UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN BROTT et al.,	)	Case No. 1:15-cv-00038
	)	
Plaintiffs,	)	
	)	Hon. Janet T. Neff
v.	)	United States District Judge
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF

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INTRODUCTION

This case presents a Fifth Amendment takings claim against the Defendant United States (the "Government"). Plaintiffs are a group of property owners in Michigan who desire to have their claim determined in the District Court, rather than the Court of Federal Claims. The Government contends that the Plaintiffs cannot maintain their suit in District Court unless they first establish consent of the United States to be sued, or there is a waiver of sovereign immunity. But, as will be argued below, the self-executing character of the constitutional command of just compensation does not require congressional approval to be enforced.

Substantively, the Plaintiffs contend that the Tucker Act, 28 U.S.C. § 1491(a)(1), is unconstitutional in that it requires filing in the Court of Federal Claims any Just Compensation claim for over $10,000 against the United States. But this statutory provision does not meet the requirements of Article III of the Constitution. Section 1 of Article III commands that the "judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Section 2 provides that this judicial power shall extend to all cases "arising under this Constitution." The article further sets forth that judges of both the supreme and inferior courts shall hold their offices during good behavior and with no diminution in salary. Art. III, section 1. Unfortunately, the congressional creation of the Court of Federal Claims does not have Article III judges with life tenure and no diminution in salary. This defect is not to be lightly considered, as Chief Justice Roberts reaffirmed for the Court, Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial branch." *Stern v. Marshall*, __ U.S. __, 131 S. Ct. 2594, 2608 (2011) (quoting *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 458 U.S. 50, 58 (1982)).

The Plaintiffs also contend that they are entitled to a jury trial as preserved under the Seventh Amendment. In light of *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999), holding there is a right to jury trial for an inverse condemnation claim brought under 42 U.S.C. § 1983, this claim will require careful consideration.

The United States does not address either argument on the merits but focuses exclusively on the sovereign immunity defense. Defendant's Memorandum In Support of Motion To Dismiss at 6 ("the Court does not need to entertain the merits of this case"). Amicus now turns to the sovereign immunity contention advanced by the Government.

ARGUMENT

I

THE SUPREMACY OF THE CONSTITUTION DEFEATS THE SOVEREIGN IMMUNITY DEFENSE

While the general principle holds that the United States cannot be sued without its consent, this principle cannot preclude a claim that emanates directly from the Constitution.

In its motion to dismiss, the Government completely ignores the single most important precedent, that is, *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). The Supreme Court there held that the Fifth Amendment's Just Compensation Clause is self-executing and needs no statutory authorization.

> We have recognized that a landowner is **entitled to bring an action** in inverse condemnation as a result of "'the **self-executing** character of the constitutional provision with respect to compensation . . . .'"

Id. at 315 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980) (quoting 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972))) (emphasis added). The *First English* majority further explained:

> As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, it has been established at least since *Jacobs v. United States*, that claims for just compensation are grounded in the Constitution itself.

482 U.S. at 315 (citations omitted). To drive home this point, the Court quoted at length from *Jacobs v. United States* as follows:

> The suits were based on the right to recover just compensation for property taken by the United States . . . *That right was guaranteed by the Constitution*. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States*.

First English, 482 U.S. at 315 (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)) (italics added by the Court).

Because the command of just compensation is "guaranteed by the Constitution" it does not need any statutory authorization. As a "self-executing" provision, statutory recognition is "not necessary." But the significance of *First English* does not end there. Most significantly, the Court **specifically rejected** the Solicitor General's argument based on sovereign immunity. Footnote 9 of *First English* was a direct response and rejection of the same contention made here to the District Court. That is, the Solicitor argued in *First English* that the Fifth Amendment "does not, of its own force, furnish a basis for a court to award money damages against the government." 482 U.S. at 316 n.9 (quoting Brief for United States as Amicus Curiae 14). But the Court rejected that position. *Id*.

