly apply the law and to do justice in matters affecting the interests of the United States. As acting head of the Civil Division, I have been blessed to have the support of a dedicated and talented group of career attorneys who day in and day out meet those high standards and help me to do so.

I have also found that, on occasion, the faithful performance of these duties can be personally painful. That has been certainly true in the *Heimbuch* case. I have a profound respect for and feel a deep personal indebtedness to the plaintiffs in this case. They and other great Americans like them endured the most brutal of conditions in the service of this Nation, as you said, Mr. Chairman, and their efforts and suffering were crucial to safeguarding our freedom at a very dark hour. I have not relished the responsibility of submitting legal papers on behalf of this Nation that have opposed their legal claims against entities that they allege abused them and benefited from their enslavement during the war.

Let me turn now to the specifics of the case. In a March 24, 2000, order in *Heimbuch,* U.S. District Judge Alsup, of the Northern District of California, requested that the United States express its views on whether Federal law governs any claims by American sol-

diers captured and imprisoned by Japan during World War II where such claims are directed to private Japanese companies for whom such soldiers were forced to work as slaves, and whether removal of such claims from State court to Federal court is proper.

On May 23, 2000, the Department of Justice, on behalf of the United States, filed a Statement of Interest with respect to those issues, as you have said, Mr. Chairman, and expressed the position that such claims are governed by Federal law and should be heard in Federal court.

This conclusion was based on the 1951 Peace Treaty between the United States and Japan, in which the United States expressly waived its own claims and those of its nationals against Japan and its nationals arising from prosecution of the war. The United States has not been asked to provide, and has not purported to provide, its views with respect to any other aspects of those cases.

Under 28 U.S.C. section 517, the Department of Justice's role is to represent the positions and policies of the United States in litigation matters. The Department of Justice, as you undoubtedly know, tries to be as responsive as possible to judicial requests for the views of the United States in cases that affect the interests of the United States.

When we receive such a request, such as the one in *Heimbuch,* we communicate immediately with the appropriate client agency to determine what the appropriate response should be. In this case, the Justice Department acted at the request of the Department of State, which, of course, is the Agency responsible for conducting the foreign relations of the United States, including interpreting treaties to which the United States is a party.

The State Department asked the Justice Department to file a brief in response to the court's request in *Heimbuch* advising the court that the 1951 Peace Treaty preempted any State law claims and required that the matter be heard in Federal court. Our attorneys reviewed the State Department's request carefully and thoroughly, and worked closely with the lawyers in State's Legal Adviser's Office, including Mr. Bettauer, to research the issues and to present the court with a statement responsive to its inquiry that represented the legal and policy position of the United States.

As you will see from the written answers that we have provided to your questions, Mr. Chairman, it is clear from the language of the 1951 Treaty and the materials surrounding its negotiation and ratification by the Senate that the United States intended to waive its claims and those of its nationals against Japan and its nationals.

As I have said, we admire and sympathize with these valiant men who were prisoners of war, and condemn the wartime policies of Japan and its industry that forced them into servitude. But in 1951, President Truman and the U.S. Senate made a carefully considered national decision that our interests would best be served by a peace settlement that resolved all potential claims. For that reason, it was the strong view of the Department of State that the United States, having made this solemn commitment in a treaty, must honor that obligation. The Statement of Interest was filed in that spirit.

Now, I know that the chairman is also concerned that, in contrast to *Heimbuch,* as you said, Mr. Chairman, the United States did not file a statement of interest in *Gross* v. *Volkswagen* and *Rosenfeld* v. *Volkswagen,* litigation in the District of New Jersey involving the claims of individuals who were allegedly enslaved by German entities during the war.

In a letter we have attached to our answers to the committee's questions, I advised U.S. District Judge John W. Bissell that negotiations between representatives of the plaintiffs—that is, representatives of the victims there—and representatives of Germany and German industry were ongoing at that time over the creation of a German foundation to compensate victims, and that those negotiations were then at a very delicate stage.

As I explained, as a result, we are reluctant to take action now that might interfere with achieving this objective, an achievement we believe the court would welcome. The Department also agreed to update the court at that time on the progress of talks and perhaps to provide the Department's views, if that would be appropriate.

Thus, the Government's decision not to submit its views to Judge Bissell was done in an effort to facilitate a consensual settlement of the case that might make resolution of the legal issues unnecessary and provide relief to many victims. The decision not to file a brief in *Gross* and *Rosenfeld* was made based upon the recommendation of the Department of State, which has been leading the effort that you described, Mr. Chairman, by the U.S. Government to facilitate such a resolution.

The State Department's responsibility is to determine the policy interests of the United States in this regard, and after extensive discussion the Department of Justice deferred to its policy views with respect to declining to file a statement of interest on the grounds I have described.

I hope that these remarks and the written answers that we have provided to the committee's inquiries are helpful. I would be glad to respond to any questions the committee may have.

[The prepared statement of Mr. Ogden follows:]

PREPARED STATEMENT OF DAVID W. OGDEN

Mr. Chairman and Members of the Committee: I appreciate the opportunity to appear before you to provide additional information concerning the United States' Statement of Interest in *Heimbuch, et al.* v. *Ishihara Sangyo Kaisha, Ltd. et al.,* a case brought by American prisoners of war of the Japanese against Japanese companies. Based upon the Chairman's letter to the Attorney General and my own discussions with Committee staff, I understand that the Chairman is seeking to ensure that the Justice Department is applying a consistent policy in its treatment of various World War II-related and prisoner of war-related matters, and in particular to assure that the Justice Department fulfilled its professional obligations and based its filing in *Heimbuch* on a sound, thorough legal and historical analysis. As I will explain, I believe the Department has been both consistent and diligent in its representation of the United States in this matter.

Before turning directly to these questions, I would like to make some preliminary and somewhat personal observations. First, I consider it a singular privilege to represent the United States in our courts, and recognize that this privilege carries substantial obligations. Foremost among these, of course, is the attorney's responsibility to his client—to represent the United States' interests faithfully and diligently consistent with the law. Counsel for the United States is also an officer of the Court, and a servant of the American people. As such, there is a particularly strong obligation to help the courts correctly apply the law and do justice in matters affecting

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I have also found that, on occasion, the faithful performance of these duties can be personally painful. That has been true in the *Heimbuch* case. I have profound respect for, and feel deep personal indebtedness to, the plaintiffs in this case. They, and other great Americans like them, endured the most brutal of conditions in the service of this Nation, and their efforts and suffering were crucial to safeguarding our freedom at a very dark hour. I have not relished the responsibility of submitting legal papers on behalf of this Nation that have opposed their legal claims against entities that, they allege, abused them and benefitted from their enslavement during the War.

Let me turn now to the specifics of the case. In a March 24, 2000 Order in *Heimbuch,* United States District Judge Alsup of the Northern District of California requested that the United States express its views on whether federal law governs any claims by American soldiers captured and imprisoned by Japan during World War II, where such claims are directed to private Japanese companies for whom such soldiers were forced to work as slaves, and whether removal of such claims to federal court is proper. On May 23, 2000, the Department of Justice, on behalf of the United States, filed a Statement of Interest with respect to those issues, and expressed the position that such claims are governed by federal law and should be heard in federal court. This conclusion was based on the 1951 peace treaty between the United States and Japan, in which the United States expressly waived its own claims, and those of its nationals, against Japan and its nationals, arising from the prosecution of the War. The United States has not been asked to provide, and has not purported to provide, its views with respect to any other aspects of those claims.

Under 28 U.S.C. 517, the Department of Justice's role is to represent the positions and policies of the United States in litigation matters. The Department of Justice, as you will undoubtedly understand, tries to be as responsive as possible to judicial requests for the views of the United States in cases in which there is a federal interest. When we receive a request such as the one in *Heimbuch,* we communicate with the client agency to determine what the appropriate response should be. In this case, the Justice Department acted at the request of the Department of State, which, of course, is the agency responsible for conducting the foreign relations of the United States, including interpreting treaties to which the United States is a party. The State Department asked the Justice Department to file a brief in response to the Court's request in *Heimbuch,* advising the Court that the 1951 peace treaty preempted any state law claims and required that the matter be heard in federal court.

Our attorneys reviewed the State Department's request carefully and thoroughly and worked closely with lawyers in State's Legal Adviser's office to research the issues and to present the court with a statement responsive to its inquiry that represented the legal and policy views of the United States. As you will see from the Department's written answers to the questions you submitted, it is clear from the language of the 1951 peace treaty and the materials surrounding its negotiation and ratification that the United States intended to waive its claims and those of its nationals against Japan and its nationals. As I have said, we admire and sympathize with these valiant men who were prisoners of war, and condemn the wartime policies of Japan and its industry that forced them into servitude. But in 1951, President Truman and the United States Senate made a carefully considered, national decision that our interests would best be served by a peace settlement that resolved all potential legal claims. For that reason, it was the strong view of the Department of State that, the United States having made this solemn commitment in a treaty, it must honor its obligation. The Statement of Interest was filed in that spirit.

I know that the Chairman is also concerned that, in contrast to the filing in *Heimbuch,* the United States did not file a Statement of Interest in *Gross* v. *Volkswagen* and *Rosenfeld* v. *Volkswagen,* litigation in the District of New Jersey involving the claims of individuals who were allegedly enslaved by German entities during the War. In a letter we have attached to our answers to the Committee's questions, I advised United States District Judge John W. Bissell that negotiations between representatives of the plaintiffs and representatives of Germany and German industry were ongoing over creation of a German foundation to compensate victims, and that those negotiations were then at a "very delicate" stage. As I explained, "as a result, we are reluctant to take action now that might interfere with achieving that objective, an achievement we believe the court would welcome." The Department also agreed to update the Court on the progress of the talks and "perhaps suggest a further schedule" for providing the United States' views. Thus, the government's decision not to submit its views to Judge Bissell was done in an effort to facilitate

a consensual settlement of the case that might make resolution of the legal issues unnecessary.

The decision not to file a brief in *Gross* and *Rosenfeld* was made based upon the recommendation of the Department of State, which has been leading an effort by the United States government to facilitate such a resolution. Its responsibility is to determine the policy interests of the United States in this regard, and the Department of Justice deferred to its policy views with respect to declining to file a Statement of Interest in the district court.

I hope that these remarks, and the written answers we have provided to the Committee's inquiries, are helpful. I would be glad to respond to any questions the Committee may have.

The CHAIRMAN. Thank you, Mr. Ogden.

Mr. Bettauer.

STATEMENT OF RONALD J. BETTAUER

Mr. BETTAUER. Thank you very much, Mr. Chairman, Senator Feinstein. Good morning. I also appreciate the opportunity to appear before you today. I am a Deputy Legal Adviser at the Department of State and have been directly involved in both the German slave and forced labor negotiations, and the development of our position on the class action lawsuits that have been brought by former POW's against Japanese private companies in California State court.

Let me begin by expressing the administration's and my own personal sympathy to the victims of Japanese wartime aggression and our deep gratitude for those veterans who bravely served our country in the Pacific theater during World War II. We and the American people owe these veterans a great debt.

I intend to address briefly the 1951 Treaty of Peace with Japan and why the State Department asked the Department of Justice to file a Statement of Interest in favor of removal of the lawsuits to Federal court.

Article 14(b) of the 1951 Treaty of Peace with Japan provides that:

> except as otherwise provided in the * * * Treaty, the Allied powers waive all reparations claims of the Allied powers, other claims of the Allied powers and their nationals, arising out of any action taken by Japan and its nationals in the course of the prosecution of the war.

The CHAIRMAN. Is that the language you are basically relying on, then?

Mr. BETTAUER. That is the basic language, yes.

The CHAIRMAN. But how can the Government waive the rights of individuals?

Mr. BETTAUER. Well, I will talk a little bit about how this occurred.

The CHAIRMAN. I shouldn't have interrupted you. I can see how the Government can waive its rights. I can see how it can enter into a treaty. I can see how it can do all of that. But what bothers me is how can it, without the consent of the individual citizens, waive the rights of individual citizens who have been mistreated.

Mr. BETTAUER. The Government has had the power to address the claims and settle the claims against foreign nations of citizens for some 200 years under our system, going all the way back, I believe, to the Jay Treaties. There are many cases, including *Bel-*

mont, Dames and Moore, which have upheld the espousal power of the United States to take up the claims of the citizens and to settle them against——

The CHAIRMAN. That is right, if they actually take up the claims of the citizens and actually settle them for the benefit of the citizens. And I could see where that would apply, but here it seems to me they have just ignored the claims of the citizens, other than the $1.50 a day.

Mr. BETTAUER. Well, I think you have to look at what the treaty intended to accomplish as a whole.

The CHAIRMAN. Yes, but I looked at the treaty and I don't see the language in there that forecloses individual suits for reparations. That is where I am having some difficulty. I am not trying to give you a rough time. I just want to——

Mr. BETTAUER. This treaty by its terms settles all war-related claims of the United States——

The CHAIRMAN. So what? So what?

Mr. BETTAUER [continuing]. And its nationals, and precludes the possibility of taking——

The CHAIRMAN. You mean our Federal Government can just say, to hell with you Bataan death marchers and you people who were mistreated, we are just going to waive all your rights because we have the almighty power to do so?

Mr. BETTAUER. There was a decision made in the 1950's——

The CHAIRMAN. I don't care about the decision. I am saying, can the Federal Government do that?

Mr. BETTAUER. Yes, I think the Federal Government can do that.

The CHAIRMAN. Actually take away their rights without giving them a chance to be heard?

Mr. BETTAUER. That is, I think, an established authority of the Federal Government.

The CHAIRMAN. I don't believe that. I mean, I know that you are sincere in expressing that, but I can't believe that under our Constitution that that is going to be upheld.

Mr. BETTAUER. I would suggest that it has been upheld many times.

The CHAIRMAN. All right, I will listen further.

Mr. BETTAUER. As I said, the treaty then settles the claims, in our view, and we think this reading of the treaty is in accord with the basic principle of treaty interpretation in the 1969 Vienna Convention on the Law of Treaties that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

The CHAIRMAN. Yes, but, look, Mr. Bettauer, I think there is a distinction between individual claims arising under domestic law versus international law.

Mr. BETTAUER. The treaty language says all claims of the powers and other claims of the powers and of their nationals arising out of any actions taken by Japan and its nationals. It is not limited to claims under——

The CHAIRMAN. Constitutionally, can our Government take away the rights of individual citizens just because they have put it in a

treaty, put language in a treaty? Can you cite a case in point, absolutely in point on that issue? Just give me a case.

Mr. BETTAUER. There is a good review of the previous authorities by the Supreme Court in *Dames and Moore* v. *Reagan.* This is the case that upheld the Algiers Accords, which was the agreement by which the U.S. hostages in Iran were released. At that time, we had an agreement that took the claims of those hostages out of U.S. courts and sent them to a tribunal in The Hague, and which took some of the claims, the claims of the people who had actually been hostage—we took claims of Americans against Iran and sent them to our tribunal. But the claims of the hostages themselves were extinguished, and there was litigation about that, too, and that was upheld as well.

The CHAIRMAN. Upheld by whom?

Mr. BETTAUER. The U.S. courts.

The CHAIRMAN. I don't think this case has been really tried. I don't think it has been tested. If there is a private right of action, isn't that property under the fifth amendment? If so, taking that property requires just compensation.

Mr. BETTAUER. Let me go on to how we got there.

The CHAIRMAN. Sure; now, if I could just interrupt you again, I have to shuttle between the Finance Committee and here because there is a very important markup going on. So if I have to leave, I am going to ask you, Senator Feinstein, or if there is a Republican here, fine, but if not, I am going to ask you to continue this hearing. Both Senator Feinstein and I have, I think, very similar interests in this and want to get to the bottom of it and see what can be done here.

But continue, Mr. Bettauer.

Mr. BETTAUER. OK; the fact that the treaty waived all claims is unambiguously supported by the negotiating history of the treaty, by the broad security objectives of the U.S. Government at the time, and by the extensive, often excruciatingly painful deliberations that preceded the treaty's advice and consent by the Senate. The Senate considered these issues.

The overarching intent of those who negotiated, signed, and ultimately ratified the treaty was to bring about a complete global settlement of all war-related claims, in order both to provide compensation to the victims of the war and to rebuild Japan's economy and convert Japan into a strong U.S. ally.

It was recognized at the time that those goals could not have been served had the treaty left open the possibility of continued, open-ended legal liability of Japanese industry for its wartime actions. In this regard, the negotiators and the U.S. Senate were extremely sensitive to the calamitous results of the continuing debts that had been imposed on Germany by the Treaty of Versailles.

Another provision of the treaty, article 19(a), similarly closed off the possibility of claims being brought by Japanese nationals against the United States or its nationals arising out of both the war and the subsequent occupation of Japan.

Our longstanding position is not one that we have reached casually or lightly. We have thoroughly examined all of the legal arguments that have been advanced, and have undertaken an exhaustive amount of historical research. Although we sympathize with

those who have brought the lawsuits and acknowledged that they have suffered great injuries in the service of their country, we are convinced that the treaty precludes these lawsuits and that we have no legal basis upon which to approach Japan or its nationals for additional compensation for war claims.

Our decision to ask the Justice Department to file a Statement of Interest, which was specifically solicited by a Federal district court, was based not only on our concern for upholding our international legal obligations, but also upon the fact that the treaty is a duly ratified international agreement of the United States that is therefore the supreme law of the land.

The treaty was approved by the U.S. Senate by a strong two-thirds majority on March 20, 1952, and subsequently ratified by President Truman. The records of the hearings of the U.S. Senate and the U.S. Senate Foreign Relations Committee indicate that the Senate was well aware that article 14(b) settled all war-related claims. In fact, the Senate heard testimony from several members of the public who were not pleased with this provision. The Senate gave its advice and consent by a vote of 66 to 10, without inserting a single reservation pertaining to war claims or article 14(b) in its resolution of ratification.

Let me emphasize that the Senate's action occurred shortly after termination of the hostilities when the horrific wounds of World War II were still fresh, emotions still raw, and the memories of the war's innumerable tragedies still vivid.

A large part of the treaty was devoted to the issue of reparations. The scheme of the treaty was that each state party would compensate its own nationals for their injuries, either out of confiscated Japanese public and private assets or otherwise. To this end, the United States confiscated approximately $90 million worth of assets owned by the Japanese Government and Japanese private nationals, including companies, and used the proceeds to satisfy the monetary claims of U.S. nationals who were victims of Japanese aggression.

Congress passed an amendment to the War Claims Act of 1948 to create a new war claims program that would award American war victims, including slave and forced laborers, amounts to be determined by a war claims commission using the proceeds of liquefied Japanese assets. Congress, through its approval of the treaty and amendment of the War Claims Act, created an exclusive Federal remedy for all American victims of the war.

Thus, when the United States filed its Statement of Interest on May 23, outlining why these lawsuits belong in Federal court, we did so not only because of our international obligations and our foreign policy concerns, but because we believe our stance is true to the intent of the U.S. Congress that approved the ratification of the treaty and created a comprehensive war claims program. It is consistent with the broad, bipartisan consensus that existed in all branches of Government in 1952 that this treaty was in the overall best interests of the American people and that reparations provisions were fair and reasonable.

For nearly 50 years, the treaty has sustained our security interests and supported peace and stability throughout East Asia. We believe the treaty leaves no sound legal basis for the United States

or its nationals to seek further monetary recovery against Japanese corporations, and that the treaty remains the supreme law of the land.

Thank you, Madam Chairman.

[The prepared statement of Mr. Bettauer follows:]

PREPARED STATEMENT OF RONALD J. BETTAUER

Mr. Chairman and Members of the Committee: Good morning. My name is Ronald Bettauer. I am a Deputy Legal Adviser at the U.S. Department of State. I have been directly involved in both the German forced labor/slave labor negotiations and the development of our position on the class action lawsuits that have been brought by former POW's against Japanese private companies in California state courts. Let me begin by expressing the Administration's and my own personal sympathy to the victims of Japanese wartime aggression, and our gratitude for those veterans who bravely served our country in the Pacific theater during World War II. We, and the American people, owe these gentlemen a great debt.

I intend to address briefly the 1951 Treaty of Peace with Japan, and why the State Department asked the Department of Justice to file a Statement of Interest in favor of removal of the lawsuits to federal court.

The 1951 the Treaty of Peace with Japan settles all war-related claims of the U.S. and its nationals, and precludes the possibility of taking legal action in United States domestic courts to obtain additional compensation for war victims from Japan or its nationals—including Japanese commercial enterprises. Article 14(b) of the Treaty provides that, "[e]xcept as otherwise provided in the * * * Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war * * *" This position is in accord with basic principles of treaty interpretation as set forth in the 1969 Vienna Convention on the Law of Treaties, i.e., "[a] treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

This is clear and unequivocal language: all reparations claims against Japan and its nationals. This language is unambiguously supported by the negotiating history of the Treaty, and by the broad security objectives the U.S. Government hoped to achieve with the Treaty, and, most important for present purposes, by the extensive, often excruciatingly painful deliberations that preceded the Senate's advice and consent to ratification of the treaty.

The overarching intent of those who negotiated, signed, and ultimately ratified this Treaty was to bring about a complete, global, settlement of all war-related claims, in order both to provide compensation to the victims of the war and to rebuild Japan's economy and convert Japan into a strong U.S. ally. It was recognized at the time that those goals could not have been served had the Treaty left open the possibility of continued, open-ended legal liability of Japanese industry for its wartime actions. In this regard, the negotiators and the U.S. Senate were extremely sensitive to the calamitous results of the continuing debts that had been imposed on Germany in the Treaty of Versailles. Another provision of the Treaty, Article 19(a), similarly closed off the possibility of claims being brought by Japanese nationals against the United States or its nationals arising out of both the war and the subsequent occupation of Japan.

Our longstanding position is not one that we have reached casually or lightly. We have thoroughly examined all of the legal arguments that have been advanced by the parties to these lawsuits, and we have undertaken an exhaustive amount of historical research. We have also discussed the issue with one of the direct participants in the negotiations. Although we sympathize with the plaintiffs and acknowledge that they suffered great injuries in the service of their country, we are convinced that the Treaty precludes these lawsuits, and that we have no legal basis upon which to approach Japan and its nationals for additional compensation for war claims.

Our decision to ask the Justice Department to file a Statement of Interest, which was specifically solicited by the federal district court, was based not only on our concern for upholding our international legal obligations, but also upon the fact that this Treaty is a duly ratified international agreement of the United States that is, therefore, the supreme law of the land. This Treaty was approved by the U.S. Senate by a strong two-thirds majority on March 20, 1952, and subsequently ratified by President Truman.

The records of the hearings of the U.S. Senate, and the U.S. Senate Foreign Relations Committee, indicate that the Senate was well aware that Article 14(b) settled all war-related claims, and in fact, heard testimony from several members of the public who were not pleased with that provision. The Senate gave its advice and consent by a vote of 66 to 10, without inserting a single reservation pertaining to war claims or Article 14(b) in its resolution of advice and consent. Let me emphasize, particularly, that the Senate's action occurred only shortly after the termination of hostilities, when the horrific wounds of World War II were still fresh, emotions still raw, and the memories of the war's innumerable tragedies still vivid.

A very large part of the Treaty was devoted to the issue of reparations. The scheme of the Treaty was that each state party would compensate its own nationals for their injuries, either out of confiscated Japanese public and private assets, or otherwise. To this end, the United States confiscated approximately 90 million dollars' worth of assets owned by Japan and Japanese private nationals (including Japanese companies), and used the proceeds to satisfy the monetary claims of U.S. nationals who were victims of Japanese aggression. The U.S. Congress amended the War Claims Act of 1948 to create new war claims programs that would award American war victims, including slave/forced laborers, in amounts to be determined by a War Claims Commission, using the proceeds of liquidated Japanese assets. We believe that Congress, through its approval of the Treaty and the amendment of the War Claims Act, intended to create an exclusive federal remedy for all American victims of the war.

Thus, when the United States filed its Statement of Interest on May 23 outlining why these lawsuits belong in federal court, we did so not only because of our international obligations or our foreign policy concerns, but because we believe our stance is true to the intent of the U.S. Congress that approved the ratification of this Treaty and created a comprehensive war claims compensation program. It is consistent with the broad, bipartisan consensus that existed in all branches of government in 1952, that this Treaty was in the overall best interests of the American people and that the reparations provisions were fair and reasonable.

For nearly 50 years, this Treaty has sustained our security interests and supported peace and stability throughout East Asia. We believe that the Treaty leaves no sound legal basis for the United States or its nationals to seek further monetary recovery against Japanese corporations, and that the Treaty remains the supreme law of the land.

Senator FEINSTEIN. Thank you very much.

Senator SESSIONS [presiding]. Are you prepared to go forward?

Senator FEINSTEIN. I am prepared.

Senator SESSIONS. Senator Feinstein?

Senator FEINSTEIN. Thank you very much, both gentlemen. Let me read article 14(b), if I might:

> Except as otherwise provided in the present Treaty, the Allied powers waive all reparations claims of the Allied powers, other claims of the Allied powers and their nationals, arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of all powers for direct military costs of occupation.

Now, I think, Mr. Bettauer, you referred to that article, and let me just read the most-favored-nations clause of article 26:

> Should Japan make a peace settlement or war claims settlement with any state, granting that state greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.

Now, my question then is, Has Japan provided more favorable terms to other nations in connection with settlements of war claims than you now assert were provided in the 1951 treaty?

Mr. BETTAUER. If I may start by focusing on article 26 for a second, that provision we do not regard really as providing a most-fa-

vored-nation-type scheme. John Foster Dulles, who personally drafted this treaty, included article 27——

Senator FEINSTEIN. Twenty-six.

Mr. BETTAUER. Twenty-six, excuse me, and said that the purpose of the provision was, and I am quoting one of his documents, "for the protection of Japan so that if other countries should make demands upon Japan, Japan would have a basis of resisting by pointing to" that provision. That was a key goal because the idea was to pull Japan away from the Communist bloc. Dulles designed the provision to deter the Japanese from dealing on favorable terms with the Soviet Union specifically with regard to its territorial demands.

So the only time that Dulles raised article 26 was in 1956, when Japan and the Soviet Union were negotiating a peace settlement. Dulles made a public statement to the effect that if Japan recognized the Soviet territorial claims of sovereignty, article 26 might open the way for the United States to claim comparable benefits.

He explained publicly that he had exerted article 26 "for the very purpose of trying to prevent the Soviet Union from getting more favorable treatment than the United States got," and that he simply wanted to remind Japan of its existence.

Dulles then met with the Japanese Ambassador to discuss the difficulties Japan was having in the negotiations and stated that the United States had no intention of making territorial demands itself, but simply to give Japan an argument with the Russians. So the contemporaneous construction of article 26 and practice under article 26 suggests that it was not really an MFN provision in the sense of comparing peace settlements dollar for dollar.

In any event, while certain types of treaties may traditionally contain MFN provisions—and these can be investment treaties and tariff treaties—this is not so with peace treaties. Peace treaties are so complex and entail so many different types of obligations that there is really no way of measuring whether, on an overall basis, one is more advantageous than the other.

Senator FEINSTEIN. Could I stop you just for one moment?

Mr. BETTAUER. Yes.

Senator FEINSTEIN. You didn't really answer my question. My question is, Has Japan provided more favorable treatment to other nations?

Mr. BETTAUER. There are a number of other treaties that Japan has with other nations, because this was a multilateral peace treaty and Japan was encouraged to conclude peace treaties with those who weren't party to it. And there are some claim provisions in some of those peace treaties, but looking at——

Senator FEINSTEIN. That are more favorable?

Mr. BETTAUER. No; it is impossible to say because you have to know what the claims of the other countries were, what the counterclaims of Japan were, what the other provisions of the peace treaties were that bear on it. And I don't think we are in a position that we can conclude any of those is more favorable.

