No. 18-

IN THE

Supreme Court of the United States

ALEXANDER ALIMANESTIANU, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

RICHARD N. CHASSIN
Counsel of Record
JESSE T. CONAN
BECKER, GLYNN, MUFFLY, CHASSIN & HOSINSKI LLP
299 Park Avenue
New York, NY 10171
(212) 888-3033
rchassin@beckerglynn.com

Counsel for Petitioners

282374

QUESTION PRESENTED

Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015), holds that the Fifth Amendment imposes a categorical duty upon the government to pay just compensation when it uses its power of eminent domain to take title to "private property." The government took possession of petitioners' private property—a judgment against Libya and the underlying entitlement to monetary relief—and then "settled" the claims and judgment as part of an agreement with Libya. The Federal Circuit declined to follow Horne's categorical rule and, in denying just compensation, analyzed the taking as a regulatory impairment under Penn Central Transp. Co. v. City of N.Y., 438 U.S. 104 (1978).

The Question presented is:

Can the United States seize, use, and compromise the claims and judgments of its citizens against a foreign state—a practice in international law known as "espousal"—while avoiding the Fifth Amendment's "categorical" requirement of just compensation?

PARTIES TO THE PROCEEDING

Petitioners are Alexander Alimanestianu, Ioana Alimanestianu, individually and as executor of the Estate of Mihai Alimanestianu, Irina Alimanestianu, Joanna Alimanestianu, Kathy Alimanestianu, executor of the Estate of Serban Alimanestianu, Nicholas Alimanestianu, Pauline Alimanestianu, executor of the Estate of Constantin Alimanestianu, Simone Desiderio, executor of the Estate of Calin Alimanestianu (together, "Alimanestianu"). Petitioners were the plaintiffs-appellants below.[1]

Respondent is the United States of America. Respondent was defendant-appellee below.

1. Ioana Alimanestianu recently passed away. Alexander Alimanestianu's appointment as executor of her estate is pending, as is his appointment to replace Ioana Alimanestianu as the executor of Mihai Alimanestianu's estate.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

STATUTES

Page

CONSTITUTIONAL PROVISIONS

INTERNATIONAL AGREEMENTS

LEGISLATIVE MATERIALS

Page

OTHER AUTHORITIES

Page

PETITION FOR WRIT OF CERTIORARI

Petitioners (defined above as "Alimanestianu"), respectfully petition this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the Federal Circuit (Pet. App. 1a-19a) is published at 888 F.3d 1374 (Fed. Cir. 2018). The opinion and order of the Court of Federal Claims granting summary judgment to the United States (Pet. App. 20a-42a) is published at 130 Fed. Cl. 137 (2016). The opinion and order of the Court of Federal Claims denying the government's motion to dismiss (Pet. App. 43a-61a) is published at 124 Fed. Cl. 126 (2015).

JURISDICTION

The Federal Circuit entered judgment on May 7, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). On July 31, 2018, Chief Justice Roberts extended the time to file this petition to September 5, 2018. The United States Court of Federal Claims had subject matter jurisdiction under the Tucker Act, 28 U.S.C. § 1491.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use without just compensation.

U.S. CONST. amend. V.

The Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya, Libya-U.S., Aug. 14, 2008, T.I.A.S. No. 08-814 (the "Claims Settlement Agreement"); Executive Order No. 13477, 3 C.F.R. 13477 (2009); Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 2999 (2008); and Referral Letter from the State Department to the Foreign Claims Settlement Commission of the United States (Jan. 15, 2009) are reproduced at Pet. App. 62a-88a.

INTRODUCTION

This case presents fundamental questions about the property rights of American citizens and the Constitutional limitation on the power of the United States to invade those rights in its foreign affairs. Specifically, the case asks whether the United States may seize, use, and compromise the claims and judgments of its citizens against a foreign state—a practice in international law known as "espousal"—while avoiding the Fifth Amendment's categorical requirement of just compensation.

Horne v. Department of Agriculture, 135 S. Ct. 2419 (2015), states the categorical rule applicable to all property appropriations under the Fifth Amendment: "the Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Id.* at 2426. The Court continues, "the Takings Clause . . . protects 'private property' without any distinction between different types." *Id. Horne* imposes a categorical duty to pay just compensation when property

is involuntarily transferred to the United States. This is a simple rule based on the text and original understanding of the Takings Clause, the equitable considerations underlying the principle of just compensation, and more than two centuries of the Court's jurisprudence.