A review of the argument advanced by the Solicitor General is worthwhile.[1] To set up the sovereign immunity argument, the Solicitor first acknowledged several cases that are contrary to the position the Solicitor would ultimately argue. At the bottom of page 13, *Jacobs v. United States* is

[1] The Solicitor General's Brief is reproduced in part as Appendix A to this brief.

acknowledged as holding that a plaintiff "could bring suit directly under the Fifth Amendment." Similarly, *United States v. Causby*, 328 U.S. 256, 267 (1946), is referenced for the proposition that a Fifth Amendment compensation "claim is grounded in the Constitution." Brief for United States as Amicus Curiae at 13. The Solicitor even quoted the "self-executing" language from *United States v. Clarke*, 445 U.S. at 257. Brief for United States as Amicus Curiae at 14. However, in the next paragraph, despite those authorities, the Solicitor contends that "the better argument is that the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." *Id*.

The Solicitor then proceeded to make several arguments in support of this position, including section B.2.a. which begins at the bottom of page 16 of the amicus brief. The Solicitor writes:

> The most obvious obstacle to such an interpretation of the Fifth Amendment is the sovereign immunity of the United States to suit, absent a waiver by Congress of that immunity.

Brief of United States as Amicus Curiae at 16. The Solicitor continued: "Nor is there any indication that this immunity was dispensed with by the Fifth Amendment." *Id*. at 17.

But the Supreme Court was not so impressed. Rather, the Supreme Court majority embraced and quoted the "self-executing character" of *United States v. Clarke*, and quoted at length from *Jacobs v. United States*, as set forth above, and including that "[s]tatutory recognition was not necessary." The clear rejection in *First English* of the applicability of sovereign immunity to the Fifth Amendment's Just Compensation Clause was spelled out in footnote 9.

> The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The **cases cited in the text**, we think, **refute the argument** of the United States that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government."

First English, 482 U.S. at 316 n.9 (and referring to *Jacobs*, *Clarke*, *Causby*, among others) (emphasis added).

In summary, the Supreme Court in its only case directly addressing the applicability of sovereign immunity to the Just Compensation Clause expressly rejected that position. The Court held that the Fifth Amendment is self-executing and needs no statutory authorization. In the present case, the United States fails to even mention this most relevant authority.

The ruling in *First English* is also consistent with the supremacy of the Constitution. The principle that the United States cannot be sued without the consent of Congress makes sense when Congress creates a substantive right such as under the War Risk Insurance Act discussed in *Galloway v. United States*, 319 U.S. 372 (1943), and *Lynch v. United States*, 292 U.S. 571 (1934), or the Age Discrimination in Employment Act discussed in *Lehman v. Nakshian*, 453 U.S. 156 (1981), all of which are cited in the Government's motion to dismiss. In these instances, Congress created the right sought to be judicially enforced, and so Congress must consent to be sued and may define the conditions of that consent. In similar fashion, Congress may consent to be sued where rights stem from some other source. For example, Congress may allow the United States to be sued for its torts, such consent having been provided by the Federal Tort Claims Act. In a recent decision, the Supreme Court again wrestled with the interpretation of that congressional consent with respect to equitable tolling of the statute of limitations set forth in that Act. *See United States v. Kwai Fun Wong*, 575 U.S. ___, 135 S. Ct. 1625 (Apr. 22, 2015).

The premise of the Government's sovereign immunity argument is that Congress can withhold its consent, *if it so chooses*. That makes sense when the United States government is the higher authority. But where the substantive right is grounded in a self-executing provision of the

Constitution, it is the Constitution that is the higher authority. In that context, where the right is grounded in the Constitution, a citizen does not need permission from the government to enforce a substantive right. The right is self-executing, and no statutory recognition is necessary.

In light of *First English*, the Government's reliance on older and general cases in other contexts is not persuasive. This Court should follow the precedent of *First English* and reject the motion to dismiss based on sovereign immunity. Since sovereign immunity is not a valid defense, jurisdiction to address the merits is provided by Article III, sections 1 and 2, and by 28 U.S.C. § 1331, providing that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution."