The CHAIRMAN. Well, if I could interrupt, in article 26, it seems to me the terms of article 26 appear unconditional and automatic. What they say is, Should Japan make a peace settlement of war claims settlement with any state granting that state greater advan-

tage than those provided by the present treaty, those same advantages shall—not "may," "could," "would"—but shall be extended to the parties to the present treaty?

Mr. BETTAUER. Well, as I just explained, the purpose of article 26 was to provide a counterweight to Soviet territorial demands.

The CHAIRMAN. Fine; then why shouldn't the claims of these American POW's enjoy the same treatment as claims by forced laborers from Burma, the Soviet Union, the Netherlands and elsewhere, all states that were granted greater advantages within the meaning of article 26?

Mr. BETTAUER. Well, I don't think we have concluded, Senator, that they have been granted greater advantages.

The CHAIRMAN. I don't see how you can help but conclude that they were granted.

Mr. BETTAUER. In addition, we were involved in and facilitated the negotiations of many of those treaties, not all of them. But, for example, we encouraged the Burma treaty negotiation. We pressed Japan to do that, and we never raised an article 26 concern at the time. It would be too late now, 40 years later, to seek to renegotiate the benefits we received under the peace treaty because of something that we assisted Japan in doing back then.

Senator FEINSTEIN. Then what was the rationale behind article 26?

Mr. BETTAUER. I have just tried to explain that, Senator.

Senator FEINSTEIN. But it doesn't seem to me to make sense.

Mr. BETTAUER. We have gone through the historical documents.

Senator FEINSTEIN. You say to wean Japan away from the Communist bloc, but I don't quite see how this relates to weaning Japan away from the Communist bloc.

Mr. BETTAUER. The two documents that are contemporaneous that deal with article 26 are a press statement by Dulles and a memorandum of a conversation that he had about the article. In both of those documents, Dulles asserts that the purpose of article 26 is to provide Japan a counterweight to territorial demands.

The language, I know, is broader than that, but after 40 years, it is too late to raise article 26 issues with Japan, particularly since we were aware contemporaneously of all the agreements that were under negotiation at the time, and indeed facilitated the negotiation of some of them.

The CHAIRMAN. Let me ask you a few questions. Has the State Department met with representatives of the Japanese companies at issue here or with the Japanese Government concerning this matter, or with both, and if so, when and how often?

Mr. BETTAUER. I am not aware of whether we have met with representatives of the Japanese companies. We can get that information for you for the record.

The CHAIRMAN. Will you get that for us? OK.

[The information referred to appears in the Appendix, Questions and Answers section.]

Mr. BETTAUER. I know that the State Department meets with representatives of the Japanese Government frequently, and I have been in some meetings.

The CHAIRMAN. On these issues?

Mr. BETTAUER. They are interested and they have asked about this issue.

The CHAIRMAN. How many times has the State Department met with Mr. Poole or Mr. Bigelow, Mr. Mazer or Mr. Tenney or their lawyers?

Mr. BETTAUER. Some of their lawyers are former colleagues of mine from the State Department, so I have met with them many times.

The CHAIRMAN. I am talking about to discuss these matters.

Mr. BETTAUER. I don't recall that any of their lawyers have requested a meeting with me to discuss these matters. I do not know if they have met with others in the Legal Adviser's Office, and we can supply that information for the record, if you like.

The CHAIRMAN. Well, if you would, I appreciate it.

[The information referred to appears in the Appendix, Questions and Answers section.]

The CHAIRMAN. Now, I have to say under article 26, the United States again is entitled to the same terms of future treaties Japan may enter into which contain more favorable disposition of claims than the 1951 treaty. And I repeat again that the terms of article 26 appear unconditional and automatic:

> Should Japan make a peace settlement or war claims settlement with any state granting that state greater advantage than those provided by the present treaty, those same advantages shall be extended to the parties to the present treaty.

This language clearly states that the terms should be extended, no ifs, ands, or buts. So why shouldn't the claims of these American POW's get the same treatment, or at least enjoy equal treatment, as claims by forced laborers from Burma who received money from Japan? As I understand it, Japan excluded claims with the Soviet Union arising before August 1945, and there may be other matters that could be interpreted more favorably than apparently the State Department is willing to interpret right now.

Mr. BETTAUER. Well, as far as I know, the Burma settlement with Japan states that Burma will supply by way of reparations——

The CHAIRMAN. Japan will supply.

Mr. BETTAUER. Japan will supply Burma by way of reparations the services of Japanese people and products, the value of which will be on the average equivalent to—it says essentially $20 million for a period of 10 years. And Japan also took every measure to facilitate economic cooperation.

Now, I am not sure that $20 million worth of services of Japanese people was something equivalent to $90 million actual at the time we got it, nor am I aware that that was something we would have wished, the United States would have wished at the time. Burma was a developing country at the time and it had been devastated by the war.

Japan's settlement with Burma was brought about, as I have just said, with the encouragement of Dulles. In September 1954, he informed the National Security Council that "The big problem eco-

nomically for Japan was the question of reparations, particularly with the Philippines, Indonesia, and Burma."

He added that he told Premier Yoshida to "try to accept a reasonable solution, such as the recent Burmese offer which appeared to be a reasonable proposal." At the time, the U.S. Government was trying to support Burma. The substantial aid package that came with the Burma-Japan settlement relieved the U.S. taxpayer of a substantial financial burden that would otherwise have been borne. This was an advantage to us. So it is very hard to conclude that the Burma settlement would provide a basis for us now to go back to Japan.

The CHAIRMAN. Well, I have to say that it is wonderful that we received some benefits because we didn't have to pay, but the fact of the matter is that the treaty says:

> Therefore, Japan agrees, subject to such detailed terms as may be agreed upon, to supply the Union of Burma by way of reparations with the services of Japanese people and products of Japan, the value of which would be on an annual average 7,200 million yen, equivalent to 20 million United States American dollars, for the period of 10 years. Japan agrees, subject to such detailed terms as may be agreed upon, to take every possible measure to facilitate economic cooperation wherein the services of Japanese people and the products of Japan, the value of which will aggregate on an annual average 1,800 million yen, equivalent to 5 million United States American dollars, will be made available to the government or people of the union of Burma for the period of 10 years, and also agrees to re-examine at the time of the final settlement of reparations toward all other claimant countries the Union of Burma's claim for just and equitable treatment in the light of the results of such settlement, as well as the economic capacity of Japan to bear the overall burden of reparations.

Then the next paragraph:

> The Union of Burma shall have the right to seize, retain, liquidate, or otherwise dispose of all property rights and interests of Japan and Japanese nationals, including juridical persons, which on the coming into force of this treaty were subject to its jurisdiction.

Well, it seems to me that we can go back to one of my original questions, and that is how can our Government take away the rights of individual citizens to sue individual companies, not the Government of Japan, but individual companies in Japan, for reparations for having been mistreated and having been forced into slave labor? What is the justification? I mean, where is the legal justification?

Show me a case that says that these veterans have no right to go against the Japanese companies that exploited them and abused them and made them slave laborers. This isn't against the Government.

Mr. BETTAUER. No, no; I have mentioned some cases, and I think we are at a point where we differ on this.

The CHAIRMAN. Well, I don't know of a case in point that says that they have no right to sue those companies.

Mr. BETTAUER. The case in point for this actual treaty is currently being litigated, but the precedent is out there saying that the United States has the ability to espouse and settle claims. And we have done so multiple times over the last 200 years, often with benefits, and here there are some. Although one would always like to see more benefits, there are some benefits for former veterans.

I mean, in the postwar period there are probably 15 or 20 times that we have done agreements with foreign countries and settled claims of U.S. nationals, whether they have liked it or not. So this is a well-established authority and it has been upheld by the courts, and I am sure you will see some of that in the papers that we have filed.

The CHAIRMAN. Well, let me turn to Senator Sessions for any questions he might have.

Senator SESSIONS. Thank you, Mr. Chairman. If I were sitting in an appellate court, I believe I would rule with you on this legal debate.

The CHAIRMAN. Well, now, that is a pleasant thought, I will tell you.

Senator SESSIONS. I was about to ask Mr. Ogden here if he would rule with you, too, just as a third party. It does seem to me that there is an opportunity for those to make these claims and it is not precluded by the plain language of the statute.

I have a friend who survived the Bataan Death March. He has shared some of the horrors with me. He speaks occasionally still in schools around the State of Alabama, and it was a very bad thing. It should not have happened.

Let me ask, Mr. Bettauer, do you conclude—and I suppose it is the State Department that would say this—do you conclude that the treatment, let's just say specifically in Japan of slave labor, violated the Geneva Accords, the Geneva agreement?

Mr. BETTAUER. My impression is that it did and that there were war crimes committed. I am aware that there were war crimes trials after the war and Japanese nationals were held accountable and executed for their violations of the law of war, and indeed that this treaty, the Peace Treaty, compels Japan to abide by the war crimes decisions that were made.

Senator SESSIONS. With regard to our compensation of Japanese-American citizens that were held against our American sense of justice, that incarceration was upheld by the courts, was it not?

Mr. BETTAUER. You mean the——

Senator SESSIONS. Internment in the United States of Japanese-American citizens.

Mr. BETTAUER. I believe so, but I am not an expert on that.

Senator SESSIONS. Well, I guess my point is we have made compensation to them even though it appears that courts have held that it was a legal act.

Would you agree, Mr. Ogden, that it was upheld as a legal act?

Mr. OGDEN. Yes, Senator Sessions, that is my understanding.

Senator SESSIONS. Has there been any effort by the State Department to encourage Japan to compensate these citizens who

were treated so badly even though there may be a dispute about whether they are legally compelled to do so?

Mr. BETTAUER. The agreement settles the claims, Senator. And we may have a disagreement about the details of the agreement, but we have researched it thoroughly and we have gone through the hearings that were held by the Senate Foreign Relations Committee at the time of the agreement and it seems abundantly clear that there was even discussion of this issue, some concern expressed about it, but the decision to settle and resolve all the claims.

Senator SESSIONS. Well, I would say this, frankly. Settling up after a war is not an easy thing.

Mr. BETTAUER. Right.

Senator SESSIONS. People have to give and take and reach an agreement that is going to bind forever. And nobody can anticipate completely what kinds of claims might occur in the future, and we are probably in the long run better off following the agreement than trying to get around the agreement.

Certainly, our partnership with Japan has been a great thing for America, and I believe the world. Their economic growth has been good, but my question is could they not be urged in the light of their economic progress and strength, whether they are legally required or not, to consider compensating these people who suffered.

Mr. BETTAUER. Well, I mean it is possible to urge, but our treaty commitment and the object and purpose of the treaty was to resolve these claims. And it would be trying to find a back door to go around the treaty commitment to say, look, we know we agreed with you that we have resolved and settled all these claims, and yet you should pay some more anyway. That is not in keeping with a good-faith abidance by the treaty terms.

The CHAIRMAN. We are not asking the Government to pay. We are asking the companies that did the acts to pay, and to pay individual American citizens who were abused and mistreated and forced into slave labor. Some of these companies are multi-billion-dollar companies today which might not be multi-billion-dollar companies today had it not been for forced labor during that period of time. That is the difference.

I would like the State Department to go back and reassess this because I think your arguments are ridiculous. You are clearly a very bright man and you clearly have been sent up here as a sacrificial lamb, it seems to me. I mean, I don't know how in the world you can come in here and make these arguments like this. Now, if you can show me where the Federal Government has a right to just strip people of rights against individual private companies that abuse them, that is another matter, but I haven't seen anything, nor do I believe there is anything that exists. And, Mr. Ogden, I think you ought to reassess this because your opinion is very broad, way too broad, and frankly it is just not right.

Look, I am just a poor little country lawyer here, but I want you both to go back and I want Mr. Pickering to reassess this. I mean, this is ridiculous. Especially in light of what is happening in Europe, I mean this is absolutely ridiculous. Your opinions, in my opinion, are not accurate. I am trying to be nice.

Senator SESSIONS. Mr. Chairman, thank you for having this hearing and for raising these issues. They are unpleasant, but I hope not damaging to our relationship with Japan, but a part of a healing process where we can recognize the bad things that did happen and we can confront them in this modern age. In the long run, I am confident it will make us stronger.

Thank you.

The CHAIRMAN. Well, thank you.

Senator Grassley, we will go to you, but you had a comment you wanted to make, Mr. Ogden, before I turn to Senator Grassley.

Mr. OGDEN. Thank you, Mr. Chairman. What I wanted to say was that I appreciated your remarks, and I certainly will go back and take another look at the——

The CHAIRMAN. I really want you to do this. Our Japanese friends realize this was a terrible set of situations. I mean, these companies are not poverty-stricken companies; it is not going to bankrupt them. They really ought to, out of good faith, reassess this situation. And I think the Justice Department ought to reassess it, and certainly the State Department lawyers ought to reassess this because I think any interpretation of constitutional law flies in the face of what you are arguing here today.

Now, I appreciate your position and I don't mean to pick on you unduly, but I do intend to pick on you some more.

Mr. BETTAUER. But I would say that we do take our guidance on constitutional law issues from the Justice Department.

The CHAIRMAN. Oh, that is good. Now, we know who is the real culprit here. [Laughter.]

Mr. BETTAUER. They talk to us about treaty interpretation issues, you see, so we cooperate.

The CHAIRMAN. I understand. You are doing the best you can, but it is not good enough. I think you ought to go reassess this, I really do.

Let me turn to Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Well, first of all, I apologize to the panel for not being here for your testimony because I, as Senator Hatch, had to be for a short period of time in markup of the marriage penalty bill down the hall in the Finance Committee. But I do feel that in the little time I have been here, Senator Hatch has laid out very strongly the position that I hold, and I thank him for doing it.

I would just simply relate that even though there are just a small number of these people affected that live in my State of Iowa—I understand that we have 33 living former POW's of Japan, 18 POW widows or next of kin, 7 civilian internees, and 1 civilian internee widow—it is still very important that we make sure that justice is done.

These individuals obviously support these hearings because they want to see that the United States turns the same scrutiny on Japan as we did on Germany. I believe I am in agreement with that position even as forcefully as it was expressed by Senator Hatch that you review our policy. And I believe that this committee does a great service, then, for the people that we owe so much to

in World War II, particularly those that suffered the most by being prisoners, that we would through this committee try to redirect U.S. policy in regard to this matter and see what we can do to make sure it is consistent.

I think the issue has already been discussed and so I will not be asking any questions. However, I will make a statement that I think we need to review our policies; that when we send letters in opposition to the position of some victims of World War II, those who were slave labor victims in Japan, but not do that in the case of slave labor victims in Germany, that we do not appear to have a consistent policy. It seems blatantly unfair, and not something that makes the American Government look good to its citizens. And I am not sure that it even sends a very clear signal about our leadership in the world community of nations, about the moral leadership that we ought to have.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Feinstein has another question.

Senator FEINSTEIN. Thank you, Mr. Chairman. I would like to introduce for the record a statement by Senator Leahy.

The CHAIRMAN. Without objection, we will place that in the record.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

I would like to begin my remarks by thanking all of our witnesses for coming today, especially those of you who were taken prisoner during the Second World War. All Americans should honor your sacrifice, and should be made aware of the inhuman conditions you were forced to endure. For that reason alone, I think it is valuable that we have this hearing today.

I am very sympathetic to the claims being advanced by the former prisoners of war appearing before us today. They were treated with utter contempt and in violation of the laws of war. Having said that, I am aware that the litigation raises complex issues involving our foreign policy powers and obligations that our courts are in the process of resolving. As such, it would be inappropriate for me or for this Committee to prejudge the merits of those legal issues. So I will simply say that you have my sympathy and my attention.

I do fear that the majority's concern about this litigation does not extend to litigation brought by other Americans looking to redress wrongs through our States' civil justice systems. We hold this hearing in the midst of our Committee's consideration of the so-called Class Action Fairness Act, which would drastically reduce plaintiffs' access to State courts, instead forcing them into federal court. It is therefore somewhat surprising that the majority has called representatives of the Justice and State Departments here this morning to answer for their legal opinion that the plaintiffs in these prisoner of war lawsuits belong not in State courts but in federal court.

I also find it somewhat ironic that we are holding this hearing so soon after the majority fought so hard against the nomination of Judge Richard Paez to the Ninth Circuit Court of Appeals. The U.S. Chamber of Commerce, one of Judge Paez's most influential detractors, based its opposition to Judge Paez *solely* on a preliminary ruling he authored in the case of *John Doe I* v. *Unocal.* In that ruling, Judge Paez merely turned down Unocal's motion to dismiss a case brought against it based on its activities in Burma, a notorious abuser of human rights. Even this early ruling—which still left open the possibility that Unocal would win summary judgment in the case—was seen as too "anti-business" and "pro-human rights" by the same majority that today holds this hearing to show support for the litigation brought by plaintiffs protesting human rights abuses by Japanese corporations.

As legitimate as these concerns are, however, I do not believe that they should overshadow the testimony and the experiences of the witnesses who are here before

us today. I simply hope that we show consistent solicitude for others who seek access to our courts.

Senator FEINSTEIN. Let me see if I understand this. If I understand this, Mr. Bettauer, you were saying that John Foster Dulles apparently made some agreement that there would be no prosecution of individual claims. You say that that is binding. Now, that may be a policy matter that was handled at the time.

When Senator Hatch asked you about a case in point, you said, well, the case in point is being litigated at the present time. From that, I would deduce that the legal question has not been finally resolved as to whether this treaty can, in fact, prevent any American from exercising their right to litigate for damages.

Mr. BETTAUER. If I may, I was trying to say that these individual claims are currently being adjudicated. So if you ask for something exactly on point, you don't have a decision.

Senator FEINSTEIN. Right.

Mr. BETTAUER. But there is ample authority for the proposition that the executive branch or the President may espouse and settle claims of U.S. nationals, and the treaty does that and it became U.S. law. It is not just done as a policy matter, but it was given advice and consent and ratified, and therefore has become part of the law of the United States.

There were hearings on this exact issue before the Senate Foreign Relations Committee at the time, and there was a back-and-forth about whether this was a desirable thing to do. And the committee at the time and the Senate at the time decided to do that, and therefore the treaty was ratified.

The CHAIRMAN. But isn't it true, Mr. Bettauer, that as a matter of law nation states do not own the claims of their nationals arising under domestic law? Consequently, how could the United States "waive" domestic law claims that it did not own? In other words, isn't the better reading that the United States waived the claims it owned, namely only the international claims of its own citizens, not the individual claims of the citizens?

Mr. BETTAUER. The treaty says claims against—it says other claims of their nationals arising out of any action taken by Japan and its nationals.

The CHAIRMAN. I agree it has that language, but——

Mr. BETTAUER. It doesn't limit it to claims arising under one or another system of law. When claims have an international character, there is precedent. And I mentioned when we normalized with the Soviet Union back in 1933, it generated a series of cases that said that the United States may take and settle claims, and they are very famous cases. This was all reviewed in the case that I mentioned concerning the Iran hostage crisis. So it is not something that is new.

The CHAIRMAN. I am aware of settling claims against countries. What I am talking about is settling claims against companies, not countries.

Senator FEINSTEIN. But if I understand what he is saying, he is saying that because the treaty has this language and this language was discussed by the Foreign Relations Committee of the Senate, and yet the treaty was adopted by the Senate, that therefore it absolves any further claims.

The CHAIRMAN. Yes, that is what he is saying.

Mr. BETTAUER. It becomes part of U.S. law, yes. The treaty, under the U.S. Constitution, is the supreme law of the land, along with statutes.

The CHAIRMAN. That is right, and it doesn't say anything about private claims against private companies brought by individual citizens who have a right to bring them.

Mr. BETTAUER. Yes, it does, Senator.

The CHAIRMAN. Yes? Point it out to me.

Mr. BETTAUER. I think we are going in circles because I think you——

The CHAIRMAN. Well, let me do this. I would like the both of you to reassess this. I would like you to assist the committee more because I don't see that. I see how you are interpreting it in a broad way. I think, Mr. Ogden, your legal interpretation is too broad, but I would like you to reassess this.

I also think that it is important for you to meet with the representatives of these individual claimants. I think, in all fairness, you should meet with the representatives of the POW's.

Mr. OGDEN. Mr. Chairman, we would certainly welcome the opportunity to do that. We always are willing to meet with litigants in matters of this nature, and in this case that would be particularly so. We would be pleased to do that.

I think on the question of the meaning of the treaty, at your suggestion, we will go back and take another look. I will say that we have not taken this lightly to this point and have put an enormous amount of work in.

The CHAIRMAN. But you have taken a broad-brush interpretation, but in a very narrow way.

Mr. OGDEN. Our view, having looked at the history and reviewed the language, is that it was the intent of the United States in the treaty to waive national-against-national claims.

The CHAIRMAN. I don't doubt that, but that doesn't waive individual rights. That is the problem.

Mr. OGDEN. You have raised, I think, a further point today, which is the question whether, if the United States has done that, it was a constitutional act. At least that is what I hear your question being, whether it was a taking of property without just compensation under the fifth amendment.

That is a separate issue. It has to do with whether there would be claims against the United States arising out of the operation of the treaty. I think I will go back and take a look at that.

The CHAIRMAN. It is more than just possible claims against the United States. It is that if those are property rights, then the United States cannot waive them. In other words, these people still have the right to bring them, and again not against the Government of Japan, which the treaty supersedes—the treaty is the highest law of the land—but against the individual companies that exploited these people.

Well, you have both agreed to reassess and go back and give us the benefit of your wisdom. You are both very bright people. I believe you are both very good men, and I would like to have you reassess this and I would like Mr. Pickering to reassess this. And I think he ought to come when we invite him next time. I hope you

will send that message to him. We have been friends for a long time, but when the Judiciary Committee wants witnesses from the State Department, we want them here. And unless they have a good excuse, we don't think they just stiff the committee.

Senator SESSIONS. Mr. Chairman, would he also respond to the chairman's inquiry about other nations, that escape valve clause and why that wouldn't apply?

The CHAIRMAN. Well, that is right.

Senator SESSIONS. If Burma gets special privileges, why not American citizens? I would like you to address that question, also.

The CHAIRMAN. Well, that is all part of this, and that is a very good point that you are making.

Mr. OGDEN. Would you like me to address it now, or are you asking us to go back and do it?

The CHAIRMAN. We would like you, in your reassessment, to take that into consideration that individual Burmese were compensated, and in that particular case, I believe, by the treaty and by the government. Under 26, it seems to me that opens the door for our POW's as well.

But we will look forward to getting more advice and counsel from you, OK?

Mr. BETTAUER. Yes.

The CHAIRMAN. All right. Well, thank you so much. We appreciate both of you being here.

Mr. OGDEN. Thank you.

The CHAIRMAN. I am very pleased to now introduce the witnesses on our second panel. We are very fortunate to have a distinguished group of former POW's, as well as Prof. Harold Maier from the Vanderbilt School of Law.

Let me say that our panel of POW's is representative. In preparing for these hearings, we have heard from many remarkable individuals—former POW's, family members, scholars and activists who work on veterans issues. The men before us today are representatives of all the POW's, their families, and those who have struggled on their behalf. I know we have a number of former POW's and family members in the audience, some of whom traveled great distances to be here today, and we deeply appreciate your presence here today.

Let me introduce the panel. Mr. Harold Poole is from Salt Lake City, UT, and served in the 20th Pursuit Squadron of the Army Air Corps in the Philippines. Mr. Poole earned a Silver Star for valor in combat during the intense fighting that broke out after Pearl Harbor. Following his capture and survival of the Bataan Death March, Mr. Poole was shipped to Japan and forced into labor for Nippon Steel.

Frank Bigelow currently resides in Brooksville, FL. He is a Navy veteran who once served aboard the U.S.S. *Arizona.* After being transferred to the Philippines, he was eventually captured by the Japanese in May 1942. Mr. Bigelow survived the horrific journey to Japan aboard the hell ships and was eventually taken to Omuta Camp 17, where he was forced to work in a coal mine operated by the Mitsui Mining Co. Beaten and tortured, Mr. Bigelow eventually lost a leg from the dangerous conditions of the mine.

Maurice “Mo” Mazer now hails from Boca Raton, FL. After surviving the Bataan Death March, Mr. Mazer was shipped to Japan and forced to labor for Mitsubishi in copper and smelter mines. He has been active in veterans organizations and is a former Commander of the American Defenders of Bataan and Corregidor.

Dr. Lester Tenney is a retired professor from Arizona State and San Diego State Universities. In 1941, he joined the Illinois National Guard and was sent to the Philippines, where he was eventually captured. Dr. Tenney was also forced into labor in the coal mines of Japan. He has written a fascinating book of his experiences entitled “My Hitch in Hell,” which is an inspiring account of the indomitable human spirit. It demonstrates how these remarkable men pulled together and helped each other make it through their ordeal. I highly recommend it to all of you.

Ed Jackfert is the National Commander of the American Defenders of Bataan and Corregidor, a national veterans organization devoted to the men who served there. Mr. Jackfert is a veteran of the Army Air Corps and is himself a former POW held by the Japanese.

Finally, we are pleased to have with us a very distinguished legal scholar, Prof. Harold Maier, of the Vanderbilt School of Law. Professor Maier is an expert in international law and has studied the 1951 Peace Treaty with Japan.

We welcome all of you here today. Before we hear opening statements from our panel, I would like to recognize some of the organizations which are represented here today and who have expressed support for the committee’s efforts. If you are representing a group, please rise at the time I mention your name.

We are pleased to have representatives from the VFW, the American Legion, the American Ex-POW’s, the American Defenders of Bataan and Corregidor, the Center for Internee Rights, U.S.S. *Houston* Survivors, Philippine Scouts Heritage Society, Jewish War Veterans, the Disabled American Veterans, and Admiral Nimitz Museum. All of you are here. We are grateful to have you here and we welcome you before the committee. Thank you very much. [Applause.]

Many other organizations, such as the Simon Wiesenthal Center, could not be here today, but have expressed support for the committee’s efforts, and those statements will be made a part of the record.

So we thank all for your participation here today.

Let’s turn to Mr. Poole at this time.

PANEL CONSISTING OF HAROLD W. POOLE, FORMER WORLD WAR II PRISONER OF WAR IN JAPAN, SALT LAKE CITY, UT; FRANK BIGELOW, FORMER WORLD WAR II PRISONER OF WAR IN JAPAN, BROOKSVILLE, FL; MAURICE MAZER, FORMER WORLD WAR II PRISONER OF WAR IN JAPAN, BOCA RATON, FL; LESTER I. TENNEY, FORMER WORLD WAR II PRISONER OF WAR IN JAPAN, LaJOLLA, CA; EDWARD JACKFERT, FORMER WORLD WAR II PRISONER OF WAR IN JAPAN, AND COMMANDER, AMERICAN DEFENDERS OF BATAAN AND CORREGIDOR, INC., WELLSBURG, WV; AND HAROLD G. MAIER, PROFESSOR OF LAW, VANDERBILT UNIVERSITY, NASHVILLE, TN

STATEMENT OF HAROLD W. POOLE

Mr. POOLE. Good morning, Mr. Chairman and members of the committee, and thank you, Senator Hatch, for your kind remarks in introducing me.

As previously indicated, my name is Harold Wood Poole. I am an 81-year-old widower living in Salt Lake City, UT. I have a son and a daughter and nine grandchildren. I retired 20 years ago from the U.S. Postal Service, having served 30 years as a letter carrier.

In 1940, I volunteered in the U.S. Army Air Corps. After a brief period of training in California, my unit, the 20th Pursuit Squadron, was shipped out to the Philippine Islands. I was assigned to the armament section and worked on the guns of our planes.