Here, Alimanestianu's claims and money judgment against Libya were involuntarily transferred to the United States. The government then traded away Alimanestianu's valuable property when it entered a "Claims Settlement Agreement" with Libya: part of the process of reconciliation between the two nations. The property was gone. The claims and judgment had been acquired and "settled" by the United States and, as President Bush explained in Executive Order 13,477, could not be asserted "in any forum, domestic or foreign." Pet. App. 68a.

The Court has never considered a takings claim arising out of such an espousal. The Federal Circuit, however, has considered the issue on several occasions over the past few decades. *See Belk v. United States*, 858 F.2d 706 (Fed. Cir. 1988); *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997); and now *Alimanestianu*, Pet. App. 1a-19a. Each time, the Federal Circuit employed a regulatory takings analysis to deny the claim for just compensation, despite the underlying transfer. *See Abrahim-Youri*, 139 F.3d at 1466-68 (contract claims); *Belk*, 858 F.2d at 709-10 (tort claims); *Alimanestianu*, Pet. App. 1a-19a (same).

The Federal Circuit's legal regime is no longer tenable. *Horne*"s categorical rule compels the payment of just compensation when claims and judgments against

foreign states are espoused. To avoid *Horne*, the Federal Circuit first held that the espousal of a claim does not amount to "a physical invasion of property." Pet. App. 15a. That conclusion is impossible to explain given the involuntary property transfer to the United States. The Federal Circuit next distinguished *Horne* by doing what *Horne* said it may not. The court broke the categorical rule by distinguishing between different property types. *Horne*, explained the Federal Circuit, concerned "entirely domestic, tangible property" and not property "entangled with international considerations." *Id.* The Federal Circuit went on to hold that such property may be appropriated, used, and traded by the United States subject only to the balancing tests applicable to regulatory takings. The holding finds no support in the text or original understanding of the Constitution, nor can justification for such disparate treatment be found in the precedents of this Court.

These two errors eliminate the Fifth Amendment's core property protection for any cause of action or judgment against a foreign state. The government's power of eminent domain is essentially unburdened by the Takings Clause in this vital area. The government may seize claims against a foreign state worth millions, without compensation, and retain the benefits for the public at large. The issue is unlikely to arise in other circuits as the Court of Federal Claims has exclusive jurisdiction over claims against the United States in excess of $10,000. Absent review by the Court, the Federal Circuit sets the law of the land. And the law currently affords little protection against the government's seizure of the claims of Americans against foreign states.

The Court should not allow the Federal Circuit's nationwide rule to remain the law without review. In light of the Panel's errors and the disturbing implications for both individual property rights and unchecked government power, this Court should grant the petition for certiorari.

STATEMENT OF THE CASE

A. Factual Background

Mihai Alimanestianu ("Mihai"), a U.S. citizen, was killed by an act of state-sponsored terror—Libya's 1989 bombing of UTA Flight 772 in southeastern Niger. Pet. App. 2a. The petitioners are all U.S. citizens and close relatives of his (spouse, siblings, and children). Pet App. 3a. In 2002, Alimanestianu, along with the families of other American victims of that terrorist act, filed an action against Libya and certain Libyan officers (collectively, the "Libyan Defendants") in the United States District Court for the District of Columbia—*Pugh v. The Socialist People's Libyan Arab Jamahirya*, 1:02-cv-02026-BJR (D.D.C. 2002) (the "Pugh Action"). Pet. App. 3a.

The complaint asserted state common law claims against the Libyan Defendants. *Pugh Action*, 530 F. Supp. 2d 216, 267-68 (D.D.C. 2008). Libya appeared and defended itself. The district court granted summary judgment to the plaintiffs and entered final judgment on August 8, 2008, awarding $6.9 billion in total damages. Pet App. 3a. Alimanestianu was awarded, in the aggregate, $1.297 billion (the "Judgment"). Each of the petitioners received a substantial multimillion dollar award. *Id.*

The Taking and the Claims Settlement Agreement

The Libyan Defendants appealed. Shortly thereafter, the United States took and compromised the Judgment. Specifically, on August 14, 2008, just six days after Judgment, the United States entered a "Claims Settlement Agreement" with Libya. Pet. App. 4a.