CONCLUSION

For the foregoing reasons, amicus Pacific Legal Foundation respectfully requests that the motion to dismiss be denied, and that a briefing schedule to address the merits of the case be established.

DATED: July 13, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2015, I electronically filed the foregoing AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF with the Clerk of the Court through the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ JOHN M. GROEN
JOHN M. GROEN

APPENDIX A

1986 WL 727420 (U.S.) (Appellate Brief)
Supreme Court of the United States.

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE, Appellant,
v.
COUNTY OF LOS ANGELES, CALIFORNIA.

No. 85-1199.
October Term, 1986.
November 4, 1986.

On Appeal from the Court of Appeal of California, Second Appellate District

Brief for the United States as Amicus Curiae Supporting Appellee

Charles Fried, Solicitor General, F. Henry Habicht II, Assistant Attorney General, Donald B. Ayer, Deputy Solicitor General, Roger J. Marzulla, Thomas E. Hookano, Douglas W. Kmiec, Deputy Assistant Attorneys General, Edwin S. Kneedler, Assistant to the Solicitor General, Peter R. Steenland, Jr., Raymond B. Ludwiszewski, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 633-2217

*I QUESTIONS PRESENTED

1. Whether this Court has either appellate or certiorari jurisdiction of this case under 28 U.S.C. 1257 (2) or (3).

2. Whether appellant's claim that the County Ordinance prohibiting the building of structures in a flood district results in a "taking" of its property without just compensation is ripe for judicial determination.

3. Whether the Fifth and Fourteenth Amendments, of their own force and without reliance on the statutory damages remedy in 42 U.S.C. 1983 enacted by Congress pursuant to Section 5 of the Fourteenth Amendment, require a state court to enter a money judgment against a governmental entity when the court concludes that a regulatory measure adopted by that entity results in a "taking" of private property.

4. Whether a local regulation prohibiting the building of structures on land within a validly designated flood control district results in a "taking" of property within the meaning of the Fifth Amendment.

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of its own force. This contention merits serious consideration in light of suggestions in statements by this Court and in light of the high place the Framers ascribed to property in the pantheon of rights. [7]

James Madison, the draftsman of the Fifth Amendment's Takings Clause, had available several models: the Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the Northwest Ordinance of 1787. Each of these phrased the guarantee in the form of an affirmative right to compensation once property has been taken. [8] Nor is there ***13** any direct evidence to indicate that the structure that Madison selected for the Clause was intended to limit the remedy available to the property owner. In an essay that Madison published after the enactment of the Bill of Rights, he stated:

If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues * * * such a government is not a pattern for the United States.

Property, Nat. Gazette, Mar. 27, 1792, *reprinted in* 14 J. Madison, *The Papers of James Madison* 267-268 (University Press of VA. ed. 1983).

Moreover, this Court has noted significant support for the view that the Takings Clause was intended to be a recognition of a landowner's right to indemnification for property taken by the sovereign. See, *e.g., Davis v. Passman*, 442 U.S. 228, 242-243 n.20 (1979) ("*Jacobs v. United States*, 290 U.S. 13 (1933), held that a plaintiff who alleged that his property had been taken by the United States for public use without just compensation could bring suit directly under the Fifth Amendment."). The Court has held that an aggrieved landowner's "claim is founded upon the Constitution," without the necessity of recourse to "an implied contract" for the United States to pay compensation. *United States v. Causby*, 328 U.S. 256, 267 (1946). In fact, the ***14** Court has in the past expressly adverted to "'the self-executing character of the [clause] with respect to compensation."' *United States v. Clarke*, 445 U.S. 253, 257 (1980). See also *United States v. Testan*, 424 U.S. 392, 401 (1976).

The advent of the modern regulatory state, and the increased incidence of taking property by regulation, has made more urgent the claim for interim damages in the case of regulations which constitute a taking. With due regard to these concerns and this evidence, we nonetheless conclude on the basis of the text of the Fifth Amendment itself as well as of other indicia of the original understanding of those who drafted and adopted the Amendment and of its earliest interpretation, that the better argument is that the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.