Life in the Philippines was initially quite pleasant until war broke out. I was stationed at Clark Field, northwest of Manila. Waves of Japanese planes bombed the field, going after our planes and munitions. I will simply say, hoping not to appear immodest, that I received the Silver Star for valor in combat for my action in shooting down a Japanese plane that day.

After holding the invading Japanese at bay for 4 months, the decision was made to surrender the U.S. forces. We were cut off, out of food, ammunition, medicine, and supplies. I will tell you it was a bleak day. Many bleak days followed—3½ years, to be exact. The Japanese guards continually berated us as cowards for surrendering, saying that we disgraced our country, ourselves, and our families, and didn't deserve to be alive.

They refused us the dignity of the title "prisoner of war." Rather, they referred to us as captives, and as such we had no rights. There were 200 members in our squadron who surrendered, and only 50 of them came home. Out of those 50, there are just a couple over 20 left.

I was shipped to Japan in one of the so-called hell ships. Having survived the death march and the hell ships, my greatest challenge was still ahead—20 months of forced slave labor for Nippon Steel Corp. We worked 7 days a week, 10 hours a day. We were starved, beaten, and abused. We suffered disease, deprivation, and depression. I nearly died twice, once from malaria in the Philippines and the other time from pneumonia in Japan.

We suffered from dysentery, beriberi, scurvy, pellagra, and jaundice, and a lot of these diseases were resulting from starvation rations which we had to put up with. If you became too ill to work, these already meager rations were further cut in half. Before the

war broke out, I weighed 180 pounds, and when we were finally liberated I weighed 97 pounds.

We worked at Nippon Steel doing heavy labor. Sometimes, we unloaded freight cars, worked to supply a blast furnace, or unloaded ships. If you didn't work hard or fast enough, you were beaten. For a long time, we were not allowed to receive or send mail. It was 2 years before my mother even knew whether I was dead or alive.

I mentioned previously that only 50 of us came home from the war. I have often wondered why I survived and why so many of my buddies did not. Obviously, these are questions whose answers are ultimately known only to God, but I attribute my survival to Him. I am a religious man and I believe my Heavenly Father heard and answered my prayers while I was a prisoner of war. My faith in Him and my country gave me the strength to hang on when there was nothing else to hold on to.

Now, over 50 years later, I think I know why my life was preserved. I am here today to speak not only for myself, but for all those young men who never came home. I am here to ask for your help as I seek justice not only for me, but for all of us who served and suffered, both living and dead. Justice has long been delayed, but it was not be denied.

I am skipping over a little of it that has been covered already, Senator Hatch, by your explanation in your first presentation.

So what I simply ask today, Mr. Chairman, is for your aid and assistance in helping us right this wrong. If the United States is not going to support us, then for heaven's sake they should not oppose us. I have confidence and trust in our American system of justice. I know if you will just allow us our day in court, our cause will speak for itself. As for me and my buddies, I will speak for those who are no longer here to speak for themselves. Please help us have that opportunity.

Thank you. I would be happy to respond at the appropriate time to any questions you may have.

[The prepared statement of Mr. Poole follows:]

PREPARED STATEMENT OF HAROLD W. POOLE

Good Morning Mr. Chairman, and members of the Committee. And thank you Senator Hatch for your kind remarks in introducing me. As previously indicated, my name is Harold Wood Poole. I am an 80-year-old widower living in Salt Lake City, Utah. I have a son and a daughter, and nine grandchildren. I retired 20 years ago from the United States Postal Service, having served 30 years as a letter carrier.

As a young man many years ago, I joined the United States Army in 1940. After a brief period of training in California, my army air corps unit, the 20th Pursuit Squadron, was shipped out to the Philippine Islands. I was assigned to the armament section, and worked on the guns on our planes. Life in the Philippines was initially quite pleasant until war broke out.

I don't have to tell you anything about Pearl Harbor. It is all well known and well documented history. But what is not so well known was the Japanese attack on the Philippines the day after Pearl Harbor. I know, I was there. I was stationed at Clark Field, northwest of Manila. Waves of Japanese planes bombed and strafed the field, going after our planes and munitions. I will simply say, hoping not to appear immodest, that I received the Silver Star for Valor in Combat for my actions in shooting down a Japanese plane that day. But I did not receive that medal until after the war, and a lot happened in between. That's what I want to tell you about today.

After holding the invading Japanese at bay for four months, the decision was made to surrender the U.S. forces. We were cut off, out of food, ammo, medicine and

supplies. I will tell you it was a bleak day. Many bleak days followed. 3½ years to be exact. The Japanese guards continually berated us as cowards for surrendering, saying that we disgraced our country, ourselves, and our families, and didn't deserve to be alive. They refused us the dignity of the title, "Prisoner of War." Rather, they referred to us as "captives," and as such, we had no rights.

You have all heard about the infamous Bataan Death March. Well, I lived it. Six days and nights of pure hell. We were already weak and ill before we began. We walked in stifling tropical heat, without water, food or adequate rest. We were prodded along by bayonets, and, if you failed to move fast enough, you were run through with the bayonet. I lost a lot of buddies on the march. I lost a lot more over the next 3½ years. Two hundred members of my squadron surrendered. Only 50 ever came home. There are now only about 20 of us left. I was shipped to Japan in one of the so-called "hell ships." Having survived the Death March and the hell ships, my greatest challenge was still ahead. Two years of forced slave labor for Nippon Steel Corporation. We worked 7 days a week, 10 hours a day. We were starved, beaten and abused. We suffered disease, deprivation and depression. I nearly died twice, once from malaria, the other time from pneumonia. We suffered from dysentery, beriberi, scurvy and pellagra. Many of these diseases resulted from surviving on starvation rations. If you became too ill to work, these already meager rations were further cut in half. Before the war broke out, I weighed 180 pounds. When we were finally liberated I weighed 97 pounds.

We worked at Nippon Steel doing heavy labor. Sometimes we unloaded freight cars, worked to supply a blast furnace, or unloaded ships. If you didn't work hard or fast enough, you were beaten. For a long time, we were not allowed to receive or send mail. It was several years before my mother even knew whether I was dead or alive. But with all due respect, most of what we experienced and lived through cannot be fully or adequately described. Suffice it to say, you had to be there.

I mentioned previously that only 50 of us came home from the war. I have often wondered why I survived and why so many of my buddies did not. Obviously, these are questions whose answers are ultimately known only to God. But I attribute my survival to Him. I am a religious man, and I believe my Heavenly Father heard and answered my prayers while I was a prisoner of war. My faith in Him, and my country, gave me the strength to hang on when there was nothing else to hold on to. And now, over 50 years later, I think I know why my life was preserved. I am here today to speak not only for myself, but also for all those young men who never came home. I am here to ask for your help as I seek justice not only for me, but for all of us who served and suffered, both living and dead. Justice has been long delayed, but it must not be denied.

I am currently a plaintiff in a lawsuit seeking justice. I am not alone. Other POW survivors are involved as well. Our lawsuit is not against the Japanese Government—nor the Japanese people. I have long since forgiven them. Indeed, as a practicing Mormon, I sent my son to Japan for two years to serve as a missionary. We are all God's children.

But forgiveness does not eliminate the demands of justice. My lawsuit is against Nippon Steel—the corporation which benefited directly from my forced slave labor. I want the world to know what happened to me and my fellow soldiers who were forced to work under such despicable conditions for Nippon Steel.

I am not a lawyer, but my attorneys tell me that a similar lawsuit such as mine was brought in New Jersey by survivors of the Holocaust. Many of them were slave laborers as well. In that case, I am told, the Department of Justice was requested to submit the position of the United States concerning the suit. The Department of Justice took no position. But now I am told that the Department of Justice has taken a position opposing our right to bring suit and to seek justice for the Pacific survivors of forced slave labor. I acknowledge that I am not educated in the law—but I think I know what is fair—and what is right. And I am here to respectfully tell you that it is neither fair nor right for the United States Government to take such a position against American soldiers—albeit over 50 years later—who when called upon so many years ago—faithfully answered their country's call.

So what I simply ask today, Mr. Chairman, is your aid and assistance in helping us right this wrong. If the United States is not going to support us, then for heaven sakes, they should not oppose us. I am told that there are very strong legal arguments why we should be allowed our day in court. Obviously, I believe there are equally strong equitable reasons as well. I have confidence and trust in our American system of justice. I know if you will just allow us our day in court, our cause will speak for itself. As for me and my buddies, I will speak for those who are no longer here to speak for themselves. Please help us have that opportunity.

Thank you. I would be happy to respond at the appropriate time to any questions you may have.

The CHAIRMAN. Thank you.
Mr. Bigelow.

STATEMENT OF FRANK BIGELOW

Mr. BIGELOW. I want to thank you for allowing me to speak to you today. I want to give special thanks to Senator Hatch, from Utah, for his efforts. I am Frank Bigelow, formerly seaman second class. I am now 78 years old and residing in Brooksville, FL. I am here to speak for the POW's from World War II.

Bullets, exotic diseases, and starvation couldn't kill us. Neither could 2 years of slave labor, being beaten, nearly beheaded, by the masters we were forced to serve. It is that strength that brings me here today. Justice is long overdue for the thousands of World War II veterans.

No doubt, you have heard of Omuta Camp 17, where your fathers, sons, and brothers were forced to do hard labor. We were defending a beach on Corregidor when thousands of Americans and Filipino troops were taken prisoner by the Japanese. I knew right then that I was going to make it. When they hauled down the American flag, ground it into the Earth, urinated on it, it made me sick, and we held a lot of guys back to keep them from fighting the Japanese because they would have had their heads cut off immediately.

I loved my flag and I loved my country. I was 20 years old and half a world a way from my home in North Dakota. I contracted malaria, jaundice, diarrhea, and dysentery all at the same time, and I forced myself to eat charcoal to save my life.

After a year, the Japanese asked for 500 POW volunteers to go to another camp, and after 3 weeks at sea we found ourselves in Omuta, Japan. That was August 1943, Camp 17. Everyday the Japanese Army delivered us to a coal mine owned by Mitsui, one of the biggest business conglomerates in Japan, and we were their slave labor. Mitsui Mining was right up there in front and we were told to work or die—long hours, short rations. Usually, tiny portions of rice and seaweed soup could barely sustain us as we were doing physical, heavy labor. I was skin and bones, and at 6 foot, 4 inches, I weighed just 95 pounds.

We worked as many as 27 days straight and we were beaten badly. Since my bones were so brittle from malnutrition, one night when a huge rock fell on my leg it broke my bones like old dead twigs. There was another American POW, Dr. Thomas Hewlett. He improvised with two sharpened bicycle spokes, one through my knee and one through my ankle. It didn't work. Eventually, I got gangrene, and due to lack of choice, since we had no medical supplies, much less surgical supplies, we had to do what was called a guillotine operation.

He had a hacksaw blade and a razor blade, some knives, and four guys holding me. He resorted to a primitive method to battle the growing infection. He put maggots inside the bandage, and when he took them out and pulled out the infection, that man saved my life and my leg—the rest of my leg, I should say.

Japan surrendered, and at the age of 24 I left that prisoner of war camp thinking only of my freedom in America. Former Navy and Marine prisoners of war were shipped to Guam, and when we

reached Guam Navy intelligence officers took us one on one into rooms. We were each handed a paper headed “Restricted.” I have that right here. This subject was restricted, “Publicity in Connection with Liberated Prisoners of War.” We were told to read and sign and keep our mouths shut, and I am just putting that politely. We were young, we were scared, and yearning to get home. We would have signed almost anything to do this.

And what do I think the company owes us? My leg, a couple of years of our lives, and at least miner’s wages for what we did. Most of all, they owe us an apology. It was war time, and as prisoners of war we were supposed to be treated humanely, fed, given a decent place to live, and medical treatment. We received absolutely none of these.

If our lawsuits go to trial against the biggest and richest companies in the world, Mitsubishi, Nippon and Mitsui among them, we hope that photos taken by Terence Kirk will help our case. Terence built his own camera and he took six pictures. That is all he got away with. We want to use them as evidence against the Japanese who enslaved us, industrialists whose companies used prisoners of war as slave labor and were never tried. The photos were never used. We feel it is only fair to hold these companies accountable.

In closing, may I say protect your freedom and your flag with your life, if it is necessary. It is the most important thing any American will ever have.

Thank you.

The CHAIRMAN. Well, thank you, Mr. Bigelow. We appreciate your testimony very much.

We will go to you, Mr. Mazer. We are happy to have you here.

STATEMENT OF MAURICE MAZER

Mr. MAZER. Good morning, Senator Hatch.

The CHAIRMAN. Good morning.

Mr. MAZER. My name is Maurice Mazer. I am one of the survivors of the Bataan Death March and 42 months’ imprisonment in various camps, both in the Philippines and Japan. I was proud to serve as the National Commander of the American Defenders of Bataan and Corregidor for 1952 and 1953.

I thank you for holding this hearing on our behalf today to call attention to those who served in the Pacific during World War II and were captured by the Japanese. We became slave laborers of private Japanese companies after our surrender and suffered unspeakable torture under our captors. Our Government has never recognized our sacrifice, and the Japanese companies who enslaved us have never compensated us. Further, we have never been compensated by our Government and have not received an apology from anyone. We deserve closure.

I was imprisoned in Hanawa Camp in Japan. Each morning, the Japanese soldiers turned me and my fellow prisoners of war over to the guards for Mitsubishi Mining, a private company which enslaved us for its own profit and forced us to work in its copper mines and smelter mines. I was beaten unmercifully by the Mitsubishi guards and had my back broken in the mines when one of the guards ran a car carrying a mine operative into me, slamming me against the wall of the mine. Today, I suffer numerous

health problems directly attributed to the time I spent as a slave laborer.

It is absolutely unconscionable that our Government has awarded reparations to Japanese-American citizens who were in the United States relocation camps during World War II, many of whom were proven to be spies and Japanese sympathizers, and has ignored the plight of its military men and women who were enslaved by the Japanese. It is incomprehensible to me that our Justice Department has taken a position against our American prisoners of war who became slave laborers at the hands of private Japanese companies during the war.

At the same time, the Justice Department made a conscious decision not to interfere with claims pending on behalf of the Holocaust survivors. Those of us interned by Mitsubishi, Mitsui, Nippon, Ishihara Sangyo, and many other Japanese companies suffered our own holocaust and this has never been recognized. This terrible injustice needs to be rectified as soon as possible. We, who are the victims, are old and dying off. We have waited too long for our private hell to end. It is a time for closure.

Thank you for having this hearing. I appreciate your efforts to rectify injustices that I and those I was imprisoned with had to endure. I hope that through your efforts, I and those I was enslaved with will find our peace.

Thank you.

The CHAIRMAN. Well, thank you, Mr. Mazer.

We have a vote on and there are only about 5 minutes left for me to get there. I think what I will do is recess for just a few minutes so I can go vote, because I would like to hear the whole testimony. Of course, if Senator Sessions comes back, he will continue the testimony.

You will be next, Dr. Tenney, and if you don't mind waiting, I don't have any choice; I need to get over there and vote. So we will recess until I can get back or Senator Sessions gets here.

[The committee stood in recess from 12:04 p.m. to 12:30 p.m.]

The CHAIRMAN. I apologize for the delay, but that is the best we can do when we have votes around here.

We will turn to you, Dr. Tenney. I am sorry that you had to wait to give your testimony until now.

STATEMENT OF LESTER I. TENNEY

Mr. TENNEY. Mr. Chairman, members of the committee, in early 1942, along with 12,000 other Americans who were fighting and defending our country on the Bataan Peninsula, I was promised supplies, food, and reinforcements by our Government. As history shows, that promise was never fulfilled.

During one of President Roosevelt's fireside chats made in February 1942, as we sat in our tanks we listened to him say that in every war there are those who must be sacrificed for the benefit of the whole war effort. We suddenly realized he was talking about us. We were being sacrificed and abandoned for the benefit of the overall war effort.

Well, Senators, we were well able to do that. After all, we were proud young men and women serving our country, and we took an oath to protect our country at all costs. Then on April 9, 1942, Ba-

taan surrendered. We then found ourselves prisoners of war. I would like to take just a moment to share with you what it was like being a prisoner of war of the Japanese.

First of all, you are stripped of every human right you thought you had. You are constantly reminded of the fact that you are cowards, that you are lower than dogs, that you have no rights whatsoever. You are humiliated beyond belief, and your faith and morals are challenged on a daily basis. Sickness and diseases like dysentery, malaria, beriberi, scurvy, and pellagra run rampant in your body. Beatings become an everyday occurrence, and you are deprived of adequate food. You can see that picture there, Senator. That is what we looked like.

Well, here we are, 58 years later, and we are once again informed that we are being sacrificed and abandoned by our own Government, but this time not for the war effort, but instead for the benefit of those large Japanese industrial giants who profited from our slave labor. I once again feel that I have been taken prisoner, but this time by my own country. I have been able to take the beatings, but now I have to take the beatings with words from our own country.

How has this come to be? Well, the California legislature, as was mentioned earlier, unanimously passed a statute that was enacted into law allowing claims for compensation for those veterans who were used as slave laborers to go forward in the courts, irrespective of the running of the statute of limitations. Pursuant to this law, I, along with many of my former POW friends who were enslaved by Japanese companies during World War II, have since filed lawsuits seeking reparations, equality, and justice.

Shockingly, the U.S. Department of Justice has recently filed a court submission, the effect of which would nullify the action of the California legislature. Why is it, then, that the Justice Department at the same time had taken a hands-off position with regard to the same treaty issues as in the German Holocaust case?

The actions of the Justice Department and the State Department is incomprehensible to me, to allude to the fact that our State Department places more emphasis on the documents of the treaty than on the actual treaty itself. I am speaking as one of the survivors of the infamous Bataan Death March and over 3½ years as a prisoner of war. Ultimately, I was taken to Japan on a hell ship. Once there, I became a slave laborer in a Mitsui coal mine. I was forced to shovel coal 12 hours a day, 28 days a month, for over 2 years.

And the reward I received for this hard labor? Beatings by the civilian workers in the mine, and the reason for the beatings were because I did not work fast enough, did not shovel enough coal that day, or because the Americans won an important battle. We got to know how the war was progressing by the frequency and severity of the beatings. And, of course, the beatings were usually with pick axe, hammer, chains, or whatever the Mitsui overseer was able to get in their hands.

Now, I, along with many of my former POW friends, are seeking justice from the Japanese companies that placed us into servitude, and they took pleasure in our humiliation. Our plight for recognition of this wrong has been ignored for the past 55 years, and more

recently is being denied by our own Government. Those of us who were fortunate enough to survive are coming to the end of our lives and we would like once and for all to see justice done on our behalf.

We cannot recapture our youth or our health. Frank here cannot get his leg back. But we would like to recapture our honor and our dignity that was taken away from us. The very least our country should do is not stand in the way by compounding our servitude. It is not money that motivates us; it is a need to remind the world of the importance of basic human rights and dignity. A wrong is a wrong, no matter how many people are doing it.

The Justice Department erroneously or negligently issued a formal submission to the courts of our Nation, omitting the most crucial issue of the San Francisco Peace Treaty, and, in effect, took away our rights for recovery. Section 26, known as the most-favored-nation clause, states:

> Should Japan make a peace settlement or war claims settlement with any state granting that state greater advantages than those provided by the present treaty, those same advantages shall be extended to the parties to the present treaty.

The records of our State Department show that at least six other nations have been granted more favorable treaty terms than those given to the United States. Article 26, when properly interpreted, allows victims of forced or slave labor to seek recovery for the wrongs perpetrated against former prisoners of war during World War II. Yet, the Justice Department studiously ignored it in its Statement of Interest and mentioned not one word of article 26, even though it had been briefed on this issue. I urge you, Senators, to use your position within our Government to correct this wrong and have our Justice Department turn away from this misguided action.

Mr. Chairman, Senators, this is not a tirade against Japan as a nation. I have no animosity toward the Japanese people. However, I and my colleagues who have served the United States and fought in Bataan are entitled to compensation and an apology from the Japanese companies that enslaved us. I heard the statement of Mr. Ron Bettauer. The debt he is talking about can be paid by helping us or getting out of our way.

Thank you, Senators, for listening to my story about honor, injustice, and responsibility. We served our country with honor, we have had our share of injustice, and now we seek responsibility from our Government in allowing us to be heard in a court of justice.

Thank you.

The CHAIRMAN. Thank you, Dr. Tenney. I appreciate your great testimony.

Mr. Jackfert.

STATEMENT OF EDWARD JACKFERT

Mr. JACKFERT. Mr. Chairman and members of the Senate Judiciary Committee, the American Defenders of Bataan and Corregidor, Inc., deeply appreciates this opportunity to speak to your committee today.

My name is Edward Jackfert. I recently completed my second term as National Commander of American Defenders of Bataan and Corregidor, Inc. This gave me the opportunity to know most of the members, the problems they encountered during the war in prisoner of war camps, and subsequent mental and physical problems that emanated from their internment.

These heroic defenders of the Philippines, Guam, Wake Island, the Dutch East Indies fought with what they had, and no army has ever done so much with so little. Upon the surrender of the Philippines, many were subjected to a death march and horrible prisoner of war camp conditions. They were then squeezed into the filthy allotted space in the bowels of the hell ships and transported to Japan. Maybe there was still some physical strength left in them to work for the Japanese industrialists, or perhaps they could serve as barter should the Japanese militarists need them for such.

Devoid of any comforts, without food or water, and not even the courtesy to mark the ship as carrying prisoners of war, they sailed through the battle-infested waters toward Japan. They saw the smack of a torpedo or a bomb as it hit their ship. They saw the rushing waters that entered the hold and they felt panic that said "this is it." There was terror written in deep, gaunt lines on the faces of the men, men that were to the breaking point both mentally and physically. Many died aboard the hell ships and were buried at sea. We have a record of 3,632 POW's dying on these hell ships.

Those that arrived in Japan were assigned to quarters which were unfit for human living. They were starved, beaten, and then assigned to Japanese industrialists as slave labor to work in plants, mines, shipyards, and factories. Many died of starvation and severe mistreatment by the Japanese industrialists in Japan. There were 27,465 Americans captured and interned by the Japanese military during World War II. Of these, 11,107 died while they were prisoners of war, and only 16,358 were returned to military control of the U.S. Armed Forces.

Those who have survived the barbaric treatment in these prisoner of war camps suffer immensely today from the residual effects of their prisoner of war life. It took our Government 36 years to recognize by law certain disabilities resulting from the atrocious treatment of prisoners of war by the Japanese military and industrialists.

Those few who came home continually looked to their Government to seek some redress from the Japanese industrialists who used them as slave labor during World War II. As of this date, they have found none. What they did receive was a peace treaty with Japan that many claim denies them compensation for violation of their human rights.

With the help of a few civic-minded attorneys and other individuals in various parts of the United States, the prisoner of war community has initiated a drive for justice against those Japanese industrialists that used them as slave labor. A number of lawsuits have been recently filed in the State of California on behalf of these former prisoners of war. These complaints were filed against those Japanese firms that benefited from their slave labor during World

War II. Hopes were high that perhaps justice might now prevail for this group.

However, the prisoner of war community has been recently informed that the U.S. Department of Justice has issued an opinion that supports an incorrect interpretation of the Peace Treaty with Japan dated September 8, 1951, which could foreclose the rights of POW's under California law.

This action by the Justice Department is in direct contradiction to a letter written by the Justice Department to Judge John W. Bissell, Newark, NJ, that requested the Department to appear as a friend of the court in two slave labor claims on behalf of persons forced to work in German factories during World War II. The Civil Division of the Department of Justice respectfully declined the request of Judge Bissell to become involved in this particular litigation.

It is very apparent that the Justice Department made a determined decision only 6 months ago not to interfere with claims pending on behalf of Holocaust slave labor victims, whereas in our slave labor cases they have taken a position which is detrimental to such claims on behalf of slave labor victims of the Japanese industrialists.

These former prisoners of war are bewildered that the Justice Department chose to take such a position which interferes with the rights of private citizens to bring claims against private Japanese companies. Is this what we fought for? Is this what some of our comrades died for? Is this justice? Are they using a double standard in their decisions relative to Holocaust slave labor victims and the slave labor performed by American prisoners of war?

We have many veterans in the audience here today, members of the VFW, the American Legion, DAV, AMVETS, Military Order of the Purple Heart Association, American Ex-POW's, Center for Internee Rights, U.S.S. *Houston* Survivors, Jewish War Veterans, Philippine Scouts, and a number of other veterans organizations. Is this the freedom and justice that they fought for?

I was interned at Tokyo Area Prisoner of War Camp No. 2, Kawasaki, Japan. Our camp was in the middle of a highly industrial area centered on Tokyo Bay midway between Tokyo and Yokohama. I was forced to work for Nippon Steel, Showa Denko, Mitsui Co., and Kokosho. Beginning in January 1945, our area was subjected to continual heavy bombing by B–29's. On many occasions, we had to perform slave labor while bombing raids were going on around us, with planes flying right over our heads. We were not permitted to construct air raid shelters until June 1945.

On July 25, 1945, our area was subjected to a heavy demolition bombing which destroyed our camp and killed 22 of our fellow prisoners of war. The next day, we had the task of picking up the pieces of flesh of our dead comrades. The memory of this haunts us to this day.

Since the end of World War II, neither the Japanese Government nor those private industrial Japanese companies that enslaved our soldiers have ever offered to make restitution for the abuses and injuries we suffered, much less to offer an apology. It is time for the U.S. Government to act honorably and quickly to close this

dark chapter and afford these former prisoners of war the dignity that was taken away from them many years ago.

Once again, I thank you for being able to appear before you today.

The CHAIRMAN. Well, thank you, Commander. We are happy to have you here.

Professor Maier, we will take your testimony at this time.

STATEMENT OF HAROLD G. MAIER

Mr. MAIER. Thank you. I have a note from Mr. O'Brien indicating that you are running short of time, and I am aware of that.

The CHAIRMAN. Well, if you could summarize, it would be great.

Mr. MAIER. That is exactly what I wanted to do. You have a written statement from me, which is much longer than I was going to deliver anyway and deals with the same issues.

The CHAIRMAN. We will put your complete statement in the record and anything else you care to provide us.

Mr. MAIER. I do have a few comments I would like to make on some of the other testimony today. I thought I would just say one thing about that which will take about 1 minute.

The CHAIRMAN. Sure.

Mr. MAIER. I was somewhat surprised at Mr. Bettauer's testimony from the State Department, although I fully understand the problems of international diplomacy and how they sometimes tend to run counter to the legal issues with which we have to deal. But my concern with it was two-fold—perhaps just one.

I think it is a very dangerous precedent for the Department of State to take the position that the plain language of a treaty—and I am referring now to the most-favored-nation clause—can be interpreted somehow in the light of a single, nonstated objective with which that claim was put into the treaty. I know of no public position taken like that, and I know of no legal support for it.

When you write it down and you negotiate it, it is just like a piece of law, and that is what the Constitution of the United States says. The treaty is the supreme law of the land and I think we have to interpret it in the way in which we normally interpret the supreme law of the land when that is written by the Congress and signed by the President. So I was concerned about that, and I don't think that that is the way in which one interprets this treaty in any event, and I have addressed that in the paper.

I do want to say one other thing. We have also two papers, one by Prof. John Rogers of the University of Kentucky, and the other by Prof. Michael Ramsey, who is a professor of law at the University of San Diego Law School. I have read both of these papers and if you do not have them, I would very much like to ask that you put those into the record as well.

The CHAIRMAN. Without objection, we will do that.

Mr. MAIER. I have read both of them, and I haven't consulted with either of them, but on the basis of my experience as a teacher and a scholar I believe that both papers are excellent analyses and support conclusions I would strongly recommend to this committee.