The Claims Settlement Agreement states that it was entered by the United States and Libya "to further the process of normalization of relations on the basis of equality and mutual benefit." Pet. App. 62a. Article I explains that the agreement will result in "a final settlement of the Parties' claims, and those of their nationals," which included Alimanestianu's Judgment. *Id.*

Article III and an attached Annex detail the bargain. The claims identified in Article I were settled. Libya agreed to make a $1.5 billion payment to a fund controlled by the United States. Libya released the United States from valuable claims held by Libyan citizens against the United States. And Libya and the United States agreed to provide each other "sovereign, diplomatic and official immunity." Pet. App. 64a. Consequently, Alimanestianu's property was espoused (taken) and settled by the United States when it entered the Claims Settlement Agreement.

The Libyan Claims Resolution Act (the "LCRA"), dated August 4, 2008, provides the statutory backdrop for the agreement. The LCRA provided that Libya's sovereign immunity would be restored if (1) a "claims agreement" was entered with Libya and (2) the Secretary of State submitted a certification to Congress that the

United States has received sufficient funds to compensate American victims of Libya's state-sponsored terror. Pet. App. 74a-77a. Libya's sovereign immunity was formally restored on or about October 31, 2008, when Secretary of State Condoleezza Rice submitted the certification to Congress—more than two months after the Claims Settlement Agreement was entered and the government had appropriated Alimanestianu's property. Pet. App. 5a.

The United States "Espousal" Admission

The United States intervened in Libya's appeal of the Pugh Action. In its motion to intervene, the United States explained that title to Alimanestianu's claims had passed to the government when it used its power of eminent domain to "espouse" them. Specifically, the United States told the court of appeals that it had "espous[ed] the claims against Libya," "made the plaintiffs' claims its own," and was "now the real party in interest." U.S. Mot. To Intervene, Vacate J., and Dismiss Suit with Prejudice ("U.S. Mot. to Intervene") [ECF No. 162-1] at 2, *Pugh v. Socialist People's Libyan Arab Jamahiriya* (No. 08-5387) (D.C. Cir. Jan. 9, 2009).[1]

1. The full passage reads:

> Intervention is warranted here because the United States has espoused the terrorism-related claims of U.S. nationals against Libya, including plaintiffs' claims. The United States' espousal is pursuant to a claims settlement agreement with the Libyan government, reached as part of a restoration of diplomatic relations with Libya, and involving payment by Libya of a large sum for the benefit of U.S. nationals. In espousing the claims against Libya, the United States has made the plaintiffs' claims its

Public Good and Just Compensation

The Claims Settlement Agreement explains that it was entered for a public benefit: "to further the process of normalization of relations on the basis of equality and mutual benefit." Pet. App. 62a. The United States gained that public good, however, by using the claims held by certain victims of Libyan terror as bargaining chips.

The State Department set the requirements for who was entitled to compensation from the fund and how much. Pet. App. 78a-88a (Letter referring administration of fund to the Foreign Claims Settlement Commission of the United States). Four of the petitioners, Ioana Alimanestianu and the Estates of Calin Alimanestianu, Serban Alimanestianu, and Constantin Alimanestianu were unable to obtain any compensation because they did not meet the jurisdictional thresholds set by the State Department.[2] The State Department recommended compensation of $200,000 to the living close relatives of terrorist victims like Mihai. Pet. App. Pet. App. 80a-81a. That is what Mihai's children, petitioners Joanna Alimanestianu, Irina Alimanestianu, Nicholas Alimanestianu, and Alexander Alimanestianu

---

> own. Because the United States is now the real party in interest, the Court should permit it to intervene in this suit as plaintiff-appellee.

U.S. Mot. to Intervene at 2.

2. Mihai's three siblings had passed away and the claimants had to be alive to be eligible for compensation. Pet. App. 7a; 80a-81a. Mihai's wife Ioana was precluded from seeking compensation because she was the beneficiary of Mihai's estate. *Id.*

received. And the State Department paid $10 million as compensation to Mihai's estate. Pet. App. 6a-7a.