1. The Text of the Fifth Amendment

The text of the Fifth Amendment supports the conclusion that the Takings Clause is strictly prohibitory and does not, without further legislative action, mandate a monetary award against the government.

a. The Takings Clause of the Fifth Amendment states: "nor shall private property be taken for a public use, without just compensation." On its face, this language prohibits certain governmental conduct (the taking of private property for a public use) except when a certain condition is met (the payment of just compensation for what is taken). Thus, the Clause imposes a limitation on the exercise of power by the government of the United States. It does not address the question of the appropriate remedy when the government has exceeded that limitation, except, perhaps, by implication that courts will not tolerate a continuing violation.

***15** b. This interpretation of the Takings Clause is confirmed by the text of the Fifth Amendment as a whole, which provides (emphasis added):

> No person shall be held to answer for a capital, or otherwise infamous crime, *unless* on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, *without* due process of law; nor shall private property be taken for public use, *without* just compensation.

Neither the Takings Clause nor any of the preceding four Clauses by its terms addresses the question of the appropriate remedy in the case of a violation. None of the others has been or should be read as creating a self-effectuating constitutional damage remedy, and there is no reason to accord such a construction uniquely to the Takings Clause.

Three of the Clauses prohibit acts except upon certain specified conditions. Thus, the Fifth Amendment does not prohibit the Federal Government from holding a person to answer for an infamous crime; it merely establishes a condition precedent of indictment by Grand Jury. The Fifth Amendment likewise does not prohibit the government from depriving a person of life, liberty, or property; it provides only that such a deprivation must be accompanied by due process. And, finally, "[t]he Fifth Amendment does not proscribe the taking of property" (*Williamson County*, slip op. 20); it merely prescribes the availability of just compensation as a condition that must be satisfied in order to sustain the taking. Contrary to the logic of appellant's argument, these conditions ***16** do not also specify the appropriate relief in the event that the conditions are not performed. Indictment is not a *remedy* for the government's holding of a person to answer for an infamous crime, any more than due process is a *remedy* for a deprivation of life, liberty, or property. It is a reasonable parallel construction of the Amendment to conclude that the availability of just compensation, while an essential condition of a constitutional taking, was not prescribed by the Fifth Amendment as the judicial remedy for an unconstitutional one. [9]

2. Other Indicia of the Drafters' Intent

Three important indicia of original intent point to the conclusion that there is no self-effectuating damage remedy available under the Fifth Amendment. These indicia are particularly compelling when it is recalled that the Fifth Amendment is directly applicable only against the United States and that appellant's argument therefore implicitly asserts that the Fifth Amendment mandates a monetary remedy against the United States.

a. The most obvious obstacle to such an interpretation of the Fifth Amendment is the sovereign immunity of the United States to suit, absent a waiver by Congress of that immunity. [10] That immunity was ***17** well understood by the Framers of the Constitution. As Alexander Hamilton explained with respect to the sovereign immunity of the States:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

The Federalist No. 81, at 487 (C. Rossiter ed. 1961) (emphasis in original). Hamilton stressed that the Constitution did not work a surrender of the immunity of the States (*ibid.*), and the Constitution likewise did not withhold this essential "attribute[] of sovereignty" from the Government of the United States. See, *e.g.*, *California v. Arizona*, 440 U.S. 59, 61-62, 65 (1979); *Kansas v. United States*, 204 U.S. 331, 342 (1907). Nor is there any indication that this immunity was dispensed with by the Fifth Amendment, which was proposed to the States for ratification only two years after the Constitution was proposed. This silence is fatal, because only an explicit waiver of sovereign immunity will suffice. See *Library of Congress v. Shaw*, No. 85-54 (July 1, 1986), slip op. 6. [11] In fact, this Court has made clear ***18** that Congress may bar suits for monetary relief against the United States even where it is alleged that a statute results in a taking of property without just compensation (*Lynch v. United States*, 292 U.S. 571, 579, 580-582 (1934)), because "[t]he rule that the United States may not be sued without its consent is

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