[The prepared statements of Prof. Michael D. Ramsey and Prof. John M. Rogers appear in the Appendix.]

Mr. MAIER. I guess I ought to say who I am. I am a professor of law at Vanderbilt. I hold the David Daniels Allen Distinguished Chair there, and I specialize in international legal studies, public international law. Constitutional Law of the United States and Foreign Relations are the two courses I teach that are related to this.

I was counsel on international law in the Legal Adviser's Office at the Department of State in 1983–84, and I continue to serve as a consultant on international legal issues for them. I am an elected member of the American Law Institute. I do that only so that the record will show that I have some expertise in the field with which we are dealing.

If I may say one more thing, my profession gives me always the great pleasure to associate with some very distinguished people—Members of the Senate, Members of Congress, Members of the executive branch, and others in the U.S. Government and outside it. But I have never been in the presence of such distinguished men as those who are at this table with me today.

That is all.

[The prepared statement of Prof. Harold G. Maier follows:]

PREPARED STATEMENT OF PROFESSOR HAROLD G. MAIER

I. PROFESSIONAL BIOGRAPHY AND QUALIFICATIONS

I am Harold G. Maier, Professor of Law at Vanderbilt University, Nashville, Tennessee, where I have been a member of the Law School faculty since 1965. I received my BA degree in English literature at the University of Cincinnati in 1959 and my JD degree in 1963 at the UC College of Law. I earned my LLM degree at the University of Michigan in 1964 with a concentration in international legal studies.

In 1959–60, I studied German language and history as a Luftbrucke Dankstipendiat at the Free University of Berlin, Federal Republic of Germany (FRG), and pursued advanced studies concerning the international licensing of industrial property rights at the Max Planck Institute for Patent, Trademark and Competition Law at the University of Munich (FRG) in 1964–65.

At Vanderbilt, I currently teach courses in *International Civil Litigation, Constitutional Law of United States Foreign Relations, and Conflict of Laws* and have also taught *Public International Law, Comparative Law, Civil Procedure, U.S. Constitutional Law, Patents, Trademarks and Unfair Competition* and *Immigration Law,* as well as seminars on various related subjects.

In 1983–84, I served as Counselor on International Law to the Legal Adviser of the United States Department of State and am presently a member of the State Department's Advisory Committee on Private International Law. I was special liaison between the Office of the Legal Adviser and the committee of Reporters for the ALI's Restatement (Third) of Foreign Relations Law of the United States, 1984–88, and was consultant to the Office of the Assistant Secretary of the Army for the Panama Canal Treaty Negotiations, 1976–77.

I served as an expert witness for the United States government in the Cuban Mariel Boat Lift cases (see, e.g., *Fernandez-Roque* v. *Smith,* 622 F. Supp. 887 (N.D.Ga., 1985) and was a member of American Branch of the International Law Association's *ad hoc* Committee on International Law in Municipal Courts, report published November 16, 1993.

I have been a visiting professor at law schools at the Universities of Pennsylvania, George Washington, North Carolina and Georgia and in summer law programs in Aix-en-Provence, France, and London, England. For the academic year 2000–2001, I have been appointed *Straus Visiting Distinguished Professor of Law* at Pepperdine University Law School in Malibu, California.

I am a member of the American Society of International Law and of the American Society of Comparative Law. I served on the board of editors of the American Journal of International Law in 1984–88, and have been a member of the editorial board of the American Journal of Comparative Law since 1997.

I was elected to membership in the American Law Institute (ALI) in 1984 and served on the Committee of Consultants for the ALI's Complex Litigation Project, 1988–1993. In 1975–1976, I was a Guest Scholar at the Brookings Institution, Washington, D.C., studying the role of the separation of powers principle in the conduct of United States foreign policy.

II. CONTEXT OF THIS TESTIMONY

I have been requested by United States nationals who were held as prisoners of war by the Government of Japan during the Second World War to consider the application of international and constitutional legal principles in United States courts in the context of claims filed by those nationals against certain Japanese corporations and their United States subsidiaries. I have been asked to assume that the Japanese corporate defendants used these American war prisoners as slave or forced laborers without pay, tortured them and committed other acts of gross inhumanity against them, all in violation of international and Japanese legal standards for treatment of prisoners of war.

III. COMMENTARY ON THE LEGAL SUBSTANCE OF THESE CLAIMS

I have been advised that both the Japanese parent juridical entities and their United States subsidiaries have invoked the 1951 San Francisco Peace Treaty between the United States and Japan [1] (and particularly Article 14(b) of that treaty) as a defense to these actions by American citizens who were Japanese Prisoners of War held in Japan during World War II. It is my opinion that none of the terms of that Treaty precludes these legal actions by American citizens who were former prisoners of war.

There are several reasons why the 1951 Peace Treaty does not preclude these claims. First, the language of Article 14 and the publicly articulated purposes of the Treaty indicate only that it intended to do more than address the limited questions of what should be done with Japanese-owned assets which in 1951 were under the control of the United States and the other Allied Powers. In this respect, the 1951 Treaty does not include terms of exclusivity of remedy with respect to all Japanese violations of individual rights of American citizens that occurred during world War II. Article 14(a)(2) of the Treaty gave the United States and it Allies only the right to seize and dispose of Japanese assets within their control. Section 14(a)(2) makes no comprehensive reference to any limitations on future remedial measures on behalf of United States nationals (for example, nothing in the Treaty addresses or purports to precludes U.S. nationals from seeking future remedies against assets or property of private Japanese nationals located in Japan).

Moreover, the mechanism selected for paying compensation (e.g., the confiscation of Japanese-owned assets *then under the control of the United States* for conversion into assets suitable for paying compensation claims to persons illegally injured by the Japanese Government) was agreed to by the Allied Powers in explicit recognition that, at that point in time, Japan could not develop a viable postwar economy if it were required to pay immediately all valid claims. This policy basis for Article 14(a)(2) excludes any reference, pro or con, to *future* claims filed by individuals to recover for injuries at the hands of the Government of Japan or Japanese nationals when the Japanese economy no longer needed protection from the necessary results of its inhumane wartime policies. As such, there is no evidence in the Treaty's language or purpose that the Allied Powers agreed to excuse the Government of Japan or Japanese nationals from *future* private claims to recover for these injuries.

Lacking the evidence of any clear intention to nullify the future rights of these former prisoners now seeking compensation, the public statements of the United States' negotiators at most suggest the Peace Treaty was specifically intended to address only the use of Japanese assets then located within the United States. Thus, for example, I would direct the attention of the Committee to Secretary of State Dulles' explanation of the Treaty's terms and intent before the Senate Foreign Relations Committee, in which he stated,

> The United States gets, under this treaty, the right to use Japanese assets *in this country* to satisfy whatever claims Congress feels should be satisfied. We have taken under that provision approximately $90 million of Japanese assets in this country. Approximately $20 million have been used to take care of claims which have been approved by the Congress on behalf of internees, civilians and prisoners of war, and it remains for Congress to decide what it wants to do with *the balance.* [2]

[1] Treaty of Peace with Japan of September 8, 1951, 3 U.S.T. 3169 (hereinafter Peace Treaty).
[2] Emphasis added.

Nothing in this statement suggests that future claims of United States nationals were intended to be nullified by operation of the Peace Treaty, or that the United States had precluded any U.S. nationals from pursuing future claims. Secretary Dulles' comments refer only to claims to be satisfied out of Japanese assets then located within the United States and to the role of Congress in distributing the balance of *these* particular assets. This interpretation makes especially good sense in the light of the stated purpose of the United States to prevent the economic collapse of post-war Japan by restricting recovery to those assets then under United States control. It has no bearing on the continued existence of claims if and when Japan's, economy might recover or if Japan demonstrated its ability to provide further compensation.

Second, the structure of the text of the Peace Treaty provided many provisions in which the United States could declare explicitly that the remedies referred to in the Treaty were exclusive (or preclusive) with respect to *all* claims brought by private U.S. citizens. As even the most cursory examination of the text of the Treaty would disclose, no such explicit limitation is contained in the Treaty. Despite this, I am advised that an assertion to the contrary has been made by the Defendant corporations (and presumably by the Government of Japan) based on Article 14(b) which, by its terms, waives:

> * * * all reparations claims of the Allied Powers, [and] other claims of the Allied Powers and their nationals, arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war. * * *[3]

Under international law and practice, this provision does not operate in the manner asserted by these Defendants. To the contrary, the most reasonable interpretation of the wording used in this provision is that the Allied Powers (including the United States) waived their respective rights to *espouse* in the future the claims of their respective nationals arising out of the prosecution of the war. Without such espousal, no claims based on private injuries *and arising under international law* exist for the Allied Powers to pursue against the Government of Japan. If this were not the intent of the waiver, the Allied Powers—including the United States—would have put themselves in the position of waiving unespoused claims in which they had no valid, legally recognized interest. Under international law, an injured national's government has no recognized legally enforceable interest, and, therefore, no interest to "waive," until the government espouses the injured individual's claim.

This rule has particular significance for the United States. Under domestic law, the United States government cannot waive a claim that it does not "own,"—that it has not espoused—without the consent of the owner of the claim. I am not aware of any indication that the former U.S. prisoners of war waived their claims, nor any evidence that the United States ever proposed espousal of these claims or formally espoused these claims. The fact that the former POW's have filed this law suit suggests precisely the opposite conclusion.

Third, even if the Treaty *could* be construed to preclude private claims by United States nationals against Japanese nationals, this preclusive effect would have been overtaken by operation of the Most Favored Nation provision embodied in Article 26. Under that Article, Japan has extended unconditionally to every Allied Power (including the United States) the right to claim the same treatment from the Japanese government that Japan gives other nations with respect to war claims, regardless of any limitation that might be read into the original terms of the 1951 Treaty. This most-favored-nation clause, which is commonplace in treaties, is unconditional and unqualified. It operates *automatically* to give the United States and any other Allied Powers rights of any other nation to which the Japanese government might give more favorable treatment with respect to war claims than it gave to the parties to the Peace Treaty. Under standard practice in international law, the United States need take no formal action to avail itself of such more favorable terms. Furthermore, the time at which such more favorable terms might be granted to another nation is irrelevant to the rights of the United States to claim the benefit of those terms. The United States need not enter into additional negotiations with Japan in order to claim its most-favored-nation rights. The failure of the United States or any other Treaty party to take any formal or official steps to invoke its rights under the most-favored-nation clause does not, of itself, constitute a waiver of those rights, nor does such failure create an estoppel against the assertion of such rights.

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[3] Art. 14(b), Peace Treaty differs from that in which the United States government has espoused a claim and then decides to settle that claim without the consent of the claim's original private owner. In those circumstances, once the United States government has espoused the claim, it has put the claim settlement process into the diplomatic realm. Private rights cannot limit the ability of the United State's government to carry on effective diplomacy by agreeing with another government to compromise a claim once that claim has been espoused.

While I have not reviewed the totality of all treaties into which Japan has entered since World War II, I have reviewed at least eight in which the Japanese government has extended "more" favorable treatment to other nations than it did to the United States with respect to United States claims on behalf of its injured nationals. For example, Japan agreed in its peace treaty with Denmark to make payment for claims for injury to Danish nationals, without requiring release of claims against Japanese nationals as Japan required in the Peace Treaty with the United States. Similarly, Japan has paid claims of foreign nationals without requiring the release of claims against Japanese nationals, the *quid pro quo* that its nationals now seek to invoke through the strained interpretation of the 1951 treaty with the United States, discussed above. (See Japanese Treaties with Sweden, Switzerland, Spain, and The Netherlands.) Further, in their war claims settlement agreement, Japan agreed with Burma to reopen both the scope of waiver and the amount of payment that Japan was to make to settle claims against Japan by Burma. Japan has made no such offer to the United States. And, in its settlement with the Soviet Union, Japan agreed to limit the scope of its release of claims to those that arose after August 9, 1945. I am advised that the claims at issue in the suits brought by U.S. nationals against Japan arose before that date.

In the light of these subsequent war claims agreements on terms more favorable to foreign nationals than those extended to nationals of the United States in the Peace Treaty, Japan must now be treated as having extended that same favorable treatment to claims by United States nationals. Those terms do not include any basis to assert that claims by United States nationals against Japanese nationals have been "waived" in any respect. Thus, I reiterate that, even if the Treaty could be construed to preclude private claims by United States nationals against Japanese nationals, this preclusive effect would have been overtaken by operation of the Most Favored Nation provision embodied in Article 26.

IV. CONCLUSION

For all these reasons, I conclude that, in accordance with international law and practice, the 1951 Treaty should not, and cannot, be interpreted to preclude private actions by U.S. nationals against private Japanese nationals, and that Article 14(b) of that Treaty does not operate to effect any contrary rule.

The CHAIRMAN. Well, thank you, professor. I think that is a nice way of summing up. I feel very honored to be with you gentlemen and your friends in the audience here today myself.

I am way over time, but let me just have each of you answer these three questions. Tell us what it meant to you to serve your country, and I think most of you have already indicated that, but if you would care to make any additional comments, and how has your Government's response to your cases affected you. Some may say that this litigation is all about money. Please tell us what asserting these claims means to you and what really do you want from these companies that had you work in slave labor.

You don't have to answer all four of them, but why don't we start with you, Mr. Poole, and then go right across the table.

Mr. POOLE. Thank you, Senator. I would like to respond to the question about why and what it is we are looking for out of this case. For myself, justice is at the top of the list, and also I would like the information and the account of this to be incorporated in our history books so that my great-grandkids and those that follow will be able to read and know what really happened to us there. And also it might be a deterrent for any of this happening again in the event that the situation arises with different nations. It might help out and give them a little more of a guideline to follow rather than what happened to us.

The CHAIRMAN. Thank you.

Mr. Bigelow.

Mr. BIGELOW. The primary thing I am looking for, sir, is justice, but I would like to say that the thing I think should happen in this

country more than anything else is that our children and our young people should be taught what happened and why it happened, and maybe the future leaders of our country won't make this same mistake. That is all.

The CHAIRMAN. Thank you.

Mr. Tenney.

Mr. TENNEY. What I would like is that I want not only the justice that we are talking about, but by getting this justice I think we will also have an opportunity to let the citizens of Japan know once and for all what really happened. They are ignorant of what has happened because the Japanese Government refuses to tell them, the Japanese Government refuses to put it in their textbooks, and the people there do not know what happened.

And so by seeking justice, by getting this apology that can be a national issue—remember that in 55 years they have done nothing, no apology, and the Japanese companies have done absolutely nothing. But by issuing a formal apology, I think that will not only help our own country, but will educate the Japanese people to what really happened. And it is through education that we can stop this from ever happening again.

It is not a case of money. It is a case of what is right, it is a case of having what is right given to us. And if that means an apology, that is fine. If it means money, then let the courts decide on that. But I don't want that. I want the apology and I want the Japanese people to all know what happened.

The CHAIRMAN. Thank you, Mr. Tenney.

Mr. Mazer.

Mr. MAZER. The only thing I want out of this is justice. We are having our laws in the United States, and we who fought and came back sick, and some are still sick, we want someone to tell us why it happened, why we didn't get the help that we should have had. But I have nothing against the Japanese people. This is Mitsubishi. They took me and they harmed me, and I would like to see that they pay for that.

The CHAIRMAN. Well, thank you, Mr. Mazer.

Mr. Jackfert.

Mr. JACKFERT. Senator, we all know that we live in the greatest country in the world. There is no doubt about that, but we were all professional soldiers. We willingly would have died for our country and freedom. Freedom is what it is all about. That is why we are here.

And as far as justice goes, I think that perhaps in our country we have the greatest jury system in the world. Let a jury decide what justice is for us. It is not money; it is what we went through. Hopefully, perhaps someday the people of the United States will realize—our story has never really been told. You have heard these veterans here tell you about what they went through, but they cannot tell you what they went through. You had to be there; you had to feel the cold, the bugs, all this. This is a part of what we went through. It is impossible.

So it is not money, it is justice, and that is all we seek. We want these companies that are responsible for making us slave laborers responsible for what we went through.

The CHAIRMAN. Thank you, Mr. Jackfert.

Professor Maier, we do have a number of legal questions we would like to ask, but in the interests of time I think it is best to submit those to you in writing and make your responses part of the formal record here.

Mr. MAIER. Thank you very much, Senator.

The CHAIRMAN. Your responses will be very important to us, so we would like those back as soon as you can, but we would like them to be as fully stated as possible.

Mr. MAIER. I will be glad to do that.

The CHAIRMAN. I would like to thank all of the witnesses who have appeared today and all of the organizations and individuals who have submitted statements or materials to be included in the record. Your input has been very valuable; in fact, let me say it has been invaluable.

I want to express my special thanks to the many former POW's and their family members who are here today. Your personal stories and experiences are powerful reminders that freedom is not free. You have paid a heavy price for the liberty that all of us enjoy and take for granted. We are forever in your debt.

I am also pleased that the Judiciary Committee has been able to provide a forum for these important issues to be raised and discussed. Obviously, there are some difficult legal issues to be raised that have been raised. There are difficult legal and diplomatic questions that must be answered and addressed.

We are going to continue to help ensure that your stories are told and that the public becomes educated about this part of history. We will continue to push for the disclosure of records and the information that should rightfully be in the public domain. We also will fight for passage of compensation for you from our Government.

Finally, regardless of how the technical legal issues of the treaty are resolved, which the courts are going to have to determine, we will continue to explore how else this committee and others in Congress might be appropriately helpful. I am open to ideas, and hope that this hearing begins a dialog to discuss what can be done in light of all the moral, legal, national security, and foreign policy interests that are at play in this matter.

Now, to commemorate your appearances here today, I am going to personally have flags flown over the Capitol and sent to your homes, flags just like this one right here. We will send them to your homes, and I would like you to please accept those as a token of the Judiciary Committee's gratitude for your service to our country.

In addition, some of you may have heard that I write music. Well, we just finished our second patriotic CD and it is called "Heal Our Land." Mr. Bigelow, the first CD, which I am going to send to you as well, because of your feelings for the flag, has the song in it "I Love Old Glory." And I presume all of you have similar feelings.

But in this second patriotic CD, I wrote a song for my brother, who was killed in the Second World War in the Plesty Oil Raid, the one that knocked out Hitler's Vienna, Austria, oil fields. He was missing in action for 2 years and then finally they found him and brought him home, so we had to go through it all again.

I also have in there the song that we wrote for John McCain's friend who gathered little bits of cloth and made a flag that they would salute and pledge allegiance to every night that kept them sane. And when they found that he had this flag inside his shirt, the Hanoi soldiers took him outside and beat him within an inch of his life and threw him back in on this cement slab in the middle of the compound all bloody and broken and beaten.

John said they cleaned him up as best they could, and he said that they had four incandescent bulbs on all hours of the day and night so there was always some light in the compound. So what they did is they went to sleep, and for some reason John woke up in the middle of the night and here was Mike Christian, this fellow who had before used a bamboo needle to fashion little bits of cloth into a flag, eyes all puffed up and bloodshot, broken and beaten and bloody, sitting with a bamboo needle starting all over again to make another U.S. flag. You folks understand that. You have been through that. You have suffered for us. You have been willing to give your lives, and to a large degree you have given a large part of your lives for us.

I hope that the Justice Department and the State Department will review this matter. I suggest to our friends in the Government of Japan that they look at this matter carefully because there needs to be some reparation here. I suggest to the people who run these major corporations that are, I think, in every case very successful that they realize they have some responsibilities here, too. I am hopeful that this hearing will move us all down that road, in those directions.

I want you to keep sending materials to us and help us to understand. We will follow these matters with a great deal of interest, and let's hope that much good will come from this hearing. I think already much good has come just because of the testimony that you gentlemen have given here today, because people all over this country are seeing this on C–SPAN and will see it again on C–SPAN, and many of us who lived through those years will recollect what you went through.

And for those who are younger who really don't have much of a recollection at all of the sacrifices that were made so that they could have freedom, this particular hearing, I think, will open their minds and their hearts to realize that there are great human beings who gave their lives for us. There are great human beings who suffered for us, and you are among them and the leaders of those great human beings.

So I am very grateful to have been able to sit through this hearing today. I feel like this has been one of the great hearings that we have had on Capitol Hill in recent years, and I just want to personally thank each and every one of you and all of those of you in the audience for the sacrifices you have made for me, for my family, for our friends, for our neighbors, for our fellow citizens, and really for the whole world, because without you this world would be a very, very different place than it is today. So God bless each and every one of you.

With that, we will recess until further notice.

[Whereupon, at 1:01 p.m., the committee was adjourned.]

APPENDIX

Questions and Answers

Responses of the Department of Justice to Questions From Senator Hatch

Question 1. In connection with the Holocaust Cases, the Department was requested by the court to submit a statement of interest as to whether the private lawsuits were precluded under international law or constitutional principles, but declined, having concluded that these actions were not barred from proceeding. In other words, where its views were consistent with the position of U.S. nationals and contrary to the views of foreign interests, the Department withheld submission of its views. Now, having concluded that its views are contrary to the views of U.S. nationals and consistent with the views of a foreign interests, the Department has submitted its views. Please explain the policy considerations that went into the decision not to submit a statement of interest in the Holocaust Cases while submitting views in these cases.

Answer 1. The premise of this question is incorrect. It is true that the Department of Justice was invited by District Judge John W. Bissell to state the views of the United States concerning the impact of various post-war treaties with Germany on the cases pending before him brought by World War II era slave and forced laborers against German companies. The United States did not, however, as the question posits, decline the court's invitation on the basis of a conclusion "that these actions were not barred from proceeding." The United States has taken no position on the interpretation of the treaties. As we advised Judge Bissell, the negotiations over creation of a German foundation to compensate victims were then at a "very delicate" stage, and the United States negotiators were hopeful that the talks could reach fruition shortly. If successful, of course, a settlement would render resolution of the legal issues unnecessary. The Department's letter (copy attached) went on to say that, "as a result, we are reluctant to take action now that might interfere with achieving that objective, an achievement we believe the court would welcome." (Tab 1). The Department also agreed to update the court on the progress of the talks and "perhaps suggest a further schedule" for providing the United States' views. These positions were taken at the request of the Department of State, who had the lead in conducting the negotiations in question, and the policy lead for the United States on these issues. Thus, the State Department's judgment that the United States should not submit its views to Judge Bissell was based on a judgment that filing could interfere with negotiations that hold out the hope of payments to slave and forced labor survivors, including perhaps 100,000 or more American citizens. If the final settlement is reached, as the State Department anticipates, these cases will be dismissed voluntarily, obviating the need to resolve the legal issues or for the United States to opine on them.

In contrast, the foreign policy agencies of the United States are not involved in any negotiations concerning the claims of American prisoners of war in Japan, and the decision to file in the *Heimbuch* case, at the request of and in close consultation with the State Department, stemmed from the United States' obligation to carry out what it believes are clear treaty commitments.' Having waived World War II claims of U.S. nationals against Japanese nationals, in a treaty made by the President with the advice and consent of the Senate almost fifty years ago, the State Department concluded that United States had an obligation to its treaty partner to see that the provisions of that agreement are faithfully executed, and that this required the filing of the Statement of Interest. After careful analysis of the law and posture of the case, the Department of Justice deferred to that judgment.

Question 2. The Statement of Interest asserts, without any analysis or citation of authority, that "the United States created an exclusive remedy for claims by its nationals against Japan and its nationals arising out of WW II through the Treaty of Peace with Japan and the War Claims Act." Please cite any provision of the War Claims Act that precludes causes of action by U.S. nationals against Japanese nationals, or provides that the War Claims Act is an exclusive remedy for any claims by U.S. nationals against Japanese nationals. In addition, please cite and provide any document (including but not limited to negotiating history) or citation to any other contemporaneous authority or precedent that the Treaty clearly, intentionally, and unmistakably excluded or precluded lawsuits by U.S. nationals against Japanese nationals?

Answer 2. There is significant public record material concerning the negotiating and drafting history and Senate ratification of the Treaty of Peace. We discuss this history below and have provided copies of pertinent materials as attachments to these answers.

Article 14(b) of the 1951 Peace Treaty states that, "[e]xcept as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." 33 U.S.T. 3169 (Tab 2). On its face, Article 14(b) waives not only claims against the Government of Japan, but all claims arising out of the prosecution of the war, whether such claims are based on actions of the Government of Japan or actions of Japanese private nationals. The Peace Treaty defines "nationals" to include "juridical persons," and juridical persons includes business corporations. Article 4(a). Nor, by its terms, is the waiver limited to claims that would fall within a strict definition of "reparations." Article 14(b) specifically waives *reparations* claims of the Allied Powers, and all *other* war-related claims of the Allied Powers *and* their nationals.

We think it clear that the treaty means what it says. The contemporaneous documentary record further demonstrates that both the Executive and Legislative Branches understood and intended that all claims, including national-to-national claims, would be waived. As is reflected in the papers of the State Department and the congressional record, both Branches were concerned that imposing heavy burdens on the Japanese economy could result in a weak Japan and, as a result, an expansion of Soviet influence. Thus, in furtherance of critical national security and other interests, the United States and the other Allied Powers sought to achieve a peace that would permit Japan to recover economically, and join Western nations. Waiving reparations and other claims against the Government of Japan and Japanese nationals was intended to advance this policy goal. In 1950, President Truman appointed John Foster Dulles as a special Foreign Policy Adviser to the Secretary of State, and assigned him the specific task of negotiating a multilateral peace treaty with Japan. Dulles fully recognized the possibility that Japan someday would be in a better economic position, and then might be able to afford to pay the legal claims of its countless victims. Nonetheless, in a draft statement he wrote for Secretary of State Acheson to deliver to the President of the Philippines in August 1951, Dulles noted that "only vigorous effort and industry by the Japanese will enable them to earn enough foreign exchange to import what they need to live in decency." Memorandum by the Secretary of State (Acheson) to the President, Washington, August 7, 1951, *reprinted in* Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1245 (1977) (enclosing Draft Proposed Statement to the Philippine Government drafted by Dulles) (Tab 3). Dulles further observed:

> This would be impossible if the Treaty kept alive the right of the Allies to demand monetary reparation payments. That would so impair public and private credit as to make essential capital developments impossible and so contract Japanese ability to finance exports and imports as to endanger Japan's survival as a member of the free world. It would destroy Japanese initiative because the Japanese would know that the greater was their exertion the more would be taken from them.
>
> It may be argued that no one can predict the future with certainty, and that events not now foreseen might give Japan a future ability to pay monetary reparation. That is true. But it is also true that if an economy is set up so that it must bear all unfavorable developments while deprived of the benefit of all favorable developments, there is lacking the balance needed to produce endeavor and to sustain credit, and disaster occurs which is not limited to the area dealt with.
>
> All of these lessons were taught by the Treaty of Versailles. Under it reparations claims destroyed German credit and will to work. The claims were

> sought to be enforced by the most determined effort that history records. Certain Allied armies occupied the industrial heart of Germany, they arrested the German industrialists for allegedly sabotaging reparations, and they operated mines and factories for reparation account. But the Treaty and all the efforts to enforce it produced no appreciable reparations, but did create grave divisions as between the principal allies and set in motion inflationary forces, first in Germany, and then on a world-wide scale which many observers believe were largely responsible for the tragic economic collapse which began in 1929 and lasted until World War II.

Id.

To ensure that all war claims, brought either by individuals or by governments, would be settled by the Peace Treaty, the United States suggested the addition of the waiver provision that eventually became Article 14(b) of the Peace Treaty. Japanese Peace Treaty: Working Draft and Commentary Prepared in the Department of State, Washington, June 1, 1951, *reprinted in* Foreign Relations of the United States 1951, Vol. IV, Asia and the Pacific, at 1084 (1977) (Tab 4). The United States justified this suggested addition with the following comment:

> The insertion * * * is proposed for the reason that the treaty should settle and dispose of all claims of the Allied Powers and their nationals arising out of the war. If no waiver were provided, some Allied governments or Allied nationals might continue to press such claims against Japan after the coming into force of the treaty. Settlement of claims in the treaty assures that no Allied government or Allied national receives preferential treatment. The language of the waiver follows closely the language of Article 19 in which Japan waives claims against the Allied Powers.