For all petitioners except Mihai's estate, the compensation paid by the United States amounted to, at most, pennies on the dollar.

B. *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015)

The Court held in *Horne* that when the government seizes private property, the Fifth Amendment imposes a categorical duty to pay just compensation. *Id.* at 2425-2433. *Horne* concerned a Department of Agriculture rule that required raisin growers to reserve a certain percentage of their crop for the government. As a consequence of the rule, title to the reserve raisins passed to the government. The transfer was the key. *Id.* at 2426-2430. The Court held that when ownership passes to the government, the Fifth Amendment imposes a categorical duty upon the government to pay just compensation. *Id.* at 2425-2433. In such cases, the factors considered under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123-128 (1978)(ad hoc balancing where impairment is partial) or *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-1030 (1992) (truncated inquiry where impairment is total), used to determine whether a regulation or impairment goes too far, are not relevant. *Horne*, at 2427.

Although Horne involved a physical object—raisins—the Court confirmed that its ruling applied to intangible property, pointing to patent rights as the quintessential example of a property interest meriting the full protection

of the Takings Clause in the face of a governmental appropriation. *Id.*

C. Proceedings Below

The Court of Federal Claims Decisions

The trial court issued two decisions. In denying the government's motion to dismiss, the trial court held that Alimanestianu's claims and Judgment were cognizable property interests under the Takings Clause. Pet App. 50a-56a. In its second decision, the trial court awarded summary judgment to the United States. *Id.* at 20a-42a. The trial court declined to apply *Horne*'s categorical rule. Instead, the trial court embarked on a regulatory takings analysis, relying on *Penn Central,* 438 U.S. 104 and *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997), a Federal Circuit decision concerning espousal that predated *Horne* by nearly 20 years.

Judge Clevenger, who also authored the opinion below, explained in his *Abrahim-Youri* concurrence why, despite the appropriation, the categorical rules did not apply to espousal:

> This case is significant in that it affords us the opportunity to recognize that the familiar per se taking and regulatory taking categories are not rigid, and that certain "per se" takings (i.e., those which involve a property owner being ousted from his property by government action-such as in this case) do not automatically result under the Fifth Amendment in compensation to the ousted property owner.

Id., 139 F.3d at 1468. The Federal Circuit's formulation is irreconcilable with *Horne*.

The Federal Circuit Decision

The Federal Circuit declined to follow *Horne*. Instead, the Federal Circuit maintained its pre-*Horne* regime and analyzed the taking as a regulatory impairment under *Penn Central*. Application of the *Penn Central* balancing factors led to the holding that "appellants have failed to show any evidence to demonstrate that they suffered a compensable taking." Pet. App. 19a (Clevenger, J).[3]

To avoid *Horne*, the Federal Circuit first pointed to two Federal Circuit decisions that focus on the restoration of sovereign immunity: "we have consistently held that prohibiting or espousing a litigant's claims by restoring a foreign sovereign's legal immunity is not a physical invasion of property." *Id.* (citing *Aviation & Gen. Ins. Co. v. United States*, 882 F.3d 1088, 1097 (Fed. Cir. 2018), and *Belk v. United States*, 858 F.2d 706 (Fed. Cir. 1988)). The Federal Circuit's characterization of the invasion is difficult to explain given the underlying transfer, and the Federal Circuit provides none. The Federal Circuit also

3. The Federal Circuit assumed but did not decide that Alimanestianu's claims and Judgment are cognizable property interests under the Takings Clause. Pet. App. 10a. The Federal Circuit has held in the past that claims are cognizable property interests. *See, e.g., Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478 (Fed. Cir. 1994); *Abrahim-Youri*, 139 F.3d 1462. There appears to be a circuit split as other circuits tend to hold, albeit in very different contexts, that claims are not cognizable property interests under the Takings Clause. *See, e.g., Ileto v. Glock*, 565 F.3d 1126 (9th Cir. 2009).

distinguished *Horne* by doing what *Horne* said it may not: it made a distinction between different property types. *Horne*, explained the Federal Circuit, concerned "entirely domestic, tangible property" and not property "entangled with international considerations." *Id.*

REASONS FOR GRANTING WRIT

The Court has never considered a takings claim arising out of an espousal. The Federal Circuit, however, has considered the issue on several occasions. *See, e.g., Belk*, 858 F.2d 706; *Abrahim-Youri*, 139 F.3d 1462; and now *Alimanestianu,* Pet. App. 1a-19a. Each time, the Federal Circuit employed a regulatory takings analysis to relieve the government of its obligation of just compensation, despite the underlying property transfer. *See Abrahim-Youri*, 139 F.3d at 1466-68 (contract claims); *Belk*, 858 F.2d at 709-10 (tort claims); *Alimanestianu,* Pet. App. 1a-19a (same).

The issue is unlikely to arise in other circuits as the Court of Federal Claims has exclusive jurisdiction over claims against the United States in excess of $10,000. And other federal courts routinely refer or direct adjudication of espousal related takings to the Court of Federal Claims. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981) (remedy for litigant seeking just compensation for possible espousal lies in the Court of Claims under the Tucker Act); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 815 (1st Cir. 1981) (remedy for litigant seeking just compensation arising out of espousal "will lie in the Court of claims"); *In re Aircrash In Bali, Indonesia on Apr. 22, 1974*, 684 F.2d 1301, 1312 (9th Cir. 1982) (whether impairment of claims under the

Warsaw Convention was a taking "is properly one for the Court of Claims").

Absent review by this Court, the Federal Circuit sets the law of the land. And as the law now stands, the Fifth Amendment affords little protection against the government's seizure and use of claims held by Americans against foreign states. After *Horne*, the Federal Circuit's legal regime is not tenable.

I. The Federal Circuit Has Disregarded the Categorical Rule of Just Compensation in Cases of Espousal

Horne's categorical rule applies to all appropriations, without exception—yet the Federal Circuit's nationwide rule exempts espousal from the categorical regime, thus stripping away the Constitution's core property protection for an entire class of property.

A. The United States Appropriates Private Property When It Espouses a Claim or Judgment

The first reason the Federal Circuit provides for avoiding *Horne*'s categorical rule is that the property deprivation did not rise to the level of a physical invasion: "we have consistently held that prohibiting or espousing a litigant's claims by restoring a foreign sovereign's legal immunity is not a physical invasion of property." Pet. App. 15a (citations omitted). The Federal Circuit's conflation of espousal with the statutory restoration of Libya's sovereign immunity trivializes and misconstrues the nature of the property invasion.

Espousal is a term of art in international law. It refers to the sovereign's seizure of a claim held by its citizens against a foreign state. *See, e.g., Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984) (Scalia, J.) (explaining background legal principles undergirding doctrine of espousal); *Antolok v. United States*, 873 F.2d 369, 375 (D.C. Cir. 1989) ("In international law the doctrine of 'espousal' describes the mechanism whereby one government adopts or 'espouses' and settles the claim of its nationals"); *Marik v. Powell*, 15 F. App'x 517, 518 (9th Cir. 2001) ("in espousing a claim a sovereign takes the claim on as its own"); Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. Davis J. Int'l L. & Pol'y 157, 160 (2005) ("Espousal is a mechanism whereby an injured national's state assumes the national's claim as its own"); Major Julie Long, *What Remedy for Abused Iraqi Detainees?*, 187 Mil. L. Rev. 43, 89 (2006) ("espousal is a mechanism through which one government adopts, or espouses, and then settles the claims of its nationals"). The sovereign may only espouse the claims of its nationals; "it has no authority to espouse and extinguish the claims of *another state's* nationals." *Simon v. Republic of Hungary*, 812 F.3d 127, 138 (D.C. Cir. 2016).