Id.[1]

The Senate Committee on Foreign Relations ("Committee") unanimously recommended that the Senate give its advice and consent to ratification of the 1951 Treaty of Peace with Japan. *See* S. Exec. Rep. No. 82–2, at 4 (1952) (Tab 5). The Senate specifically focused on the wisdom of waiving legal claims. In its recommendation, the Committee warned that requiring payment of reparations and other war-related claims "in any proportion commensurate with the claims of the injured countries and their nationals" would be "contrary to the basic purposes and policy of the free nations, the Allied Powers, and the United States in particular" in the Far East. *Id.* at 12. The Committee described Article 14(a) as containing "the unequivocal provision that Japan should pay reparations to the Allied Powers for the damage and suffering it caused during the War," but recognized that, "[a]t the same time, article 14(b) states that except as otherwise provided, the Allied Powers waive all reparations and claims against Japan." *Id.* In recommending that the Senate give its advice and consent to ratification of the Treaty, including the waiver provisions, the Committee emphasized Japan's willingness otherwise to "shoulder" reparations, and the unprecedented magnitude of reparations it had already paid. *Id.* at 12, 14.

The Committee informed the Senate that the Treaty's "provisions do not give a direct right of return to individual claimants except in the case of those having property in Japan." S. Exec. Rep. No. 82–2, at 13; *see also Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific: Hearings Before the Senate Comm. on Foreign Relations,* 82nd Cong. 144–45 (1952) ("Committee Hearings") (the Treaty's waiver provision "closes" and "locks" the gate on all avenues of recovery) (Tab 6). In fact, the Committee held extensive public hearings in January 1952 on the specific issue of war claims. The records of these hearings confirm that the Senate was aware that all individual claims were being waived by Article 14(b), and that such claims would be dealt with exclusively through legislation. Committee Hearings at 133–45.

During the hearings, various objections and questions were raised concerning compensation for individual claims and specific objections were made to the waiver of these claims. *See, e.g., id.* One legislator even attempted to limit the effect of Arti-

[1] Article 14(b) and Article 19(a) of the Treaty are not identical. Article 19 does not use the term "reparations" at all, instead providing simply that Japan waives all claims of Japan and its nationals arising out of the war. Article 14(b) waives all "reparations" claims of the Allied Powers, but then goes on to say that all "other claims" of the Allied Powers and their nationals against Japan and its nationals also are waived. Thus, to the extent that there is a legal distinction between "reparations" claims of the Allied nations against the defeated nation of Japan and other sorts of claims that might arise out of the prosecution of the war, Article 14(b) explicitly waives both.

cle 14(b) by proposing a reservation to the Treaty stating that "nothing contained in this Treaty shall be construed to abrogate the * * * just and proper claims of private citizens of the United States." *See* 98 Cong. Rec. S2365, 2567–71 (1952) (Tab 7). In a memorandum, Adrian S. Fisher, the Legal Adviser for the U.S. Department of State, informed Secretary of State Acheson that this proposed reservation was "in direct conflict with Article 14(b)," and that, if this reservation were added to the Treaty during the ratification process, "a renegotiation of the Treaty Article would unquestionably ensue." Memorandum to The Secretary from Mr. Fisher (the Legal Adviser), dated March 19, 1952, at 4 (Tab 8).

In lieu of such a provision, the State Department recommended that Congress adopt the War Claims Commission's suggestion that Congress amend the War Claims Act of 1948 "to provide for the receipt, adjudication and payment of claims * * * resulting from mistreatment, personal injury, disability, or impairment of health caused by the illegal actions of any enemy government during World War II." Committee Hearings at 147. Congress eventually accepted this invitation, and amended the War Claims Act to "create[] a domestic mechanism for distributing captured Japanese assets," which entitled members of the putative class "to detention benefits for the period of imprisonment in Japan." *Aldrich* v. *Mitsui & Co. (USA),* Case No. 87-912-Civ-J-12, slip op. at 3 (M.D. Fla. Jan. 20,1988) (citing 50 U.S.C. App. § § 2004 and 2005 (1994)) (Tab 9).

Consistent with this position, the Senate gave its advice and consent to the Treaty on March 20, 1952, by a vote of 66 to 10, without adding a reservation pertaining to war claims in its resolution of advice and consent. *See* 98 Cong. Rec. S2594 (1952) (Tab 10). Advice and consent was considered and approved as part of a package with three additional security treaties relating to the Pacific region, reflecting the United States' view of the Treaty as an integral part of its political and foreign relations goals in that region. *See, e.g.,* Cong. Rec. S2327, 2361, 2450, 2462 (1952) (Tab 11).

Article 14(b)'s waiver provision did not, however, mean that victims who had claims against the Japanese government and Japanese nationals would not be compensated. A key feature of the Treaty was the system for the payment of war-related claims it established to provide compensation for "the damage and suffering" inflicted by Japan and its nationals "during the war." Treaty, Art. 14(a). Private Japanese nationals—primarily corporations—who had property or other assets located outside Japan, paid a heavy price under the 1951 Peace Treaty to satisfy the requirements of this system. The Government of Japan volunteered the use of those assets to satisfy war claims.[2] Pursuant to that Article and Article 16 of the Treaty, assets located in Allied territory valued at approximately $4 billion were confiscated by Allied governments, and their proceeds distributed to Allied nationals in accordance with domestic legislation. *See* Comments on British Draft, Memorandum by the Officer in Charge of Economic Affairs in the Office of Northeast Asian Affairs (Hemmendinger) to the Deputy to the Consultant (Allison), April 24, 1951, *reprinted in* Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1016 (1977) (Tab 12). The total value of Japanese-owned assets located in U.S. territory (including the Philippines) was estimated in 1952 to be worth more than $90 million. *See* Japanese Peace Treaty Negotiations, Feb. 5, 1952, *reprinted in* Executive Sessions of the Senate Foreign Relations Committee (Historical Series), Vol. IV, 82nd Cong., 2nd Session, 1952, at 121–22 (1976) (Tab 13).

Following the war, these assets were seized by the Office of Alien Property (an office within the U.S. Department of Justice), liquidated, and the proceeds placed into a War Claims Fund, for ultimate distribution to POWs and other claimants. As Ambassador Dulles explained:

> The United States gets, under this treaty, the right to use Japanese assets in this country to satisfy whatever claims Congress feels should be satisfied. We have taken under that provision approximately $90 million of Japanese assets in this country. Approximately $20 million have been used to take care of claims which have been approved by the Congress on behalf of internees, civilian and prisoners of war, and it remains for Congress to decide what it wants to do with the balance.

[2] [E]ach of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of

(a) Japan and Japanese Nationals,

(b) Persons acting for or on behalf of Japan or Japanese Nationals,

(c) Entities owned or controlled by Japan or Japanese nationals.

Treaty, Art. 14(a)(2).

Id. Funds to pay reparations mostly were provided from the confiscation of assets of Japanese businesses, in accordance with United States and Allied policy.[3]

Using these confiscated funds, the Senate Committee on Foreign Relations recognized that it "is the duty and responsibility of each [Allied] government to provide such compensation for persons under its protection as that government deems fair and equitable, such compensation to be paid out of reparations that may be received from Japan or from other sources." S. Exec. Rep. No. 82–2, at 12–13. Following the recommendation of the State Department, Congress amended the War Claims Act of 1948, 50 U.S.C. App. § § 2001–2017 (1994), to afford additional compensation to those taken prisoner of war by the Japanese. 50 U.S.C. App. § 2005(d) (1994).

Originally enacted immediately after the war, the War Claims Act had established a system of compensation for prisoners of war like Plaintiffs and certain other victims of World War II. The Act established a War Claims Commission (now the Foreign Claims Settlement Commission), which initially was authorized to adjudicate claims "filed by any prisoner of war for compensation" for specified violations of the Geneva Convention of July 27, 1929, suffered while a prisoner of war, including claims for violations "relating to labor of prisoners of war." 50 U.S.C. App. § 2005 (1994). These claims covered inadequate food, inhumane treatment, and certain types of forced labor. The Act was prompted by Congress' desire "to facilitate the giving of immediate relief to those American citizens who were imprisoned by the enemy during the war." S. Rep. No. 80–1742, at 7 (1948) (Tab 14).

At that time, however, Congress acknowledged that "the question of war claims * * * is too complex to be approached by the Congress on a piecemeal basis and that the subject in its entirety must be studied thoroughly before any intelligent action can be taken." H.R. Rep. No. 80–976, at 4 (1947) (Tab 15). Therefore, Congress charged the Commission with recommending types of claims to be accepted, adopting the procedures for considering claims, and establishing uniform standards for handling such claims. *See* 50 U.S.C. App. § 2007 (1994); 94 Cong. Rec. H564–69 (1948) (Tab 16). Congress anticipated that the Commission would ensure "the claims [would] be handled in accordance with priorities, priorities to be established for, we will say, the veterans of Bataan and others who have suffered similarly, as being No. 1 for consideration." 94 Cong. Rec. H566 (1948).

Congress rejected a proposal that would have allowed federal courts to adjudicate war compensation claims, because of the complexity of the issues and the need to have the claims "classified by experts who are qualified so to do" in order to "get some rationality out of this situation [and] to determine the categories of claims that should be allowed." 94 Cong. Rec. H564 (1948). It is clear that Congress did not want claims within the Commission's jurisdiction to be adjudicated by the courts, because it barred judicial review of the Commission's decisions "by mandamus or otherwise." 50 U.S.C. App. § 2010 (1994).

Question 3. At no point in the Statement of Interest does the Department provide any analysis of the language of Article 14(b) of the Treaty which limits the scope of any waiver to "actions taken by Japan and its nationals in the course of the prosecution of the war." Please explain the meaning of this limitation, and identify and provide all contemporaneous documents upon which the Department relies in that interpretation. Please explain how the failure by private Japanese companies to pay U.S. nationals for commercial labor at commercial-level wages is conduct arising "in the course of the prosecution of the war."

Answer 3. Everything known about the drafting of the phrase "in the course of the prosecution of the war" indicates that it was intended to have a very broad scope.[4] The phrase first appeared in a proposed revision to Article 19(a) of the U.S.-U.K. draft of the Treaty. Japanese Peace Treaty: Working Draft and Commentary Prepared in the Department of State, Washington, June 1, 1951, *reprinted in* Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1093–94 (1977) (Tab 4). Article 19(a) is a reciprocal provision to Article 14(b) that waives all claims by Japan and its nationals against the U.S. and its nationals. The revision was proposed by the United Kingdom along with the alternative phrase "or in the exercise or purported exercise of belligerent rights." *Id.* The United States pre-

[3] As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and *those of its nationals* * * * for the benefit of former prisoners and their families." Treaty, Art. 16 (emphasis added).4

[4] The phrase "in the course of the prosecution of the war" is not a specific term of art under the laws of war. We have only found the phrase in one other international agreement, a 1972 agreement, Union of Soviet Socialist Republics Settlement of Lend Lease, Reciprocal Aid and Claims, 23 U.S.T. 2910.

ferred the language in "the course of the prosecution of the war" because it was more comprehensive. *Id.* The phrase was later inserted into Article 14(b).

In their complaint, Plaintiffs allege substantial and active participation by the Japanese Government in subjecting American prisoners of war to forced labor. Compl. ¶¶ 10, 12, 13, 43, 46 (Tab 17). According to the allegations in the complaint, the conduct that forms the basis of Plaintiffs' claims was the direct result of laws and policies toward POWs adopted by the Government of Japan to aid its war effort. Compl. ¶¶ 10, 12, 13, 41.[5] Indeed, almost all of the allegations in the complaint deal with the actions of Japan and its policies in prosecuting the war. The allegations of actions taken by Japan and those taken by defendant companies are mingled, and clearly were taken "in the course of the prosecution of the war."

The war-time Japanese economy was an integral part of Japan's mobilization for "total war." *See* John W. Dower, *Embracing Defeat: Japan in the Wake of World War II,* 529–30 (1999). "The complexities of mobilizing an industrialized nation for total war required them [the military] to take Japan's other vested interests into partnership. They enlisted the aid of the leaders of big business, whose expertise was crucial in exploiting the resources of the Japanese Empire and in designing and building new weaponry." Meirion and Susie Harries, *Sheathing the Sword: The Demilitarization of Japan,* 4 (1987). By the late 1930s, industry, commerce and finance in Japan were dominated by an interlocking series of monopolistic combines called *zaibatsu. Id.* at 5. The *zaibatsu* rose to positions of prominence by collaborating closely with the military. Dower, at 529–30. "The zaibatsu factories were called upon to provide equipment, their shops to provide transport, their banks for finance, and their overseas branches were useful bases for intelligence-gathering." Harries, at 53. The military and *zaibatsu* cooperated to create an economy devoted to the pursuit of the war, and it is clear from plaintiffs' complaint that the very purpose of pressing prisoners of war into forced labor was to shore up industrial support for this total war effort.

Question 4. Has the Department attempted to determine whether Japan has entered into any war claims settlement or other agreements through which, pursuant to Article 26 of the Treaty, more advantageous terms must be extended to the United States by Japan? Attached are copies of relevant portions of other treaties entered into by Japan. Please explain why the United States should not now invoke the equivalent rights extended to Burma by Japan, particularly in light of the determination of the United Kingdom that that Agreement triggered rights of the Allied Powers under Article 26. Please explain why, in light of Japan's War Claims Agreement with the Soviet Union, the United States should not take the position that Article 14(b) applies only to claims of U.S. nationals arising after August 8, 1945. Please explain why the terms of Japan's War Claims Settlements with other countries which do not require the waiver of claims by nationals or against Japanese nationals should not be extended to the United States by operation of Article 26. Please provide all analyses supporting these views and all documents on which they rely.

Answer 4. Article 26 does not provide any rights to private litigants who may claim that they should have the benefit of a treaty signed by other sovereign nations. There is no private right to invoke Article 26 of the Treaty—only the United States Government has rights under Article 26. "International treaties are not presumed to create rights that are privately enforceable." *Goldstar (Panama) S.A.* v. *United States,* 967 F.2d 965, 968 (4th Cir.), *cert. denied,* 506 U.S. 955 (1992); *see also United States* v. *Li,* 206 F.3d 56, 670 (1st Cir. 2000) (*en banc*) ("treaties do not generally create rights that are privately enforceable in the federal courts"); *Tel-Oren* v. *Libyan Arab Republic,* 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (same), *cert. denied,* 470 U.S. 1003 (1985); Restatement § 907 comment a ("[international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts * * *."). As the Supreme Court said well over 100 years ago in the *Head Money Cases:* "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." 112 U.S. 580, 598 (1884). To be sure, the presumption against a private right of action may be overcome where a treaty confers rights on private parties, and the treaty partners intend that those rights be judicially enforceable. *See Diggs* v. *Richardson,* 555 F.2d 848, 851 (D.C. Cir. 1976). But that is not the case here. *See id.; cf. Li,* 206 F.3d at 63 (noting State Department

[5] Article 28 of the Geneva Convention of July 27, 1929, provides that "[t]he detaining Power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons." 6 U.S.T. 3316 (1929).

distinction between a treaty that creates "state-to-state" rights and one that creates individual rights).

Only the United States may invoke Article 26 in appropriate circumstances. Whether to invoke the rights embodied in Article 26 is a mixed question of law and diplomatic policy entrusted in the first instance to the Department of State. Article 26 has been mentioned publicly by United States officials only once, to deter the Japanese from granting sovereignty over the Kurile Islands to the Soviet Union. *See* Secretary Dulles' News Conference of August 28, 1956, Department of State Press Release No. 450 (Tab 18). Absent invocation of Article 26, there is no current basis for altering or construing the Treaty of Peace to conform to the terms of other nations' treaties with Japan.

Question 5. In determining the position that the 1951 Treaty necessarily and unmistakably waived the claims of private U.S. nationals against private Japanese nationals, did the Department make any independent review of the negotiating history? Please explain how the position of the Department is consistent with the exchanges between Japan and the Netherlands, which are attached. Did the Department consult with the Japanese Government regarding public reports (some quoting the Japanese Prime Minister) that the official position of the Japanese Government was that the 1951 Treaty did not waive national versus national claims?

Answer 5. The Department of Justice made an exhaustive review of the drafting and negotiating history of the Treaty prior to submitting the Statement of Interest. We also held appropriate consultations with the Japanese Government and are confident that the official positions of the United States and Japanese Governments as to whether these claims can be brought under the Treaty are consistent. Our answer to question 2, above, reflects our review of the negotiating history.

The exchanges between the Governments of the Netherlands and Japan do not alter the United States' understanding of the treaty. The exchanges between the Governments of the Netherlands and Japan make clear that, under the Treaty of Peace, Dutch nationals would not be able to obtain satisfaction for their claims from Japan or Japanese nationals. The claims of Dutch nationals, as with all other Allied nationals, would continue to exist and could be satisfied through compensation by their own government (similar to what the United States provided through the War Claims Act) or through voluntary agreement by the Japanese government. *See* Memorandum of Conversation, by the Deputy Director of the Office of British Commonwealth and Northern European Affairs (Satterthwaite), San Francisco, September 4, 1951, reprinted in Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1332–33 (1977) (Tab 19).

Question 6. In preparing the Statement of Interest, did the Department (or the State Department) consult with any scholars or experts on international law or treaty interpretation? Did either Department discuss any of the above-mentioned issues with any person involved in the negotiation or contemporaneous application of the 1951 Treaty? In the event of an affirmative answer to either question, please provide the name of such person and any document memorializing the substance of the discussion or consultation.

Answer 6. In preparing the Statement of Interest, the Department of Justice consulted with and relied on the legal and policy expertise of the Department of State. It is the Department of State, not outside scholars and/or experts on international law, that is responsible for the foreign policy of the United States, including the interpretation of its treaties and obligations under international law.

RESPONSES OF RONALD J. BETTAUER TO QUESTIONS FROM SENATOR HATCH

Question 1. Has the Department of State met with Japanese companies to discuss the lawsuits filed by the U.S. POWs?

Answer 1. No, the Department of State never met with the companies. Department of State and Justice attorneys have, however, had telephone conversations with some of the Japanese companies, legal representatives. After the U.S. Government was invited by the District Court to file a Statement of Interest, legal representatives of the companies sent most of their comments, inquiries and correspondence to the Department of Justice.

Question 2. How often has the Department of State met with the plaintiffs (the POWs) or their attorneys?

Answer 2. The Department of State has not met with the plaintiffs. The plaintiffs themselves never initiated contact with the State Department, nor did their legal representatives ever indicate to the Department that their clients wished to meet with State Department officials. The State Department never initiated contact with

the plaintiffs, as it would have been unethical (under legal ethics rules) to contact parties directly who are being represented by counsel. Department of State attorneys, however, had a number of telephone conversations with legal representatives for the plaintiffs. These conversations were of a similar nature to the conversations that government attorneys had with defendants' attorneys.

Significantly, however, on February 15, 2000, representatives for the plaintiffs met—at their request—with Deputy Secretary of the Treasury Stuart E. Eizenstat, who was acting in his capacity as the Special Representative of the President and the Secretary of State on Holocaust Issues. Also present at the meeting was a representative from the State Department's East Asian and Pacific Affairs Bureau. At this meeting, plaintiffs' attorneys presented a list of legal points in support of their presentation. Mr. Eizenstat committed to pass these points to Department of State attorneys, and he promptly did so. These points were given serious attention by Department of State and Justice attorneys in their internal deliberations.

After the U.S. Government announced its decision to file its Statement of Intent, legal representatives for the plaintiffs sent most of their comments, inquiries and correspondence to the Department of Justice.

ADDITIONAL SUBMISSIONS FOR THE RECORD

Berlin, Germany, June 26, 2000.

TEXT OF E-MAIL MESSAGE TO SENATOR HATCH FROM RABBI ABRAHAM COOPER OF THE SIMON WIESENTHAL CENTER

The Simon Wiesenthal Center applauds the initiative of Senator Orrin Hatch to convene hearings on the ex-POWs of the infamous Bataan Death March of World War II this week under the jurisdiction of the U.S. Senate Judiciary Committee. The great sacrifice, dignity and unselfish heroism of great Americans like Lester Tenney deserve to be remembered by all Americans for all time. However, the full scope of their suffering was never fully understood by the American people, nor fully dealt with by our government. On the eve of Independence Day, July 4th, it is only right therefore, that the Committee fully explore all of the historic issues surrounding the plight of these former POWs. While the Wiesenthal Center is not involved in restitution issues, It is the position of our Center, that all documentation related to the Pacific/Asia theater of World War II be made available by all relevant governments, led by Japan, The United States, China and Russia. Without full disclosure of the past, there can be no just nor final closure for history, no full and meaningful reconciliation for those who suffered. We look forward to reading the full text of these important hearings and to learn of any further Congressional initiatives which results from them.

With best personal regards to Chairman Hatch and the distinguished members of the Judiciary Committee, Rabbi Abraham Cooper.

PREPARED STATEMENT OF BRUCE R. HARDER, DIRECTOR, NATIONAL SECURITY AND FOREIGN AFFAIRS, VETERANS OF FOREIGN WARS OF THE UNITED STATES

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: The Veterans of Foreign Wars of the United States is pleased to be able to make a written statement for the record on behalf of those American veterans who were prisoners of war in the Pacific during World War II.

This statement is the written testimony of the Veterans of Foreign Wars of the United States. We understand that the purpose of today's hearing is to explore the historical, legal, and practical issues surrounding the plight of the former POWs.

This written testimony presents the VFW leadership's views on this issue. We want to make it clear that we strongly support the right of these veterans who are former Prisoners of War (POWs) to receive fair and just compensation for the injuries they suffered at the hands of their Japanese captors, and the slave labor they were forced to perform by private Japanese Companies during World War II.

It is a well-documented fact that during World War II, thousands of Americans were taken as POWs in the Pacific Theater and many were forced into slave labor. According to our sources, over 33,000 U.S. military personnel were captured in the Pacific Theater and interned by the Japanese. Of this total, over 12,500 of them died in captivity. The percentage of those who died in captivity gives a good indication of the horrid conditions that existed in the POW camps administered by the Japanese. These POWs suffered from a lack of adequate food, clothing, shelter, and medical care, suffered interrogation and torture, endured unthinkable abuse and brutality under the hands of their captors, and had their rights under the Geneva Conventions routinely violated. In addition, many of these POWs were transported to mainland Japan, and were required to work for private Japanese companies as slave laborers under horrible conditions. Here as well they were subjected to severe beatings and many different types of human rights abuses. When the war ended, the survivors returned home, but have never received fair compensation for their injuries and labor.

In fact, the only compensation most of these POWs received was standard Veterans Administration/Affairs benefits including medical care, and one dollar from the U.S. government for every day they spent in enforced labor while enslaved to private Japanese companies. After the war, peace treaty considerations kept them from legally pursuing larger reparations from the Japanese government or companies. On the other hand, the Japanese companies who profited from the enslavement of these American POWs have never compensated their American victims in any way nor have they offered so much as an apology for the way our POWs were abused and

exploited. We think these former American POWs have a right to be adequately compensated from the private Japanese companies for their suffering and sacrifice.

Recently, we received a letter from former POW, Robert M. Shrum who was held as a POW by Japan for three and a half years during World War II. A life member of the American Defenders of Bataan and Corregidor and the Veterans of Foreign Wars of the United States and other veterans organizations, Mr. Shrum was captured in the Philippines in April 1942 following the fall of Bataan and Corregidor. A survivor of the Bataan Death March, Mr. Shrum recently wrote a letter to President and in it he said:

> After World War II ended in the Pacific, neither the Japanese government or the private Japanese companies who worked us as slave laborers, has ever offered to make restitution for the work, lack of food, abuse, unbearable living conditions, suffered injuries, tortured and killings; and have not even offered an apology.
>
> Most distressing to us, the U.S. government has continued to ignore us during these same intervening years. Our government has never supported us to have fair compensation and restitution paid to us who were brutally enslaved and deprived of all human dignity. To me this is incomprehensible especially as in recent years our government has awarded reparations to Japanese American citizens who were interned in U.S. camps during World War II, as well as diligently worked to resolve claims by victims of German atrocities during the Holocaust. Both of these injustices deserve to be remedied and finally achieved—but we former Pacific prisoners-of-war slave laborers continue to be ignored by the U.S. government and Japanese government.

If the Japanese are willing apologize and pay restitution for crimes committed by their own soldiers against the former "comfort women" of the Republic of Korea, then why should they not do the same for American POWs who also ruthlessly abused and enslaved during World War II. We believe that private Japanese companies have a similar obligation to provide just and equitable compensation to American former POWs.

On May 12, 2000, the Executive Director of the VFW Washington Office sent letters to both Attorney General Janet Reno and Secretary of State Madeleine K. Albright pointing out that our own government had turned its back on our former POWs and did not pursue compensation from those companies for the injuries these veterans sustained. In addition, his letters urging both Attorney General Reno and Secretary Albright to stand up for these former prisoners of war whose claims are not against our government or the government of Japan, but on the private companies that brutally enslaved them and profited form their labor. Unfortunately, to date, our letters have gone unanswered.

Recently, we were distressed to learn that the United States Department of Justice publicly stated a position that is adverse to the efforts of the former POWs who seek redress from private Japanese corporations. Frankly, we are outraged that the Department of Justice has found it necessary to take such a position against our own former POW veterans.

The VFW believes it is time that our government showed compassion for these brave men and support their claims for just and equitable compensation. Our veterans seek only fairness and equitable restitution for injuries suffered in defense of our great country and all that it represents. Now is the time for the U.S. government to act honorably to afford the former POWs the fairness and dignity they deserve.

Therefore, we urgently request that the Congress of the United States thoroughly investigate this matter and intervene on behalf of our veterans to ensure that justice is done before it is too late.

Mr. Chairman and Members of the committee, thank you for this opportunity to present the views of the Veterans of Foreign Wars of the United States on this issue.

Prepared Statement of Linda G. Holmes

AMERICANS IN CAPTIVITY: AN OVERVIEW OF THE PACIFIC WAR, 1941–45

Shimon Peres recently referred to Japan's conquest of East and Southeast Asia as "The other Holocaust." When I asked him to clarify the context of his remark, he wrote to me: "What I mean is that although one can in no way compare the atrocities perpetrated by the Nazis to any other atrocities, nevertheless the damage

caused by the Japanese attacks during the war was similar in character to that of a holocaust.'' And indeed it was.

After feeling entitled to slaughter millions of Chinese and to subjugate the people of Korea to a brutal occupation, Japan's military forces began implementing their primary goal of what its leaders termed ''The Greater East Asian Co-Prosperity Sphere'': to eliminate white people from Asia, forever. Between 1941 and 1945, its occupying troops systematically worked to do just that. And they had standing orders, issued in 1942, to kill all white people in custody if surrender were imminent. Only the abrupt, atomic end of the Pacific War prevented this mass execution, which would have annihilated nearly 300,000 white families and military prisoners scattered in internment camps and company worksites all over occupied Asia and the home islands of Japan.

Within weeks of the attack on Pearl Harbor, Japanese army and navy personnel rounded up every white man, woman and child in Asia, including almost 14,000 Americans. A few—a very few—were released, if they were lucky enough to be married to an Asian or a national from an Axis country; or if they were one of the 3000 civilians exchanged for Japanese civilians living in the Americas. After three months, when our government saw that the Japanese intended to keep nearly all of our citizens incarcerated, we began rounding up Japanese living in the United States, primarily those on the West Coast. The delayed timing of this relocation is often overlooked; it followed weeks of frantic diplomacy. We had been Japan's protector nation in three previous wars, including World War I; and Washington officialdom couldn't believe the government of Japan was not prepared to return the favor. We had no idea how deep the resentment of ''white colonials'' was throughout Asia; it had been building for a long time.

Before sundown on December 8, 1941, Japanese forces began taking American military personnel prisoner in various outposts and embassies. By Christmas Eve, nearly 1200 civilian construction workers on Wake Island found themselves prisoners of war, along with the Marine garrison there. And before six months had passed, General Douglas MacArthur's entire Army of the Pacific had been either killed or captured. By May 1942, over 25,000 Americans were prisoners of war; their number would eventually swell to 36,000+. Nearly half died in captivity, as compared to just 1.1 percent of military POW who perished in German military *stalags,* or fixed POW camps. Over 3,600 Americans died at sea in unmarked merchant ships transporting them to the Japanese home islands for use as slave laborers in war production at factories, mines and shipyards. Nine out of 10 POW who died in World War II perished in Japanese, not German custody.

All of our prisoners of war performed slave labor, under brutal conditions, for the next three and a half years, even when they were so sick they could hardly stand. Theirs was the longest captivity anywhere during World War II, and it was marked by slow starvation, disease, medical experimentation at many POW camps, and the deliberate withholding of medical supplies, relief packages, mail and even soap or toilet paper.

Much has been made of the fact that the Japanese Diet [parliament] failed to ratify the 1929 Geneva conventions relating to prisoners of war, which their delegate had signed. But the Diet did ratify the conventions of the International Red Cross, which were a part of that same 1929 gathering. So the fact that the Japanese refused to distribute Red Cross packages which arrived weekly at company worksites and POW camps throughout occupied territory—constituted a separate category of war crime. The Japanese government also declared all of its occupied territory a war zone, and refused to let Swiss inspectors inspect POW camps and civilian internee centers within the ''war zone.'' Japanese authorities refused to cooperate with the International Committee of the Red Cross in supplying names of those held captive; for most American families, a year or more went by with no confirmation of the status of their sons, husbands, brothers. And our civilians in internment centers were slowly being starved to death as well; visits from Red Cross or Swiss government representatives were rare events; most internees or POW never saw a Red Cross representative and can only remember one or two Red Cross boxes being given out during nearly four years of captivity. Perhaps the most egregious interference with relief was the withholding by the Japanese government of 98 million swiss francs in relief funds contributed by the United States, Great Britain and The Netherlands, in a secret bank account set up through the Swiss National Bank, which the Japanese government had pledged to release so Swiss workers could buy extra supplies for POW and internees. Instead, the money sat in the Yokohama Specie Bank till war's end. Over $6.2 million, worth $54 million today, was from the U.S. Treasury; we never asked for a dime of it to be returned.

Although it was a clear violation of international law to do so, Japanese company heads asked for the use of white prisoners; paid the government two yen per day

for the use of each prisoner; agreed to pay the prisoners Japanese soldier's pay, and were required to house them on company property. Most prisoners never saw any money; all came home empty-handed and sick. None ever regained full health; all still suffer nightmares, PTSD, and many residual, compounded health problems.

After the war ended, Japan's major industrialists were named as suspected war criminals, but the indictments were dropped for lack of evidence (no clear paper trails could be found in time for the trials' opening date; and very, very few members of the trial teams could speak or read Japanese.) A policy decision was made to avoid mentioning the names of companies during the trials, according to a member of the prosecution team. After a high-profile trial which seemed to drag endlessly, 25 Japanese Class A [top leaders] criminals were sentenced. Seven were executed; 16 received life sentences; one died in prison before sentencing and another was declared insane. The rest were released, and further investigations of Class A criminals were abruptly halted.

Although several hundred Japanese military and civilian war criminals were convicted of sentences ranging from death to life imprisonment to 25 years or more, most death sentences were commuted, and no convicted Japanese served more than ten years. The majority were released when our occupation officially ended in 1952; by 1958 all had been released and Sugamo Prison was closed because it was empty.

Surviving American ex-POW were allowed to file claims under the War Claims Act of 1948 to receive $1.00 per day times the number of days held captive for "missed meals," with a cap of $1500 per claimant. After the 1951 Treaty of Peace was signed, and our ex-POW were prevented from filing further claims, Congress passed the War Claims Act of 1952, allowing ex-POW to apply for $1.50 per day for "forced labor and/or mistreatment" while in custody. The payment funds came from $280 million in frozen Japanese and other Axis assets seized in the United States between 1942 and 1946.

But no one at that time could predict how severe the residual effects of prolonged malnutrition and the diseases which accompany it would be for these survivors. The effects of their captivity have continued to compound throughout their lifetimes. Many have fought for 50 years to receive full disability payments from the Veterans Administration; some were granted full allowances as recently as 1998 or 1999. Information about their treatment by the Japanese had been so suppressed both during and after the war, that many medical personnel at VA centers have had a hard time grasping the long-term effects of severe malnutrition, or to understand the types of injuries these men sustained during their captivity.

It is worth noting that the official Japanese government report on the wartime use of POW labor was not issued until December 1955, long after the conclusion of the Tokyo War Crimes Trials and the drawing up of the 1951 Treaty of Peace. This report is based in turn on the periodic reports Japanese companies were required to file, showing compliance with the regulations on payment of POW and other matters involving care etc. of POW. The companies apparently stated that payments had been made to POW and backed up these reports with pay sheets some POW say they were forced to sign, despite not receiving the stated pay. Also, the companies reported receipt of relief supplies (Red Cross) but failed to mention that they did not distribute the packages to the POW.

So it is possible that the Japanese Government, and for that matter our own Government, may have been under the impression that our POW were in fact paid, housed and cared for to a degree that in fact rarely, if ever, occurred. Red Cross reports show an acute awareness of this fact (misleading information from Japanese authorities.)

In other words, the Japanese government may be basing its position on these rather misleading reports which formed the basis if its government's 1955 official report. However, I have no evidence one way or the other to suggest that our own government officials were aware of, or read, the 1955 Japanese government report.

Adequate compensation for the suffering and slave labor endured by our prisoners remains the largest unresolved issue of the Pacific War. It is hoped that the hearing conducted by the Senate, Committee on the Judiciary today will bring forth further discussion and documentation to illuminate the full intention of the San Francisco Peace Treaty, and of the framers who drafted it. Such illumination may at last bring some closure to those who became what their Japanese captors liked to refer to as "guests of the emperor." Meanwhile, the ashes of thousands of Americans have long since been scattered to the winds which blow across Japanese company properties.

I respectfully request that this statement become part of the record of the hearing conducted by the Senate Committee on the Judiciary June 28, 2000.

PREPARED STATEMENT OF CHALMERS JOHNSON

In December 1937, when the invading Japanese army captured the city that was then the capital of China, Nanjing, it proceeded to rape, torture, and execute many thousands of Chinese civilians and unarmed prisoners of war. The facts of this atrocity are not in dispute, although controversy still surrounds the absolute numbers of Japan's victims. Survivors of this and other instances of Japan's brutality toward civilians and prisoners during wartime—in violation of international treaties to which Japan was a signatory-have repeatedly sought compensation from the Japanese government for their suffering. On September 22, 1999, in Tokyo, the chief judge of the Tokyo District Court dismissed the most important case concerning the Nanjing massacre on grounds that individuals do not have a right to sue the Japanese government.

It is in part because the Japanese courts have never once ruled in favor of Japan's victims that California and other American states have recently passed laws allowing former prisoners of war to sue American branches of Japanese corporations for compensation for their suffering. On August 26, 1999, the California legislature passed a resolution calling on Japan to pay reparations to "United States military and civilian prisoners of war, * * * the survivors of the 'Rape of Nanking' [Nanjing], * * * and the women who were forced into sexual slavery and known by the Japanese military as 'comfort women.'" The California Legislature also extended the statute of limitations for World War II lawsuits to the end of 2010, in another piece of legislation, Senate Bill 1245.

During World War II, some 33,587 United States military and 13,966 civilian prisoners of the Japanese military were confined in prison camps, where many were subjected to forced labor. On August 11, 1999, the first individual lawsuit in California was filed on behalf of Dr. Lester Tenney, against Mitsui & Co., Ltd. and related entities for the slave labor that Dr. Tenney endured in Mitsui's coal mines. Since then a number of suits have been filed against companies such as Mitsubishi International Corp., Mitsubishi Materials Corporation, Mitsui Mining Co., Ltd., Nippon Steel, Japan Energy, Ishihara Sangyo, Ishikawajima Harima Heavy Industries, Ltd., Sumitomo Heavy Industries, Nippon Sharyo, Ltd. and other Japanese companies.

These lawsuits are likely to be much more damaging to Japanese-American relations than any genuine governmental apology and the payment of token compensation. Thus far Japan's official response has been to stonewall and to argue that the peace treaty of 1952 settled all claims arising from the war. There is a possible Japanese defense against these lawsuits, but this is assuredly not it. International law has now progressed to where claims by an individual against a state are recognized. Moreover, Germany has already agreed to pay large sums to compensate its forced laborers-in addition to the billions it has paid to Israel and other survivors of the Nazi genocide against the Jews.

Relying on the peace treaty is not a good defense for several reasons. First, the suits are not against the Japanese government but against private Japanese corporations. Second, the United States required that Japan pay only minimal reparations after the war because it was trying to integrate Japan into the U.S.'s Cold War structure. Third, the reparations Japan did pay went primarily to corrupt dictators in places like the Philippines, Indonesia, and Burma, not to individuals who had truly suffered at Japan's hands. Fourth, the precedent of holding Germany, Switzerland, and American corporations such as the Ford Motor Co. responsible for their wartime activities is clearly applicable to Japan.

Japanese government officials acknowledge that Japan paid considerably less in reparations after the war than other Axis powers and that this favorable treatment of Japan came about because of the strategy the United States pursued in the Cold War in east Asia. Thus, for example, Tetsuo Ito of Japan's Ministry of Foreign Affairs writes in The Japanese Annual of International Law (No. 37, 1994):

> The chaotic international conditions in the midst of the Cold War eventually favored Japan in terms of the [Peace] treaty contents. The co-drafters of the treaty [the United States and Great Britain] had obviously eased their policy on reparations, deciding not to impose a heavy burden on the Japanese economy, because the rapid recovery of Japan would serve their interest by helping to strengthen the Western Camp in their defense of freedom against the Communism about to infiltrate Asia. [p.4]
>
> * * * If we compare the San Francisco Peace Treaty with other peace treaties after the Second World War, such as the Allied peace treaties with Bulgaria, Finland, Hungary, Italy and Romania signed on February 10, 1947, we can find that, while the latter provided for specific figures of reparations to be made in kind by the defeated countries, the former treated

> Japan in a very generous manner by letting Japan negotiate with each claimant country to make decisions, even regarding important conditions such as the amount of each reparation. Besides the problem of reparations, the Allies seemed to have treated Japan more favorably than the European Axis countries in other matters as well. [p. 43]

The peace treaty was negotiated and signed while the Korean War was actually in progress. Japan was then the major military staging area for American operations in Korea, just as a decade and more later Okinawa was for American operations in Vietnam. The United States treated its "fuchin kubo" (unsinkable aircraft carrier), to use the language of the time, generously and ensured that the other allies went along with this.

Article 14(b) of the "Multilateral Treaty of Peace with Japan,"signed at San Francisco September 8, 1951, and in effect from April 28, 1952, stipulates that "Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims by the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation." This is the article on which the Japanese government relies in rejecting all claims by former P.O.W.s and internees that they be compensated for their illegal treatment at the hands of the Japanese during the war. But there are legal problems with this defense, in addition to the political ones already mentioned. One is described by Tetsuo Ito of the Japanese Ministry of Foreign Affairs as follows: "The waiver of 'claims of its nationals' can not mean the renunciation of such claims by a state in rigid legal terms, * * * because a state can not theoretically waive the right of a third person, without its consent, who is not a party to the treaty concerned, regardless of whether it is a state or an individual" [J.Ann. Int. Law, No. 37, 1994, p. 68]. Individuals always retain the right to enter a claim based on their municipal law.

The more serious problem of relying on article 14(b) is its opening clause, which reads "Except as otherwise provided in the present Treaty." Article 26 of the same Treaty overrides it: "Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty." In treaties with the Netherlands, Denmark, Sweden, and Spain, Japan accepted a release of claims only against the Government of Japan, not by nationals of those countries against Japanese nationals. The Netherlands treaty was signed May 13, 1956. Since that time article 26 has superseded article 14(b) with regard to claims by foreigners against Japanese civilians for their actions during the war.

Japan's only real defense would be that it was the United States government that refused to press the claims of its own citizens against Japan. General MacArthur decided to exonerate the Emperor from any responsibility for the war-thereby causing most Japanese to believe that if the head of state was not responsible, then ordinary people and companies were certainly blameless. The surviving American prisoners of war thus could make as good a case against their own government's indifference to their suffering as against Japanese corporations today.

Instead of stonewalling, the Japanese government would be wise to take these suits as an opportunity to deal with some of the unfinished business of World War II. Perhaps it should seek to create a joint Japanese-American foundation that could compensate the survivors and also offer to them a sincere apology for their shabby treatment by both governments a half century ago. Thanks to the Cold War, Japan enjoyed a long period in which the United States blocked all private claims against it. Today, most of the plaintiffs in these cases are very elderly. It would be easy for Japan to pay them. Since World War II, the only two countries that have ever indicted their own citizens for war crimes are Germany and France. But this is not something that either Japan or the United States should be proud of. A trial like that in France in 1997 of Maurice Papon, the wartime mayor of Bordeaux, for collaborating in the deportation of Jewish civilians to Germany and his recent recapture after he fled to Switzerland is simply unimaginable in Japan. That is what is fueling these lawsuits as much as monetary claims.

Chalmers Johnson's latest book is "Blowback: The Costs and Consequences of American Empire" (Metropolitan Books, 2000). He is also the editor of "Okinawa: Cold War Island," published by the Japan Policy Research Institute, of which he is president. He is an emeritus professor of international relations and a specialist on the political history of East Asia at the University of California, San Diego.

(Translation), August 15, 1995.

PREPARED STATEMENT OF PRIME MINISTER TOMIICHI MURAYAMA

The world has seen fifty years elapse since the war came to an end. Now, when I remember the many people both at home and abroad who fell victim to war, my heart is overwhelmed by a flood of emotions.

The peace and prosperity of today were built as Japan overcame great difficulty to arise from a devastated land after defeat In the war. That achievement is something of which we are proud, and let me herein express my heartfelt admiration for the wisdom and untiring effort of each and every one of our citizens. Let me also express once again my profound gratitude for the indispensable support and assistance extended to Japan by the countries of the world, beginning with the United States of America. I am also delighted that we have been able to build the friendly relations which we enjoy today with the neighboring countries of the Asia-Pacific region, the United States and the countries of Europe.

Now that Japan has come to enjoy peace and abundance, we tend to overlook the pricelessness and blessings of peace. Our task is to convey to younger generations the horrors of war, so that we never repeat the errors in our history. I believe that, as we join hands especially with the peoples of neighboring countries, to ensure true peace in the Asia-Pacific region—indeed, in the entire world—it is necessary, more than anything else, that we foster relations with all countries based on deep understanding and trust. Guided by this conviction, the Government has launched the Peace, Friendship and Exchange Initiative, which consists of two parts promoting: support for historical research into relations in the modern era between Japan and the neighboring countries of Asia and elsewhere; and rapid expansion of exchanges with those countries. Furthermore, I will continue in all sincerity to do my utmost in efforts being made on the issues arisen from the war, in order to further strengthen the relations of trust between Japan and those countries.

Now, upon this historic occasion of the 50th anniversary of the war's end, we should bear in mind that we must look into the past to learn from the lessons of history, and ensure that we do not stray from the path to the peace and prosperity of human society In the future.

During a certain period in the not too distant past, Japan, following a mistaken national policy, advanced along the road to war, only to ensnare the Japanese people in a fateful crisis, and, through its colonial rule and aggression, caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations. In the hope that no such mistake be made in the future, I regard, In a spirit of humility, these Irrefutable facts of history, and express here once again my feelings of deep remorse and state my heartfelt apology. Allow me also to express my feelings of profound mourning for all victims, both at home and abroad, of that history.

Building from our deep remorse on this occasion of the 50th anniversary of the end of the war, Japan must eliminate self-righteous nationalism, promote international coordination as a responsible member of the international community and, thereby, advance the principles of peace and democracy. At the same time, as the only country to have experienced the devastation of atomic bombing, Japan, with a view to the ultimate elimination of nuclear weapons, must actively strive to further global disarmament in areas such as the strengthening of the nuclear non-proliferation, regime. It is my conviction that in this way alone can Japan atone for its past and lay to rest the spirits of those who perished.

It is said that one can rely on, good faith. And so, at this time of remembrance, I declare to the people of Japan and abroad my intention to make good faith the foundation of our Government policy, and this is my vow.

PREPARED STATEMENT OF MICHAEL D. RAMSEY

My name is Michael D. Ramsey and I am a Professor of Law at the University of San Diego Law School. I teach and write in the area of foreign affairs law, including the law of treaties. Among other matters, I specialize in the legal aspects of international claims against foreign governments and foreign nationals. I am submitting this statement for the record in a Hearing to be held by the Senate Judiciary Committee scheduled for June 28, 2000, regarding the legal status of claims against and Japanese nationals by former U.S. Prisoners of War (POW's).

I have been asked to assume that the POW's were held and forced to labor for private companies in Japan, that such companies were never "mobilized" under Japanese law, to operate as a part of the war effort under the daily control of the Japanese military; that by treaty such labor could only serve commercial purposes (and

could not promote the war effort of Japan); and that these companies were obligated to pay wages to these laborers at private, commercial rates, but did not do so.

The following sets forth my views on the question whether the 1951 Peace Treaty, signed in San Francisco between Japan and various allied powers including the United States (the "Treaty"), waives the claims of individual U.S. citizens against private Japanese entities for injuries suffered during World War II. I should note that my views are not based on an exhaustive review of the history and context of the Treaty, but only upon my general knowledge of treaty and constitutional law and practice. For the reasons set forth below, I conclude that the Treaty should not be read to waive private claims alleged against individuals or entities who were not acting as agents of the Japanese government.

At the outset I think it critical to distinguish among three types of claims by U.S. citizens: (1) claims against the Japanese government; (2) claims against individual Japanese nationals and Japanese entities acting as agents of the Japanese government; and (3) claims against individual Japanese nationals and private Japanese entities not acting as agents of the Japanese government. I propose to discuss only the third type of claim, and my conclusions with respect to the treaty are limited to this category of claims, which I shall hereafter call "private claims".

The relevant language of the Treaty is Article 14(b), which states:

> [T]he Allied Powers waive all reparations claims of the Allied Powers, [and] other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war * * * (emphasis added).

I assume for purposes of this discussion that the initial part of the Article 14(b) language—that is, the waiver of claims of the Allied Powers and their nationals arising out of any action taken by Japan and its nationals—could be read to encompass all of the above categories of claims, including the private claims. I have not been asked to consider this issue, and express no opinion on it one way or the other. However, even if this part of Article 14(b) does include private claims, for the waiver to apply the second part of the relevant article requires that the claims aris[e] * * * in the course of the prosecution of the war. It is not at all clear that this language includes the private claims and in my opinion that is not the best reading of the language.

To be sure, one might argue that the phrase "in the course of the prosecution of the war" encompasses all actions by whatever parties that directly or indirectly aided the Japanese war effort. I assume that those who would find a waiver of the private claims in Article 14(b) are relying on such a reading. This is quite a broad reading, as it would encompass, in effect, any action taken during wartime that benefited Japan or weakened the United States, as any such action would contribute to Japan's war effort. But there is also a narrower reading available: specifically, that since only the government "prosecutes" (that is, carries into execution) a war, only actions of the government and its agents related to the war effort would be included, and not all private actions occurring during the war. Thus, the phrase "in the course of the prosecution of the war" is at least ambiguous as to whether it encompasses actions of purely private parties not acting under the direction of the Japanese government.

I believe that the narrower reading is not only plausible, but is the preferred reading of the relevant language. This is based on four factors, as set forth below: (1) historical practice; (2) constitutional considerations; (3) ordinary usage, and (4) other portions of the Treaty.

First, with respect to historical practice, agreements settling claims between the United States and foreign nations are of course quite common, dating to the earliest days of the Republic. However, it is highly unusual for a claims settlement treaty to waive purely private claims. Most, if not all, claims settlement agreements to which the United States is a party waive claims of the United States and of U.S. nationals against a foreign government and (sometimes) against agents of the foreign government. Although I have not undertaken a comprehensive study, I am generally familiar with claims settlement agreements entered into by the United States and I personally am not aware of any claims settlement agreement of the United States that manifestly waives claims between private U.S. nationals and private foreign nationals for purely private conduct. At best, such a waiver would have to be viewed as highly unusual. The claims settlements that have been extensively litigated, such at those considered by the U.S. Supreme Court in the Pink and Belmont cases and more recently in *Dames & Moore* v. *Regan,* only waived or adjusted claims by private U.S. individuals against the foreign government itself and individual and corporate agents of the foreign government. In *Dames & Moore,* for example, the Court referred to the settlement power as the "sovereign authority to settle the

claims of its [the U.S.'s] nationals against foreign countries." *Dames & Moore* v. *Regan,* 453 U.S. 654 (1981).

As I have indicated, reading Article 14(b)'s phrase "in the course of the prosecution of the war" broadly to include private wartime activities would result in an extensive waiver of claims by private individuals against private individuals. That is entirely contrary to historical practice, which is not to include such claims within negotiated intergovernmental claims settlement agreements. On the other hand, reading "in the course of the prosecution of the war" narrowly to refer to only governmental activities would make the 1951 Treaty accord with historical practice of limiting intergovernmental settlements to claims against the foreign government and its agents.

Second, a broad reading of the phrase "in the course of the prosecution of the war" leads to serious constitutional difficulties, while a narrow reading of the phrase is somewhat less constitutionally problematic. The relevant constitutional provision is the Fifth Amendment, which among other things prohibits the U.S. government from taking private property without just compensation. It is certainly arguable that a private legal claim is "property" within the meaning of this clause. Indeed, at least one court of appeals, relying on Supreme Court precedent, has squarely declared that "There is no question that claims for compensation are property interests that cannot be taken for public use without compensation." *In re Air Crash* in Bali, Indonesia, 684 F2d 1301 (9th Cir. 1982). Under this reading, if the U.S. government waived private claims in Article 12(b) of the Treaty, that was a taking of private property. It is also certainly arguable that the owners of that property never received adequate compensation for it. Indeed, Article 14(a) of the Treaty seems to acknowledge that the United States is settling claims against Japan for far less than they are worth in order to support Japan's economy. Thus the Treaty, if read broadly, appears to take private property without just compensations, contrary to the Fifth Amendment.

It is true that a similar argument could be raised against a waiver of claims of U.S. citizens against Japan and its agents. These too, it might seem, are property interests worthy of constitutional protection; indeed this was suggested by Justice Powell in his dissenting opinion in *Dames & Moore,* 453 U.S. at 691. However, courts that have addressed similar claims since *Dames & Moore* have treated them differently than, for example, the Ninth Circuit treated purely private claims in the Bali case. The case of *Shanghai Power Co.* v. *United States,* 4 Cl. Ct. 237 (1983), affirmed without opinion, 765 F.2d 159 (Fed. Cir. 1985), is illustrative. Decided by Judge Kozinski, then on the court of claims and now an intellectual leader of the Ninth Circuit, the Shanghai Power case involved President Carter's claims settlement with China. The plaintiff, Shanghai Power, had a claim against an instrumentality of the Chinese government which the agreement settled for a fraction of its value, and Shanghai Power alleged a violation of its rights under the Fifth Amendment. The court agreed that Shanghai Power's legal claim was property, but held that no compensable taking had occurred, essentially on two grounds: (1) the unique nature of claims against foreign governments, and (2) the longstanding historical practice of the U.S. government settling claims against foreign governments without the affected parties' consent. Similarly, in *Marks* v. *United States,* 15 Cl. Ct. 609 (1988), the court of claims rejected an alleged unconstitutional taking based on the U.S. government's settlement of private claims against the government of Iran and its agents.

Of course, the decisions in *Shanghai Power* and *Marks* may not be correct, as the Supreme Court appeared to leave that question open in the *Dames & Moore* decision and has not definitely ruled on it since then. However, at a minimum there appears to be some support for the proposition that the courts would not find a constitutional violation where the U.S. government settles individual claims against a foreign government it and its agents without the consent of the claimholder, even though in general abrogation of private legal claims is constitutionally problematic under the Fifth Amendment. As a result, a narrow reading of Article 14(b) of the 1951 Treaty would likely render the Treaty constitutional, if the rule of *Shanghai Power* were applied. On the other hand, a broad reading of Article 14(b)—such that it extended to claims between private parties—would raise serious constitutional difficulties under the *Bali* case. The reasoning that allowed the *Shanghai Power* court to avoid finding a constitutional violation would not be available with respect to the 1951 Treaty if Article 14 (b) is read broadly to apply to private claims. This again suggests that the narrow reading should be preferred.

A third reason for preferring the narrow reading of the phrase "in the course of the prosecution of the war" is that even in isolation, that is the better reading of the language. The relevant dictionary definition of "to prosecute" is "to carry on". War is a public act, carried on ("prosecuted") by a government through its agents.

There is no such thing as a "private" war. Individuals not in government service do not "carry on" a war. They may support the war, but they do not "prosecute" it, if "prosecution" is read, as the dictionary says it should be, to mean mean "carrying on". Thus claims do not arise from the "carrying on" of war unless they arise from the activities of those who are carrying it on—namely the government, acting through its agents. To put it in practical terms, if an individual Japanese national living in a neutral country murdered an individual U.S. national in that neutral country, even during wartime, this would not be considered part of the war effort because it is not endorsed by the Japanese government. Rather, it would be treated as a simple murder. It makes little sense to speak of this as part of the "prosecution" of the war, even if the reason for the murder was that the Japanese citizen was motivated by patriotic zeal, and even if it indirectly benefited the Japanese government in some way. On the other hand, if the murder was committed by a Japanese government agent, for some purpose connected to the war, that clearly seems to be a "prosecution" of the war. The difference is the government agency, because governments, and not private citizens, "prosecute" wars.

This ordinary usage is confirmed by the way the phrase "prosecution of the war" is used in U.S. statutes. When used in U.S. statutes, it plainly refers to the U.S. government's war effort, not to all private activities that assist or relate to the war effort in some way. For example, the Wartime Suspension of Limitations Act, 18 U.S.C. 3287, provides that "When the United States is at war the running of any statute of limitations applicable to any offense * * * committed in connection with * * * any contract, subcontract, [or] purchase order which is connected with or related to the prosecution of the war * * * shall be suspended." As its context makes clear, the Act intended by this language to suspend the statute of limitations on a narrow class of actions: specifically, fraud in wartime government procurement contracts. See *Bridges* v. *United States,* 346 U.S. 209 (1953) (noting that the general purpose of the statute was to safeguard U.S. treasury from wartime fraud); *United States* v. *Grainge,* 346 U.S. 235 (1953) (discussing the Act as applying to fraud in government contracts). The Act did not create a general suspension of the statute of limitations in private contract cases during wartime, and to my knowledge no court has suggested such an interpretation. The obviously limited scope of the Act necessitates a narrow reading of the phrase "prosecution of the war" encompassing only the government's war effort. If "prosecution of the war" included purely private conduct during wartime that had some connection with or benefit to the war effort, then the language of the Act would suspend the statute of limitations with respect to much purely private activity that occurred during the war—a reading that has never occurred to anyone, interpreting the statute. Thus reading "prosecution of the war" in the 1951 Treaty narrowly to refer to war-related activities of the Japanese government is consistent with that phrase's statutory usage, while a broader reading of the language is not.