When a claim against a foreign state is espoused, the former holder of that claim no longer has any cause of action against the foreign state. *Asociacion de Reclamantes*, 735 F.2d at 1523. The claim is transferred to the sovereign, who "has wide-ranging discretion in disposing of it. It may compromise it, seek to enforce it, or waive it entirely." *Id.*

In contrast, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, is a jurisdictional

statute. *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393 (2015) (FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country" (citations omitted)). The restoration of a country's sovereign immunity merely eliminates the power of the judiciary to adjudicate a dispute. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016) ("it remains Congress' prerogative to alter a foreign state's immunity and to render the alteration dispositive of judicial proceedings in progress"). Amending FSIA confers or withdraws jurisdiction; it does not alter substantive rights. Amending FSIA does not cause property to be transferred to the United States. *See Republic of Austria v. Altmann*, 541 U.S. 677, 703 (2004) (Scalia, J., concurring) (FSIA, "and the regime that it replaced, do not by their own force create or modify substantive rights").

Here, Libya's sovereign immunity was ultimately restored, but only after the United States seized and settled the claims (and judgments) of its citizens against Libya. The United States conceded the nature of the property invasion in 2009 when it moved to intervene in Alimanestianu's lawsuit against Libya, explaining that when it "espoused" the claims of the plaintiffs, it "divested" Alimanestianu of their claims, "made them its own," and "is now the real party in interest in this suit." U.S. Mot. to Intervene at 2, *Pugh v. Socialist People's Libyan Arab Jamahiriya* (No. 08-5387) (D.C. Cir. Jan. 9, 2009). And in Executive Order 13,477, dated October 31, 2008, President Bush states that the claims were "settled" and that as a result "no United States national may assert or maintain any claim . . . in any forum, domestic or foreign." Pet. App. 68a.[4]

4. The key distinction between this case and *Aviation & Gen. Ins. Co. v. United States,* 882 F.3d 1088 (Fed. Cir. 2018), *petition*

The nature of the intrusion is beyond doubt. Ownership was transferred to the United States. From a Fifth Amendment perspective, there is no material difference between the government's seizure of plaintiffs' claims against Libya and the seizure of land or a car. As this Court held in *Horne*:

> The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.
>
> The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." It protects 'private

---

for cert. filed, No. 17-1673 (U.S. Jun 13, 2018), another case arising out of the same general set of facts, is that the United States did not acquire and compromise the claims of the foreign Aviation petitioners. The United States could not exercise its power of eminent domain to seize a foreign national's property. *See, e.g., Simon v. Republic of Hungary*, 812 F.3d 127, 138 (D.C. Cir. 2016). The taking at issue in Aviation is a true regulatory taking. The Aviation plaintiffs, unlike the Alimanestianu Plaintiffs, lost their forum when Libya's sovereign immunity was restored. The Aviation petitioners complain about the termination of their lawsuits because there was no transfer. They are still free to assert their claims in other jurisdictions. *See Republic of Austria v. Altmann*, 541 U.S. 677, 703 (2004) (Scalia, J., concurring) ("Federal sovereign-immunity law limits the jurisdiction of federal and state courts to entertain those claims...but not respondent's right to seek redress elsewhere") (citation omitted). And Executive Order 13,477 provides: "Neither the dismissal of the lawsuit, nor anything in this order, shall affect the ability of any foreign national to pursue other available remedies for claims coming within the terms of Article I in foreign courts or through the efforts of foreign governments." Pet. App. 70a.

> property' without any distinction between different types.

135 S. Ct. at 2426 (citations omitted). Despite *Horne*'s categorical rule, the Federal Circuit refused to abrogate its pre-*Horne* jurisprudence and, without any substantive analysis, declared "we have consistently held that" espousal "is not a physical invasion." Pet. App. 15a.

In light of the transfer, however, the Federal Circuit's characterization of espousal as something less than a physical invasion is wrong. Because private property is transferred to the government, espousal affects a "classic taking." *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010) ("the classic taking is a transfer of property to the State or to another private party by eminent domain"). And just compensation is categorically required. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) ("[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property").

The Federal Circuit's nationwide rule can be justified only by pretending that when the United States espouses the claims of its nationals, it does not use its power of eminent domain to take title to their property; but that is precisely what it does.

B. There Is No Foreign Policy Exception to the Categorical Rule

Even though *Horne* held that all appropriations are subject to the categorical requirement of just

compensation, the Federal Circuit next distinguished *Horne* by creating a foreign policy exception. The panel explained that *Horne* concerned "entirely domestic, tangible property," not "events that involved the Government's plenary authority over foreign policy, or property entangled with international considerations." Pet App. 15a. The Federal Circuit went on to hold that the categorical per se rules, stated so clearly in *Horne*, would give way to *Penn Central* regulatory balancing if the appropriation concerned such property, as it does in cases of espousal. Pet. App. 15a-16a.

Unless reviewed by this Court, the Fifth Amendment's core protection against the uncompensated taking of private property is unavailable in the Court of Claims for property sufficiently entangled with the foreign affairs of the United States. The ramifications for the nationwide rule extend well beyond espousal, as it would except all property—real, personal, tangible, and intangible—sufficiently burdened with foreign policy implications from the categorical rules and substitute ad hoc *Penn Central* balancing.

1. The Takings Clause Was Originally Understood to Require Just Compensation in Connection with Appropriations Arising out of Foreign Affairs

The Federal Circuit's disparate treatment of property entangled with foreign policy considerations cannot be reconciled with the original understanding of the Takings Clause. The clause itself was most likely adopted as a response to the United States army's appropriation of personal property during the Revolutionary War, a

practice referred to as impressment. *See Horne*, 135 S. Ct. at 2426 ("the Takings Clause was probably adopted in response to the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation") (internal citations and quotations omitted); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 835 (1995) (explaining that the clause was most likely "ratified in order to insure compensation when there was military impressment of personal property") (citing St. George Tucker, author of the first treatise on the U.S. Constitution). One would be hard pressed to imagine acts more entangled with foreign policy implications than property seizures made in aid of our war for independence.

The case of *Jones v. Walker*, 13 F. Cas. 1059, 2 Paine 688 (C.C.D. Va. 1793) (Jay, Circuit J.), decided in 1793, illuminates the framing generation's view of the government's power of eminent domain in the context of its foreign affairs. The opinion is authored by Chief Justice John Jay, who was sitting on circuit.[5] Jay writes:

> No principle is better established, nor more generally acknowledged, than that the right of eminent domain is inseparably attached to national empire and sovereignty, and that it accompanies the right of making peace . . . . [t]he necessity of making a peace authorizes the

5. *See, e.g.*, William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1799 n. 355 (2013) (identifying Chief Justice John Jay as the author of the circuit opinion).

> sovereign to dispose of things even belonging to private persons, and the eminent domain gives him this right. But these cessions being made for the common advantage, the state is to indemnify the citizens who are sufferers by them.

Id. at 1066-67. Though the case was decided under the Articles of Confederation, the decision was grounded in a contemporaneous understanding of eminent domain and the law of nations. *See, e.g.,* Emer de Vattel, THE LAW OF NATIONS, Book IV, Ch. 2, § 12 at 434 (J. Chitty et al. transl. and ed. 1863) ("the necessity of making peace authorises the sovereign to dispose of the property of individuals; and the *eminent domain* gives him a right to do it . . . [b]ut as it is for the public advantage that he thus disposes of them, the state is bound to indemnify the citizens who are sufferers by the transaction").

Historically, foreign policy considerations do not lessen the protections of a citizen against property deprivations. To the contrary, the just compensation clause was specifically adopted to protect against property deprivations that occurred in the context of the nation's foreign affairs. *Horne* reviewed this same history and found that "nothing...suggests that personal property was any less protected against physical appropriation than real property." 135 S. Ct. at 2427. That statement could just as easily apply to property burdened with serious foreign policy entanglements. Nothing in the text of the Constitution or the original understanding hints at the disparate treatment adopted by the Federal Circuit.

2. The Takings Clause Was Originally Understood to Require Just Compensation upon the Espousal of a Claim

In the early 1800s, the country was confronted with the consequences of a putative taking concerning a pivotal moment in the young Republic. In 1801, the United States signed a treaty with France in which it appropriated and traded away the claims of its citizens. The claims are commonly referred to as the French spoliation claims.

The claims had their origins in the assistance France provided to the United States during the Revolutionary War. Without France's help, the United States may not have survived its war for independence. That help came at a steep price. The United States agreed to a permanent alliance with France (the Treaty of Alliance) and granted France a set of exclusive commercial privileges (the Treaty of Amity and Commerce Between the United States and France) (the "French Treaties").[6] The alliance and privileges were put to an immediate test in the 1790s as war consumed Europe.