Finally, evidence from other parts of the Treaty confirms that the narrow reading is the correct one. First, there is an official French version of the Treaty, as well as the official English version. The French version of Article 14(b) renders "the prosecution of the war" as "la conduite de la guerre". The relevant French dictionary definition of "conduite" is "conduct; * * * direction; supervision." Thus the French version of the Treaty waives claims arising from the "conducting, direction or supervision of the war." These words clearly refer to actions of one who has control over the war effort, which can only be the government and its instrumentalities. Even if the word "prosecution" is thought ambiguous, surely "conduct", "supervision" and "direction" are not: governments and government agents (but not purely, private individuals), "conduct" war or "direct" war or "supervise" war. In short, the French version ("conduite") plainly limits itself to the government's war effort, and does not encompass private activities. This suggest that the English version, "prosecution", should be read equivalently—that is, as not encompassing purely private activity.

That reading is confirmed by other parts of the Treaty, specifically two sections of Article 19. When the parties to the Treaty intended a broad waiver of claims, they used broader language than Article 14(b). In Article 19(a), Japan "waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war * * *" While it is not obvious what claims this encompasses, it certainly seems broader than claims "arising out of * * * the course of the prosecution of the war" (else the phrase "the course of the prosecution of the war" would be superfluous). It seems likely that the parties intended for Japan (but not the Allies) to make a broad waiver, extending to at least some private claims having a close link to the war. In addition, in Article 19(a), Japan waived "all claims (including debts) against Germany and German nationals on behalf of the Japanese government and Japanese national * * * for loss or damage sustained during the war". This appears to be an even broader waiver encompassing essentially everything that happened

in the war years. These three distinct ways of expressing waiver of claims suggested that each should be given a distinct meaning, and the only reasonable way to do this is to read "prosecution of the war" narrowly so that it does not swallow the other two categories.

In summary, I conclude that even assuming Article 14(b) of the Treaty extends to individual claims against Japanese nationals in some instances, it would only apply to those situations in which the defendant was acting as an agent of the Japanese government in carrying on the war effort. (Thus a U.S. national could, under this reading, not sue a Japanese military officer in his individual capacity for battlefield atrocities). Only these cases are properly viewed as being part of the "prosecution of the war" as required for the Article 14(b) waiver. Private parties do not "prosecute" a war, so purely private claims do not arise out of actions taken "in the course of the prosecution of the war." This reading is consistent with the ordinary meaning of the phrase "to prosecute"; with other evidence from the treaty itself, including the French version and the phrasing of the Article 19 waivers; with historical practice, in which intergovernmental waiver of purely private claims without consent of the claimholder is at best unusual; and with constitutional requirements, which would find waiver of purely private claims to be constitutionally suspect. On the other hand, the broader reading that would encompass all private claims within the Article 14(b) waiver is not consistent with the most natural reading of the relevant phrase, creates tensions with other parts of the document, and is historically anomalous and constitutionally suspect, For these reasons, I conclude that the best reading of the Article 14(b) waiver is that it does not extend to purely private claims.

PREPARED STATEMENT OF PAUL W. REUTER

I wish to thank Chairman Hatch and the Committee of the Judiciary for the opportunity to present these comments regarding the maintenance, treatment, transfer and slave labor conditions suffered by American Prisoners of War while held captive by the Imperial Japanese Military Forces during World War Two.

Ten and one-half hours after the attack upon the Hawaiian Islands, the Japanese military bombed Clark Field in the Philippines, destroying 50 percent of the US Army Air Corps heavy bombardment offense inventory in the Far East area. Lack of operational aircraft plus superior Japanese air power forced trained airmen and associated military personnel into front line duties usually employed by Infantry and Artillery units. Facing overwhelming odds, extreme shortages of food, medicines, defective ordinance, personal maintenance equipment and an unfamiliar leadership situation; a surrender to the enemy was made on 9 April 1942.

Surrender was followed by the Bataan Death March and incarceration at Camp O'Donnell in Tarlac Province on Luzon. Extreme shortage of food, water, medical attention, plus the severe weather conditions of a hot tropical climate suffered under the Japanese captors rules, resulted in the death of many hundreds of men.

The Japanese sent work details from Camp O'Donnell, and later Cabanatuan, to areas on Luzon Island such as the Tayabas Road Detail, the Nichols Field runway detail, Bataan Peninsula detail to reclaim Army ordinance, Pier 7 stevedore detail plus a large farm detail to Davao Penal Colony on Mindanao. In late Summer, 1942, drafts of POW's by the thousands were shipped to the Japanese home islands to support a severe labor shortage caused by the drain of manpower to sustain combat efforts against the approaching Allied armies.

The transports used for POW transit to Japan were derelict tramp steamers of aged and uncertain vintage. Most were two hold cargo ships having one or two cargo decks below the main deck. Many had hauled horse drawn artillery South from Japan, then modifying the lower deck to accommodate men where stalls had held horses. A stall five feet wide would contain two horses, but with a shelf built five feet above the deck it held ten POW's cramped together and limiting lateral space to a cramped twelve inches. Food and water were lowered from the hatch opening in five gallon cans when weather permitted moving across the main deck to deliver the foodstuffs.

Cans were lowered to serve as latrine vessels but these filled rapidly and were not emptied soon enough to prevent overflow of waste products. On our ship the Corol Maru a wooden latrine containing five holes, or seats, hung over the forward rail in a position where the user of the latrine was hanging off the side of the ship with nothing but the Ocean beneath. Food consisted of rice (about one cup) twice a day, and, weather and ship movement permitting, some sort of thin soup. Water was lowered by cans into the hold to be dispensed to POW's below, usually by tablespoons full per man and never enough to satisfy. When the weather turned foul,

and lasted the full trip from Formosa to the port of Mogi on the Island of Hokioda, the hatch cover was closed and, on occasion, the canvas cover was battened down leaving the hold in pitch black darkness.

Our ship left Manila for Formosa on 21 September 1943. We stayed a few days at anchor in a locked in harbor on Formosa, about fifty feet from another ship painted white and sporting large green crosses but with artillery barrels visible under the canvas canopy. The ship flew the flag of a Hospital ship and carried troops while we traveled in a targeted ship to Japan. Five or six bodies were off loaded while at anchor, presumably from the aft hold. Our transport had two holds, the fore hold held 400 POW's and the aft hold held 480 POW's. The only contact between men in these holds occurred when men were dispatched to carry food and water to the individual holds.

Our trip to Mogi was quick but horrendous travel. With a heavy weather, stormy ocean the ship headed on a direct route to Mogi because hunting submarines could not operate in such stormy weather. Many other Hell ships carrying POW's to Japan were forced to hug coastlines, travel in convoy, do defensive sailing maneuvers, dodge torpedoes and submarines; all of these forcing long days on the water and causing many deaths from the maltreatment. On three of these Hell ships over 4000 American POWs lost their fives, but deaths and casualties were rampant on many other ships taking POWs to Japan for continued labor.

On arrival at Mogi the fore hold POWs were fined up and marched to the railroad station, boarded a train and after an overnight trip arrived at Hirahata, a town on the inland sea, opposite Shikoko Island, in the Osaka Protectorate and about 35 miles southeast of Osaka. Our group of 400 joined the 80 Marine and Navy personnel from Wake and Guam Islands already in the camp. We began work at the steel mill operated by Seitetsu Steel the next day. The mill was located about two miles from the camp and the town of Hirahata, on a road that lead directly to the mill. We marched that road, sometimes jogged, every day under the charge of civilian steel company overseers who also assigned jobs, set completion levels, and administered physical punishment, sometimes without reason, as at those times when language differences defied communication.

My first assignment was in a machine shop as operator of a Shaper, or horizontal lathe, a device that I was totally unfamiliar with. After operating this Shaper for six months I was observed committing an unauthorized act, which resulted in a beating by the military commander, and banishment from the machine shop detail. The majority of POWs worked the yard detail which included jobs such as lifting, carrying, chipping, shoveling, stevedoring, etc., all necessary around a steel mill. This mill was a large steel producer and the site contained a large coke and gas central for the nearby area which contained many mills and factories in either direction along the coast.

The work on yard details was strenuous and energy draining. Surviving three and a half years on drastically reduced diets, when daily calorie intake measured well under 1000 calories, and forced to perform a required quantity of work under primitive, hazardous conditions without the use of safety equipment resulted in terribly malnourished underweight bodies. At the outset of the war my weight was 208 pounds. At Hirahata my weight reached 130 pounds. We worked as stevedores unloading coal ships, iron ore ships, loading slag, unloading pig iron from the foundry (a full pig weighed 145 pounds) placing the pigs in stacks, loading the pigs into rail cars for furnace use, unloading rail cars of white rock, chipping large bricks for furnace lining, unloading coal rail cars at the coke plant and loading benzine onto rail boxcars.

The barracks were terrible and unheated, baths were available about twice per month, meals were usually a cup of rice in the morning, another cup on the job around noon and rice plus soup or diacon, or occasionally tofu or dried fish or silkworms soaked in brine. We received two Red Cross packages in the two years at the camp. Upon arrival we were fed under the civilian ration of 750 calories per day which proved too little intake for large American frames. After a few months the effect of our deteriorating condition and low work effort caused the Japanese to put Americans on the military ration of 850 calories per day.

The camp was governed by Japanese military. A Lieutenant, a noncom, a medic and perimeter and gate soldiers were all of the military. Workers were turned over to company overseers who marched us to work, gave out work assignments, administered punishment, and returned us to the camp at night. We received a day off about every three weeks, to clean ourselves and launder clothes. We did not receive pay, as such, although the Japanese said they were paying us. There were two versions of our pay status; the first explanation was that the mill paid for our food and lodging and this amount equaled the pay we would have received. This method meant we worked only for the opportunity to survive. This system is borne out in

that we worked under the edict "no work, no eat" so all workers able to walk to the mill, made the trip. We POWs disregarded this system and everyone shared alike.

The second method of payment for our work also resulted in zero transfer of money. Under this method monies earned were deposited, by individual name, in a Postal Savings Account. However, no books were kept and no POW has ever benefited from such an account.

Some of my fellow POW friends swear that a Code of Silence has been imposed upon them which prevents them from discussing their experiences while a prisoner of war of the Japanese. Other former military members and civilians who, during the period immediately following the surrender of Japan, participated in the discovery, examination, analysis and prosecution of Japanese involved in biological warfare and inhuman medical experiments have, without divulging classified material, made remarks very disturbing to the POW's. Remarks such as: "I am sorry we did not tell the men what was happening to them, or at least we should have told the VA"., and, "Each Japanese POW should have an extensive blood serology examination". and, "Americans were used in Unit 731 experiments.". At Hirahata, in the two year stay, three times Medical personnel came to our camp, lined everyone up, and injected some undisclosed material into the left nipple. One wonders, Why always the left nipple? and, Why not inform our Doctor about the medication?

Secrets are necessary to proper functioning of the military and foreign service in their dealing in other entities, but secrets involving the feeding, medicating, treatment and anything affecting the well being of individuals should not be kept secret, especially to the individual who is now and has been hurt by the authorities not divulging information pertinent to the individuals life. The President has opened many of the files relating to the World War Two European campaign and treatment administered by the Nazi regime. Why keep the files on Japans actions relating to their war effort and culpability in unauthorized acts toward Asian and American closed after sixty years have past? Cannot the Judiciary Committee recommend such a move?

I Love my country. I fought for my country, willingly and aggressively without expectations. It is time for my country to level with me about the WHY of the deleterious actions which affect me and concern me.

I call upon the Senate Judiciary Committee to fully support the Bataan-Corregidor compensation entered by Sens. Bingaman and Domenici.

In conclusion, let me be the first Japan held POW to call upon President Clinton to declassify World War Two records thru the Treaty date in 1952.

Prepared Statement of John M. Rogers

I am the Lewis Professor of Law at the University of Kentucky College, of Law. I have taught public international law regularly since 1979 and U.S. constitutional law since 1982. I have also taught international law as a Fulbright Professor for a year at the Foreign Affairs College in Beijing, China, as a Fulbright Professor for a year at Zhongshan University in Guangzhou, China, and as visiting professor at the University of San Diego Law School. My research scholarship has focused to a large extent on the relation between domestic and international legal systems. I recently published a book describing and justifying the accepted, albeit limited, role of public international law in U.S. law. Before becoming a professor, I engaged in appellate litigation practice for the Civil Division of the United States Department of Justice, for four years. Later, as Visiting Professor at the Department of Justice in 1983–85, I represented the Department of State, the Immigration and Naturalization Service, the Defense Department, the Treasury Department, the Federal Reserve Board, and other federal agencies in a number of federal courts appeals involving foreign affairs law and international law.

I have been requested by counsel for United States nationals who were held by the Government of Japan during the Second World War as Prisoners of War to consider the application of international legal principles in the context of the pursuit by those nationals of certain claims. In particular, I am advised that these nationals are pursuing claims in the state and federal courts of the United States against entities organized under the laws of Japan which, during the Second World War, directly employed these Prisoners of War as laborers, allegedly failed to pay them wages required under international and Japanese law, and allegedly tortured them or committed acts of gross inhumanity, all in violation of international and Japanese law standards. In addition, I am advised that California law allows such actions also to be pursued against subsidiaries of these entities operating in the United States and that such subsidiaries are also defendants in the pending litigation.

I have been advised that the defendants have invoked the terms of the 1951 Treaty of Peace with Japan (and particularly Article 14(b) of that Treaty) as a defense to these actions. After review of the Treaty and materials available from public sources, as well as the memoranda regarding Article 14 submitted in these cases, I have reached an opinion that Article 14(b) does not preclude actions brought by United States nationals in United States courts under domestic (i.e., Japanese or United States) law.

The plain meaning of the language of Article 14(b) of the Treaty of Peace with Japan in which "the Allied Powers *waive * * * claims of* the Allied Powers and *their nationals* arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war" is that it extends only to international claims in respect of nationals. Such claims are well understood to be governed by the international legal system even though they arise by virtue of harms to individuals. States of nationality of the victim have complete control ever such claims, and may settle them over the objection of the victims. The Peace Treaty's use of the word "waive" indicates unmistakably that such international claims are contemplated. Domestic law claims, in contrast, are subject to national or local law, even though international matters may be involved. A private individual's claim under domestic law cannot be "waived" by the state, because it is not the state's claim under the domestic legal system.

A clear understanding of the distinction between international law claims and domestic law claims makes the above conclusion inescapable. The two different types of claims arise under different law, with different fora, different enforcement mechanisms, and usually with different parties. An international claim in its purest form is a claim between nation-states. The Statute of the International Court of Justice reflects this by providing that only states may be parties before the Court. I.C.J. Stat. art. 34(1). The body of law that applies to an international claim is found in international treaty and custom, and not generally from the tort or contract law of particular states, which may after all be different. International claims are typically resolved by diplomacy, but may be subject to international arbitration, or even submitted to international courts like the International Court of Justice. The law applied in such fora is treaty law and customary international law, and not the domestic law of the states parties. (E.g., I.C.J. Stat. art. 38(1); General Claims Convention (Mexico-U.S.), Sept. 8, 1923, art. II, *reprinted in* 4 U.N. Repts.. of Intl. Arb. Awards 11, 12.) Enforcement of such claims proceeds the way any treaty obligation is enforced. That is, states presumably obtain advantage from being seen as complying with international obligations, and therefore make good on international claims accepted as valid within the international legal system.

An international claim can be on "individual" claim in the sense that state A owes State B an obligation not to mistreat a national of State B in a certain way. This occurs also when State A fails to give the national of State B the protection that international law requires. For instance, Iran violated the international law rights (under treaty law and customary international law) of the United States by not protecting individual U.S. diplomats from Iranian mobs (*see* Case Concerning United States Diplomatic and Consular Staff in Tehran (*U.S.* v. *Iran*), 1990 I.C.J. 3, 31–33), and the United States in 1891 violated the international law rights of Italy by permitting a mob to lynch Italians in New Orleans (*see* Lynching of Italians at New Orleans and Elsewhere, 6 J. B. Moore, Digest of International Law § 1026, at 837 (1906)). In these situations the harm to an individual violated an international obligation defined by international treaty and international customary law. The claim is an individual one in the sense that harm to an individual is the basis for the claim, and the individual often must have exhausted local remedies before the international claim way be upheld. And when a claim is paid to the claiming state, it is normally turned over by that state to the injured individual. But in concept the international claim is one brought by, and under the control of, the state of nationality of the individual victim. A state may settle or waive such claims since it is the party making the claim, and need not get the approval of the individual victim. *See* 8 M. Whiteman, Digest of International Law 1216 (1963).

In contrast, a domestic law claim is brought under domestic (i.e, national or local) law, such as common law contract or tort law, or statutory antitrust or employment discrimination law. The parties are typically private individuals and corporations (but may include states and government agencies, to the extent that they have personality within the domestic legal system). The forum is generally a court or adjudicative agency of the nation's government or its subdivisions. The enforcement mechanism is the executive arm of the government, which insures that judgments are enforced. Of course the government can affect the rights and obligations of parties to domestic law claims, for instance by legislating to change the law applicable to such a claim. But such a change of rights or obligations would only in the most

puzzling fashion be called a "waiver." The government may not waive the claim of its national under domestic law, since it does not represent that individual, nor does it own the claim in any sense even remotely like it owns individual claims under international law.

The law of one system may refer to, and sometimes even incorporate, the law of the other. A treaty may, for instance, refer to the domestic law of the parties. In the other direction, a statute may refer to, or incorporate, treaty language. My recent book is largely a survey of the various ways in which domestic law refers to international law. International Law and United States Law, Ashgate Press, 1999 (hereinafter "IL&USL"). But international claims remain something very distinct from domestic law claims. Under domestic law, for instance, the Constitution as interpreted by the Supreme Court is the highest domestic law of the United States, regardless of what any treaty says. *See Reid* v. *Covert,* 354 U.S 1, 15–18 (1957) (plurality opinion). Under international law, in contrast, a valid treaty is higher than anything in the U.S. Constitution. *See* Vienna Convention on the Law of Treaties, art. 27, 1155 U.N.T.S. 331.

It is also true that one action may result in both an international claim and a domestic law claim. The categories actually overlap in this sense, but an international claim is often not sufficient to raise a domestic law claim, and a domestic law claim is often not sufficient to be an internation law claim. For instance, an attack on a diplomat—not prevented by local authorities—could give rise to a tort claim for battery by the diplomat against the attacker under California law, and to an international law claim by the sending state against the United States. But many tort and contract claims, even against foreign nationals, and even against foreign states, are not sufficient for the United States to raise an international law claim. Indeed, the United States generally refrains from raising contract claims at the international level, unless there has been something like a state refusal to provide a fair forum. 8 M. Whiteman, Digest of United States Practice International Law 906 (1963); 1975 Digest of United States Practice in International Law 485. And many international claims do not raise the possibility of a domestic law claim. For instance, if the United States were to pass legislation permitting violation of a binding UN Security Council resolution embargoing some rogue regime, no claim would lie under U.S. law against an individual selling goods in violation of the embargo, even though a valid international claim could presumably be brought against the United States (*see Diggs* v. *Shultz,* 470 F.2d 461 (D.C. Cir. 1972)).

The overlap is in a very rough way analogous to the overlap of tort law and criminal law within the United States domestic legal system. Tort law and criminal law are different bodies of law, with generally different purposes and different parties. Mere negligence resulting in injury may be tortious but not criminal. And driving recklessly without hurting anyone may be criminal but not tortious. But careless driving may in some cases be both a crime and a tort. It does not follow, though, that the tort claim can be waived by the criminal prosecutor. The government is the party in interest bringing a criminal case, it brings the case in the interest of the public, even though the victim is an individual. The government can settle, criminal claims, even over the objection of the victim, in the greater interest of the general public. It can be said to "waive" future prosecution. But the government is not the party in interest in a civil tort suit, and it would be a puzzling use of words for a government prosecutor to "waive" future tort litigation brought by the victim. Until the O.J. Simpson case, many non-lawyers may not have clearly understood the way in which resolution of a criminal case does not control resolution of a civil case. But the difference was always there. Similarly, many lawyers misapprehend the clear difference between an international law claim and a domestic law claim, but the difference still there.

As. pointed out in paragraph 7, a government may of course change domestic law, and thereby change the content of domestic law rights and duties. Typically this is done by legislation, but in the United States it can also be done by self-executing treaty provision (President plus ⅔ Senate approval), by congressionally approved executive agreement (President with statutory authorization), and (in a limited category of cases) by executive agreement without explicit congressional authorization (*see United States* v. *Pink,* 315 U.S. 203 (1942)). For instance, the self-executing treaty provision at issue in the famous case of *Martin* v. *Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816), changed the domestic law rights of private parties contesting the ownership of real property in Virginia. *See Fairfax's Devisee* v. *Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813). And the executive agreement upheld in Darnes & Moore* v. *Regan,* 453 U.S. 654 (1981), changed the domestic law rights of private contractors raising domestic law contract claims against instrumentalities of the Iranian government.

Article 14(b) of the Treaty of Peace with Japan by its plain terms contemplates resolution of *international law claims* against Japan. This is because of the use of the word "waive." The United States can waive individual claims under international law, because such claims are claims of the United States in important and legally relevant ways. It would make no sense for the United States government to "waive" claims of individuals under domestic law. In order to extinguish (or even to affect) domestic law claims, some different language would be required. "Waive" means give up, relinquish, or surrender. To *extinguish domestic law claims,* in contrast, one would expect language like "extinguish," "suspend," "invalidate," "nullify," or the like. Thus, the executive agreement upheld in *Dames & Moore* v. *Regan,* 453 U.S. 654 (1981), provided that the United States was obligated

> to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

453 U.S. at 665, quoting directly from the executive agreement. Or instead of prohibiting domestic litigation, a self-executing treaty might directly change domestic law obligations. For instance, the following treaty provisions changed what otherwise would have been the domestic law rights or obligations of private parties in the United States courts:

> The citizens [of the Parties] shall have liberty to * * * carry on trade * * * upon the same terms as native citizens or subjects. (*Asakura* v. *City of Seattle,* 265 U.S. 332, 340 (1924).)
>
> A national of the other state 'shall be allowed a term of three years in which to sell [certain inherited real] property * * * and withdraw the proceeds * * *' free from any discriminatory taxation. (*Clark* v. *Allen,* 331 U.S. 503, 507–508 (1947).)
>
> in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State * * * in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the State * * * will permit to sell such property, he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty. * * * (*Hauenstein* v. *Lynham,* 100 U.S. 483, 486–490 (1879).)
>
> no higher or other duties, charges, or taxes of any kind, shall be levied by one country on removal of property therefrom by citizens of the other country 'than are or shall be payable in each State, upon the same, when removed by a citizen or subject of such state respectively'. (*Nielsen* v. *Johnson,* 279 U.S. 47, 50 (1929).)

Article 14(b) of the Treaty of Peace with Japan contains no such language, The article simply does not refer in any plain way to domestic law rights, obligations, or claims. Instead, it *waives* claims of the United States government, including both claims by the nation as a whole, and *international law claims* of the United States *in respect of nationals.*

This conclusion says nothing about whether Article 14(b) is "self-executing." Whether a treaty provision is self-executing determines whether the provision changes domestic law without implementing legislation by Congress. Only it Article 14 obligated the United States to extinguish a category of domestic law claims, or to change domestic law rights or obligations, and no legislation implemented the obligation, would a court have to determine whether the obligation was self-executing as a matter of United States law. *See* IL&USL at 76–87. But where a treaty provision does not obligate the United States to change its domestic law in the first place, it is a question of the most conjectural sort to ask whether, *if it did,* it would be self-executing. Accordingly, no authorities dealing with whether a treaty provision is self-executing are relevant to the conclusion that the provision simply does not extend to domestic law claims.

That Article 14(b) does not extend to domestic law claims of nationals is directly supported by the contemporaneous Stikker-Yoshida correspondence of 1951. By note of September 7, 1951. Netherlands Minister of Foreign Affairs Dirk Stikker drew the attention of the Prime Minister of Japan to Foreign Minister Stikker's words addressed to the Peace Conference on the previous day:

> It is my Government's view that article 14(b) as a matter of correct interpretation does not involve the expropriation by each Allied Government of the private claims of its nationals so that after the Treaty comes into force these claims will be non-existent.

> The question is important because some Governments, including my own, are under certain limitations of constitutional and other governing laws as to confiscation or appropriating private property of their nationals. Also, there are certain types of private claims by allied nationals, which we would assume the Japanese Government might want voluntarily to deal with in its own way as a matter of good conscience or of enlightened expediency.

This statement, is perfectly consistent with reading the waiver with respect to nationals found in Article 14(b) to extend only to international law claims of states in respect of individuals, and not to claims of nationals under domestic legal systems, Indeed, it is otherwise difficult to make sense of the Netherlands Foreign Minister's statement.

That Article 14(b) does not extend to domestic law claims of nationals is further supported by a law review article by the Counselor, at the time of writing, of the Japanese Embassy in London. Tetsuo Ito, *Japan's Settlement of the Post-World War II Reparations and Claims,* 34 Japanese Annual of International Law 38 (1994). Mr. Ito's analysis, though it is his own and does not purport generally to represent official Japanese government opinion, has particular weight inasmuch as Mr. Ito is a former director of the Legal Affairs Division of the Treaties Bureau of the Japanese Foreign Ministry. At the end of a clear two-page discussion of the nature of international claims in respect of individual nationals, *id.* at 67–69. Mr. Ito reaches the following conclusion, describing it as the position of the Japanese Government:

> [I]t seems the following view of the Japanese Government is persuasive: "the waiver by a state of claims of its nationals," provided for in treaties concerned, does not mean the renounciation of the right to claims themselves, which its nationals possess, or, at least, can claim to possess, on the basis of its municipal laws, but means the renounciation of the right of diplomatic protection, which the state possesses, in respect of the claim of its nationals, under international law. Therefore, after waiving the claims of its nationals in treaties, the state can not take up the issue of such claims on an intergovernmental basis, even if its individuals request to do so.

Id. at 68–69.

Finally, the Statement of Interest by the United States is remarkably bare of support for its apparently contrary analysis. It is true that courts defer to the opinion of the Executive Branch. The Statement of Interest filed on May 23, 2000, however, fails to provide any support far its conclusion that the Treaty of Peace aid the War Claims Act created a remedy that excluded domestic law claims of U.S. nationals. The Statement of Interest states repeatedly (at 2, 4, 6, 10, 12, 13) that the Peace Treaty, along with the War Claims Act that provided for distribution of funds obtained by the United States pursuant to the treaty, created an exclusive remedy for compensation for prisoners of war. But nothing in the Statement of Interest actually supports this conclusion. First, Congress's desire that claims within the War Claims Commission's jurisdiction not be adjudicated by courts (Statement of Interest at 6) by its terms extends only to claims against the funds that the War Claims Commission was to distribute, i.e., funds obtained for international legal claims. It is perfectly consistent with that intent for domestic law claims between nationals of the two states to survive. Second, contrary to the Statement of Interest (at 10), the plain meaning of Article 14(b) does not support the argument that domestic law claims are, extinguished The plain meaning of "waive" is to the contrary, See paragraph 12, *supra.* Third, the discussion of the federal preemption doctrine (at 11–13) relies upon the treaty interpretation of Article 14(b) that domestic law claims are extinguished, but does nothing to support that underlying premise. All of the authorities cited in the Statement of Interest are fully consistent with the natural reading of Article 14(b), that the Allied Powers waived their international law claims. The Statement of Interest fails entirely to deal with the accepted distinction between international law claims and domestic law claims. The Statement of Interest fails to explain how language of "waiver" somehow means extinguishment. It fails to explain either the Stikker-Yoshida correspondence, or the Japanese Government views described in the Ito article. Accordingly, with respect to Article 14(b), the Statement of Interest contains no more than repeated governmental *ipse dixit* that domestic law claims of U.S. nationals have been excluded by a treaty, a treaty that simply does not say as much.

It should be added that domestic law claims of the United States *government* are also conceivably waived by Article 14(b), since it is possible that the United States gave up its right to pursue a class of claims in the domestic courts of Japan or the United States, in addition to waiving its international law claims. But with respect

to domestic law claims *of U.S. nationals,* it is an entirely strained and unnatural reading of the words "the Allied Powers waive" to interpret it to mean the Allied Powers "take away" or "extinguish" claims of *their nationals* in domestic courts under domestic law. Under no accepted concept are such claims—in contrast with international law claims—theirs to "waive."

Prepared Statement of Joseph A. Violante

Mr. Chairman and Members of the Committee: On behalf of the more than one million members of the Disabled American Veterans (DAV) and its Auxiliary, I am pleased to provide DAV's remarks for the record on the plight of former World War II American Prisoners of War (POWs) captured in the Pacific, and their struggle for justice.

The DAV is made up of men and women disabled in our nation's defense. The DAV was founded in 1920 and chartered by Congress in 1932 as the primary advocate for America's service-connected disabled veterans, their dependents and survivors. Since its inception, the DAV has been dedicated to one, single purpose: building better lives for our nation's disabled veterans and their families. During the past 80 years, the DAV has never wavered in its commitment to serve our nation's service-connected disabled veterans, their dependents and survivors.

The DAV has a narrow legislative focus defined by its Congressional charter and our Constitution and Bylaws. We are charged with advancing the interests of wartime disabled veterans and their dependents concerning certain federal veterans' benefits and services. These benefits and services have, as part of their eligibility criteria, the establishment of a service-connected disability as a result of wound, injury, or disease that occurred during active duty.

Our major policy positions are determined by our membership passing certain resolutions at our annual National Conventions. These resolutions must be in keeping with the guidelines of our charter, as well as our Constitution and Bylaws.

In recognition of the fact that former POWs suffered cruel and inhumane treatment and nutritional deprivation at the hands of their captors, which resulted in long-term adverse health effects, our membership has consistently supported legislation that would expand POW presumptions.

Although no resolution was submitted for DAV to consider supporting the efforts of former World War II American POWs in the Pacific in their efforts to seek legal action against those Japanese companies who used American POWs as slave labor, the DAV is seriously concerned about our government's position opposing this litigation. It is inconceivable that our government would take a neutral position with regards to similar issues affecting reimbursement from German companies, and oppose claims directed to private Japanese companies for whom former POWs were forced to work as slaves.

Sadly, our nation has chosen to continue to ignore its commitment to those brave men and women who have defended the freedoms all Americans, and many citizens around the world, cherish. It is hard to imagine a group of men and women more deserving than those former POWs who endured months and years of cruel and inhumane treatment, brutality, nutritional deprivation, and adverse health effects at the hands of their captors, especially those captured in the Pacific theater.

The DAV strongly believes that our nation has a sacred obligation—a duty—to ensure that the defenders of our freedom are adequately cared for, compensated, rehabilitated, and returned to gainful civilian employment, whenever possible. In many cases, it is impossible to erase the physical and mental traumas of war suffered by those valiant warriors who sacrificed, and gave their all, no questions asked, in defense of freedom.

There is a common bond among veterans, forged by their shared experiences that have molded their character and their values. Although their lives have been forever changed, their values have not, and their commitment to this nation remains strong, even though our government too often reneges on its commitment to them.

In return for sacrificing their lives, their limbs, and mental and physical well-being, the only thing that veterans have ever asked in return is that our government honors its commitment to help them and their families in their hour of need. This sacred covenant between our nation and its citizen soldiers has been both implied and implicit since our nation was founded.

We must never forget how blessed we are to live in a free society, nor forget the price that was paid for our freedom, especially by those deprived of all human dignity by their captors. We must, therefore, honor and care for those who distinguish their lives in defense of freedom—whatever the cost.

The only thing that these former World War II American POWs of the Pacific Theater ask is for the right to receive just and fair compensation from private Japanese companies who profited from their slave labor, without interference from our government. At the very least, our government should remain neutral and not oppose their legal action—they deserve nothing less.

Mr. Chairman, this completes my testimony. Thank you for allowing the DAV the opportunity to discuss its concerns about our government's opposition to the legal claims of former World War II American POWs against private Japanese companies.

AMERICAN DEFENDERS OF BATAAN & CORREGIDOR, INC.,
Wellsburg, WV, June 20, 2000.

Senator ORRIN HATCH,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: We were squeezed into the filthy allotted space in the bowels of the hell ships, and were locked in for safe-keeping. Maybe there was still some physical strength left for work or perhaps they would serve as barter should the Japanese militarists need them for such. Devoid of any comforts, without food or water and not even the courtesy to mark the ship as carrying prisoners of war, we sailed through the battle infested waters toward Japan. We saw the smack of a torpedo or bomb as it hit the ship, we saw the rushing water as it entered the hold and we felt panic that said "This is it". There was terror written in deep gaunt lines on the faces of the men. Men that were then to the breaking point. We arrived in Japan and were assigned to quarters which were unfit for human living, starved, beaten and then assigned to Japanese industrialists as slave labor to work in plants to manufacture and handle war materials which would be used against our own country men for almost three and one half years. thousands died from starvation and severe mistreatment by the Japanese military. Today we suffer immensely from the residual effects of our prisoner of war life. It took 36 years for our government (PL 97–37) to recognize the physical and mental disabilities of this group of veterans.

Those few who came home continually looked to their government to seek some compensation from the Japanese government and industrialists who used them as slave labor during World War II. As of this date they have found none. What we did receive is, a peace treaty with Japan, that many of us claim denies us redress for violation of our basic human rights. With the help of a few civic minded attorneys and other individuals in various parts of the United States, the prisoners of war community has initiated a drive for justice against those Japanese industrialists that used us as a slave labor in plants that produced war goods which were used against those gallant and brave armed forces who were island hopping in the South Pacific to free them from the tyrannical hands of the Japanese government. A number of law suits have recently been filed in the state of California on behalf of these former prisoners of war. These complaints were filed against those Japanese firms that benefited from their slave labor during World War II. Currently, there are almost eighty attorneys assisting in the litigation against the Japanese industrialists.

Hopes were high that perhaps justice might now prevail for this group. However, the prisoner of war community has recently been informed that the United States Department Of Justice, pursuant to a court's order requesting such, has issued an opinion that supports the Peace Treaty with Japan dated September 8, 1951. The opinion states that a claim relying on state law is considered one "arising under" federal law and may be removed to federal court, The opinion states that the Peace Treaty along with the War Claims Act of 1948 preempts state law claims as shown in Raymond Heimbuch et al against Ishihara Sangyo Kaisha Ltd. for remanding the litigation to a state court.

This action by the Justice Department is in direct contradiction to a letter by Judge John W. Bissell that requested the department to appear as "amicus curiae" (commonly known as friend of the court) in two slave labor claims on behalf of persons forced to work in German factories during World War II. The Civil Division of the Department of Justice respectfully declined the request of Judge Bissell to become involved in this particular litigation.

It is very apparent that the Justice Department made a determined decision only six months ago not to interfere with claims pending on behalf of Holocaust slave tabor victims, whereas in the Raymond Heimbuch et al litigation, they have taken a position which is detrimental to such claims on behalf of slave labor victims of the Japanese industrialists. These former prisoners of war are bewildered that the Department Of Justice chose to take such a position which interferes with the rights

of a private citizens to bring claims against private companies. These plaintiffs are particularly concerned that the effect of this opinion could nullify the action of the California legislature in seeking to open up State courts for American POW's pursuing fair compensation for slave labor performed during World War II.

Why are former prisoners of war who were forced to perform slave labor for the Japanese companies being treated differently from persons who performed as slave labor for German companies during World War II? Why did the Department of Justice publicly state a position that is adverse to the former prisoners of war who seek redress from private Japanese companies? It should be noted that many of the Holocaust slave labor victims and their representatives have been actively involved in supporting legislation against Japanese companies and are doing everything they can to right the injustices which occurred in the Pacific during World War II. We would appreciate your help on this matter.

Respectfully yours,

EDWARD JACKFERT,
Past National Commander, American Defenders Of Bataan & Corregidor.

THE AMERICAN CENTER FOR CIVIL JUSTICE,
Brooklyn, NY, June 10, 2000.

STUART EIZENSTAT,
Deputy Secretary of the U.S. Treasury,
U.S. Treasury Department, Washington, DC.

DEAR MR. EIZENSTAT: The American Center for Civil Justice, an advocacy group, has been responsible for the public awareness that has spawned the more than thirty present lawsuits against Japanese Corporations for the enslavement of American ex-POWs during World War II.

The Center provided the initial and essential historical and legal research to enable these claims to move forward. The Center has also corresponded with some of the Japanese Corporations that maintain headquarters in the United States.

The Center's primary goal and commitment has been to establish a quick and early closure to this issue of compensation that has been ignored for half a century.

The Center is presently proposing a direct settlement between the companies and the claimants, that will be fair to the victims without harming the corporations involved.

The Center believes this approach is in the best interest of all parties and in the national interest of both Countries.

The Center represents the majority of living American claimants and has the ability to reach out to all American victims within a reasonable period of time.

The Center has no financial interest in this claim or settlement and has made every effort in preventing this issue from becoming a new found source of revenue for the legal industry,

This proposal and your response to it are destined to become part of the history of this affair, and such intervention would seem to be within your official capacity.

I would be available to meet with you at the earliest possible opportunity.

Sincerely,

MICHAEL ENGELBERG, MD.

THE AMERICAN CENTER FOR CIVIL JUSTICE,
Brooklyn, NY, June 13, 2000.

Mr. HIROAKI YANO,
President, Mitsubishi International Corp., NY, NY.

DEAR MR. YANO: The American Center for Civil Justice, an advocacy group, is authorized to represent 600 American ex-POWs of alleged Japanese slave labor, the largest group seeking redress for enslavement.

Since our last correspondence in December, approximately thirty new lawsuits have been filed against Japanese industries and the United States legal system is being used as a tool to pursue these claims.

The Center which was the original advocate of this issue and was responsible for making it public, proposes a swift and direct settlement, which will remove this claim from the courts. By immediately addressing these claims, this issue, that will affect American and Japanese relations, and may affect the future of your company, would be resolved in a sensible and just manner.

The Center will be able to reach out to all American victims within a reasonable period of time.

In continuing to defend these mushrooming claims in U.S. Courts, your legal and public relations cost could possibly exceed a total settlement cost while not bringing closure to either plaintiff or defendant.

This is a serious offer of good faith on behalf of the victims and the Center will have no financial interest in this claim or settlement.

The Center believes this approach is in the best interest of all the concerned parties and is in the national interest of both of our countries. While it is unfortunate that the Center's December correspondence and its recommendations was not acted upon, no action on your part will initiate further law suits which will elevate the expenses and public profile of this unfortunate matter.

Your response to this offer, which is being made on behalf of the elderly and frail American surviving victims, will for posterity, reflect your attitude and approach towards correcting an historical injustice.

If you would like to explore the framework and details of this recommendation, I will be available to meet with you or your representative at the earliest possible opportunity.

Sincerely,

MICHAEL ENGELBERG, MD.

THE AMERICAN CENTER FOR CIVIL JUSTICE,
Brooklyn, NY, June 13, 2000.

Mr. HIROSHI NODA,
Kawasaki Heavy Industries (U.S.A.), Inc., NY, NY.

DEAR MR. NODA: The American Center for Civil Justice, an advocacy group, is authorized to represent 600 American ex-POWs of alleged Japanese slave labor, the largest group seeking redress for enslavement.

Since our last correspondence in December, approximately thirty new lawsuits have been filed against Japanese industries and the United States legal system is being used as a tool to pursue these claims.

The Center which was the original advocate of this issue and was responsible for making it public, proposes a swift and direct settlement, which will remove this claim from the courts. By immediately addressing these claims, this issue, that will affect American and Japanese relations, and may affect the future of your company, would be resolved in a sensible and just manner.

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If you would like to explore the framework and details of this recommendation, I will be available to meet with you or your representative at the earliest possible opportunity.

Sincerely,

MICHAEL ENGELBERG, MD.

ASSEMBLY CALIFORNIA LEGISLATURE,
Sacramento, CA, June 30, 2000.

RE: Senate Hearing on "Former U.S. World War II POWs: A Struggle for Justice"

Hon. ORRIN HATCH,
Chair, Honorable Members of the Senate Judiciary Committee,
U.S. Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIR AND JUDICIARY COMMITTEE MEMBERS: I write to you as a co-author of California State Senator Tom Hayden's legislation (Senate Bill 1245 of 1999)

which grants former prisoners of war a basis to pursue claims against Japanese companies doing business in California. I am also the author of Assembly Joint Resolution 27 of 1999, which calls for Japan to formally apologize and pay reparations for war crimes.

In 1670, Benedict Spinoza wrote in his Theological-Political Treatise:

> Peace is not an absence of war, it is a virtue, a state of mind, a disposition for benevolence, confidence, justice.

For former slave laborers, the war is over, but there is no peace. In an effort to bring closure to a heroic community of Americans, the State of California has granted former prisoners of war who were forced to work as slave laborers a right to seek compensation. I urge you to do all within your power to allow these Americans to have their day in court.

The Justice Department has interpreted the San Francisco Peace Treaty of 1951 as barring these claims. The Justice Department opinion passively restates the position of the State Department, but is void of any apparent common sense of justice. It fails to recognize that a true peace is more than the absence of war.

While I value the work of the Justice Department, I recall that the Justice Department successfully opposed the initial claims of Japanese-Americans seeking redress for their internment. In this instance, as in the past, there are persuasive legal arguments contrary to the position of the State Department. These arguments must be aired in a court of law.

This is truly a test of our democracy. I urge you and every member of Congress assist these valiant Americans by securing their day in court—they deserve nothing less. To deny them a day in court is, at this point, to deny them justice and their only remaining opportunity for true peace.

Sincerely,

MICHAEL M. HONDA,
California State Legislature, 23rd Assembly District.

THE CENTER FOR INTERNEE RIGHTS, INC.,
Miami Beach, FL, June 22, 2000.

Senator ORRIN HATCH,
Senate Judiciary Committee, U.S. Senate,
Washington, DC.

DEAR CHAIRMAN HATCH, On behalf of our fifty thousand members representing former POWs and civilian internees of Japan in World War II let me thank you for taking an interest in the plight of these poor souls who were so brutalized by Japan in WWII.

Frankly, we are shocked and disappointed on the recent decision issued by the Department of Justice relating to American POWs used by private Japanese companies as slave labor in WWII. California took the initiative and did the right thing by passing laws to allow slave laborers to sue the companies that used them illegally and who never paid them. The issue is not a sovereign nation to sovereign nation issue but one of an individual citizen suing a private company. Why people keep bringing up the San Francisco Peace Treaty as blocking the ability of these lawsuits to progress is beyond me.

Frankly, Senator Hatch, the San Francisco Peace Treaty ought to be looked at very carefully for it specifically *did not* end the issue of compensation for the victims of Japan. The history of the Treaty is certainly flawed with ominous political reckoning and the victims were mostly ignored by their own Government. Germany on the other hand has stepped forward and faced their transgressions in WWII in a just and honorable way. The US Government has strongly supported the effort both private and governmental in settling compensation issues for those who suffered under the Nazi German Regime. Why then is there a dual standard when it comes to the same type of victims who suffered under the Japanese?

I can tell you this, having been a former internee of the Japanese in WWII, those captured by Japan suffered unspeakable and inhumane treatment by Japan. The US on the other hand treated the Japanese, Japanese-Americans, Italians and Germans who were interned in the United States during the war with kindness, respect and far beyond the parameters of the Geneva and Hague Convention. That is the American way and we can be proud that we treated enemies at time of war in such a benevolent fashion.

The Japanese Government will continue to hide behind the San Francisco Peace Treaty until the United States Government faces the fact that they themselves were

involved in an unjust Treaty that fully overlooked the plight of the American citizens captured and interned by Japan.

It is our hope, Senator Hatch, that your Hearings will expose the US Government's calloused and uncaring attitude toward the American citizens who sacrificed all in the pursuit of freedom and democracy that we are privileged to enjoy today. In the spirit of our great nation your Committee can resolve the situation. it is time to do the right thing.

Respectfully,

GILBERT M. HAIR (SANTO TOMAS INTERNEE),
EXECUTIVE DIRECTOR,
Life Member—ADBC, AXPOW, DAV, AMERICAN LEGION, CORMV.

[EDITOR'S NOTE: The attachment of an article from the Veterans' Journal, October 1999 Issue, Volume 2, Number 10, "Massacres and Atrocities of World War II," is retained in Committee files.]

INFORMATION ON US POWs HELD IN WWII

MILITARY

There were 130,201 US Military captured and interned in WWII. As of January 1st 2000, 38,114 were still alive (29.2%) Of the total count of US POWs in WWII 36,260 were captured and interned by the Japanese. On January 1st 2000, 5,745 were still alive (15.8%). Here is the grim news; the comparison of those military held by Germany and Japan.

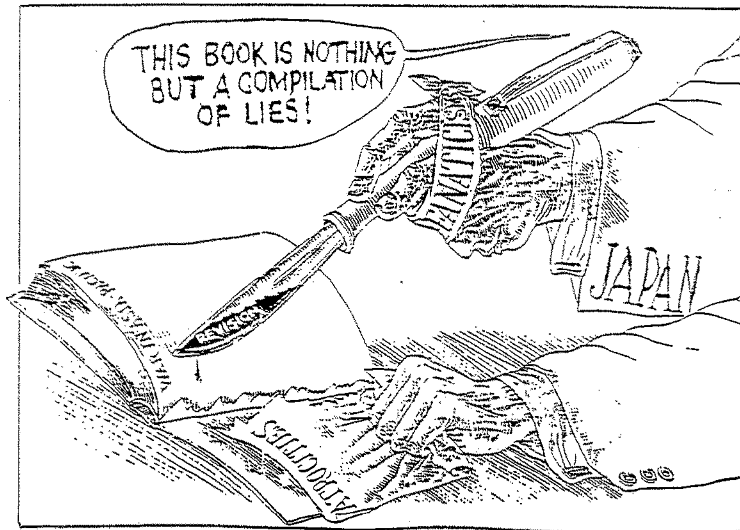
U.S. MILITARY HELD	BY NAZIS	BY JAPANESE
Captured & Interned	93,941	36,260
Died While POW	1,121 (1.1%)	13,851 (38.2%)
Alive on January 1st 2000	44,773 (47.6%)	5,745 (15.8%)

CIVILIANS

There were 18,745 US Civilians captured and interned in WWII. As of January 1st 2000, 3,018 were still alive (16.1%). Of the total civilian POWs in WWII 13,996 were captured and interned by the Japanese. On January 1st 1999, only 1,497 were still alive (10.7%). Again, here are the grim statistics; the comparison of U.S. civilians interned by Germany versus those held by Japan.

U.S. CIVILIANS HELD	BY NAZIS	BY JAPANESE
Captured & Interned	4,749	13,996
Died While Interned	168 (3.5%)	1,536 (11%)
Alive on January 1st, 2000	1,521 (32%)	1,497 (10.7%)

(These are the official figures provided by the AXPOW Association March 15th, 2000.)



OFFICE OF SELECTMAN,
STATE OF CONNECTICUT,
Stafford Springs, CT, June 20, 2000.

Senator ORRIN HATCH,
Chairman, Senate Judiciary Committee, Washington, DC.

DEAR MR. HATCH, A resident of our community, Darrell Stark was captured in the Philippines by the Japanese as a young man at the onset of World War II.

While most of the men in his unit died either while being transported or in captivity, Mr. Stark survived. He was transferred to Japan and forced to work as a slave laborer for three years.

He feels strongly that like his counterparts who were forced to do slave labor for the Germans, that he should be able to bring Civil Actions against the Japanese companies that profited from his labor in the United States Courts.

We understand that people, who were enslaved in the European Theater, are permitted to bring suit, but those people used in this fashion in Asia are not. The concept that some former service men and women can bring suit and others can't is difficult to understand.

We understand that vital social and governmental issues may be involved with their decision but the overriding human consideration should be that federal legislation should be enacted to permit our former slave laborers to be compensated for their suffering and their work.

Your swift attention to this matter will be appreciated not only by Darrell Stark but also by the thousands of other former service men and women who suffered the same fate.

Very truly yours,

JOHN E. JULIAN,
First Selectman.

THE AMERICAN LEGION,
Washington, DC, June 27, 2000.

Hon. ORRIN HATCH,
Chairman Senate Judiciary Committee,
Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN HATCH: On behalf of the 2.8 million members of The American Legion, I want to express our sincere thanks to you for scheduling the Judiciary Committee hearing on June 28 on the subject of compensation for Bataan POWs. We welcome and appreciate your leadership on this issue and trust that the hearing will help bring closure and justice to the survivors of Bataan who have been waiting for this for over fifty years.

Bataan survivor compensation has been a concern of The American Legion for many years. We have two longstanding resolutions that speak to this specific issue. Our steadfast position remains that the Japanese government must:

(1) Render an official and unequivocal apology for the pain, suffering and death inflicted on American POWs and

(2) Pay $20,000 to the surviving service members who were involved in the Bataan Death March and to the Families of the non-surviving service members.

We feel that this is the very least the Japanese can do to right one of the most egregious wrongs of the 20th Century.

As you are well aware, the American prisoners held by the Japanese were subjected to conditions and deliberate abuse that were beyond belief. Upwards of 10,000 American prisoners died as a result of Japanese brutality during their occupation of the Philippines. Seeing that Germany has apologized for its injustices during World War II and reparations have been paid to Japanese-Americans who were forced into internment camps, positive steps from Japan are long past due.

The American Legion was certainly pleased to see the recent introduction of H. Con. Res. 357 that expresses the sense of Congress concerning war crimes committed by the Japanese military during World War II. This resolution closely mirrors American Legion positions and calls for both an apology and the payment of reparations to surviving POWs, by the Japanese. We strongly support H. Con. Res. 357 and urge the U.S. Government to exact pressure on the Japanese government and commercial interests to make an apology and make payment of reparations a reality.

We are also aware of section 655 of S. 2549, the National Defense Authorization Act for fiscal year 2001, which if enacted will pay a gratuity through the Secretary

of Veterans Affairs to eligible veterans or their surviving spouses. This provision would pay $20,000 to veterans of Bataan or Corregidor who were POW's forced to preform slave labor in Japan during WWII. The American Legion would support this proposal only after all attempts diplomatic, administrative and Congressional in nature for payment by the Japanese government or Japanese commercial interests have been exhausted.

The American Legion applauds the Committee's actions to expose and address the heinous activities of the Japanese during World War II. While Japan can never fully atone for these actions, the Japanese most assuredly should take steps to apologize and provide a sense of justice to the Bataan survivors and their families.

Sincerely,

JOHN F. SOMMER, JR.,
Executive Director.

AMVETS,
Lanham, MD, June 26, 2000.

The Hon. ORRIN HATCH,
U.S. Senate Washington, DC.

DEAR SENATOR HATCH: As AMVETS National Commander, I am pleased to support the efforts of the Senate Judiciary Committee to examine the plight of the U.S. POW's and civilian internees who were captured, interned and brutalized by Japan during WWII.

It is important that we as a nation investigate the service of American POW's forced to endure long hours of hard labor for Japanese businesses during their capture and recognize and compensate those brave veterans. This issue is of great concern to the AMVETS membership. This August, at our 56th National Convention, delegates will consider an organizational resolution that requires AMVETS to support all efforts to investigate and resolve the claims of slave labor by the Japanese during WWII.

Thank you for the opportunity to express our support for this important issue. AMVETS is proud of your efforts in helping to secure the benefits of America's veterans.

Yours in loyalty and service,

CHARLES L. TAYLOR,
AMVETS National Commander.

HOUSE OF REPRESENTATIVES,
Washington, DC, June 23, 2000.

The Hon. ORRIN G. HATCH,
Chairman, Senate Judiciary Committee, Washington, DC.

DEAR MR. CHAIRMAN: It has come to my attention that you are considering holding hearings on the ability of American Prisoners of War (POWs) held by the Japanese during WWII to sue, in federal court, for the injuries, back wages, and damages resulting from the POW's imprisonment and forced labor. I write to express my strong support of your holding hearings to look into this matter.

Several thousand American soldiers were held as POW's and performed slave labor which, in large part, contributed to the wealth and success of many private Japanese corporations. These POW's endured unspeakable horrors, were beaten often, and poorly fed while working in mills 10 to 15 hours per day. We, in the Federal Government, have an obligation to ensure that the soldiers, who were imprisoned as they fought to protect and preserve our freedom and democracy, receive the just compensation to which they are entitled.

As you know, similar cases involving Nazi Germany have arisen. However, there seem to be inconsistencies in how the Department of Justice has responded to certain courts which have sought the opinion of the United States regarding cases involving POW's held by Japan and Germany. As such, I believe that a hearing is appropriate and the Senate is best suited to conduct hearings on how best to resolve this situation as any action on this issue would involve or be impacted by the treaties that ended WWII.

You may also know that the State of Rhode Island is currently considering legislation that would allow former POW's and their kin to sue, in Superior court, Japanese corporations that profited greatly from the slave labor of these prisoners. That legislation unanimously passed the Rhode Island State Senate and is expected to pass the House.

Thank you for your attention to this matter and please feel free to contact me if you have any questions or if I can provide any additional information.

Sincerely,

BOB WEYGAND,
Member of Congress.

MILITARY ORDER OF THE PURPLE HEART,
Springfield, VA, June 23, 2000.

The Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate,
Dirksen Senate Office Building, Washington, DC.

SENATOR HATCH: The Military Order of the Purple Heart, a Congressionally chartered organization dedicated to protecting and advancing the rights and interests of our Nation's Combat Wounded Veterans, supports the request for equitable and fair treatment made by our former Japanese-held World War II Prisoners of War. Specifically, these POWs are requesting that the U.S. Government support, by all appropriate means, their claims for redress from private Japanese companies that used them as slave labor during the course of their imprisonment.

The Military Order of the Purple Heart. requests that the Senate Committee on the Judiciary investigate and explore the historical, legal, and practical issues involved with the claims for equitable compensatory action made by these gallant veterans and former POWs. We would especially ask that the following specific concerns of these veterans be addressed:

- That certain key language in the San Francisco Peace Treaty of 8 September 1951 is not operative in light of Article 26, the Most Favored Nation Clause, of that treaty.
- That the language of Article 14(b) of the Treaty does not encompass current U.S. POW claims.
- That the Treaty does not operate to waive national versus national claims.
- That the U.S. Justice Department's Statement of interest of the United States on the Plaintiffs Motion to Remand in *Heimbuch* v. *Ishihara & Co., Ltd.,* Case No. COO–0064 WHA, (N.D. Cal. Mar. 23, 2000) (J. Alsup) dated 23 May 2000 is inequitable in light of the U.S. position taken on litigation (*Gross* v. *Volkswagen* and *Rosenfeld* v. *Volkswagen*) involving German Holocaust victims.

I thank you in advance for your interest and consideration of this request.

Yours in patriotism,

FRANK G. WICKERSHAM, III,
National Legislative Director, MOPH.