The United States attempted to remain neutral. But strict neutrality became untenable as the war dragged on and, in 1795, the United States effectively sided with Great Britain against France by ratifying the Jay Treaty with Great Britain. France viewed the Jay Treaty as a breach of the French Treaties and a state of "quasi-war"

6. *See* Treaty of Alliance Between the United States of America and His Most Christian Majesty, Fr.-U.S., Feb 6, 1778, 8 Stat. 6; Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, Fr.-U.S., Feb. 6, 1778, 8 Stat. 12.

broke out between France and the United States. Fought principally on the high-seas, French privateers seized and confiscated American merchant vessels along with their cargo.

In negotiations to end the quasi-war, France took the position that the United States broke the French Treaties and demanded their reaffirmation. The demand was unpalatable to the United States as it would have brought the country into direct conflict with Great Britain. The United States, for its part, demanded that France pay damages to the United States merchants for losses stemming from the illegal seizure of American merchant vessels. The parties eventually agreed that the United States would renounce the claims of its citizens for damages against France and France would release the United States from its obligations under the French Treaties.[7] That bargain, however, left the aggrieved U.S. merchants without recourse against France; their only recourse was against the United States for just compensation. *See generally Gray v. United States,* 21 Ct. Cl. 340, 346-388 (1886) (setting forth origins and resolution of quasi-war between United States and France); Report of Committee of Foreign Relations, Rep. Com. No. 1, 40th Cong., 1st Sess. at 5-26 (Mar. 12, 1867) ("Sumner Report") (same).

At the time, there was no judicial forum to adjudicate the merits of an uncompensated taking. The payment had to be sanctioned by Congress. *See, e.g., Mitchell v. Harmony*, 54 U.S. 115, 126 (1851) ("The duty of the

7. *See* Convention Between the French Republic and the United States of America, Fr.-U.S., Sep. 30, 1800, 8 Stat. 179.

government to compensate for property taken and applied to the public service is well established; but compensation cannot be given without legislative sanction."). The United States did not waive its sovereign immunity in connection with the Takings Clause until passage of the Tucker Act. *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("No one would suggest that, if Congress had not passed the Tucker Act, 28 U.S.C. § 1491(a)(1), the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation.").[8] The aggrieved merchants had one recourse—petition Congress for just compensation. And within months of the appropriation, Congress was inundated with petitions. Sumner Report at 3.

Early Congressional expositions provide strong contemporaneous evidence as to the original understanding of the Takings Clause. *See, e.g., Printz v. United States*, 521 U.S. 898, 905 (1997) ("early congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning") (citations and quotations omitted); *Utah v. Evans*, 536 U.S. 452, 503 (2002) (Thomas, J., dissenting) ("We have long relied on contemporaneous constructions of the Constitution when interpreting its

8. It was not until 1855, with the passage of the Court of Claims Act, that suits seeking the payment of just compensation from the United States began to be submitted to the judiciary. And it was not until the Tucker Act's passage, in 1877, that the courtroom doors truly opened to the adjudication of constitutional claims like those seeking payment of just compensation. *See* Robert Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 VAND. L. REV. 57, 137, n.342 (1999).

provisions."). And the first Congressional Report on the French Spoliations and the requirement of compensation was issued in 1802. Sumner Report at 43.

Over the next century, more than forty Congressional reports were issued, nearly all finding that the Fifth Amendment and the equitable principles embodied by the just compensation clause compelled the payment of just compensation or an indemnity.[9] *Gray*, 21 Ct. Cl. at 407. At the time, the government's obligation under the just compensation clause was often expressed as one of indemnity.[10] For instance, James Madison, in his seminal essay on property, published on March 29, 1792, characterized the property protection in the Fifth Amendment as "none shall be taken directly even for public use without indemnification to the owner." James Madison, *Property*, NATIONAL GAZETTE, Mar. 29, 1792.

---

9. The principle of just compensation is often expressed as one arising out of equity. *See, e.g., United States v. Fuller*, 409 U.S. 488, 490 (1973) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law")(citation omitted).

10. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 568 (1837) (explaining that agents of the government "reverse[d] the decision, and award[ed] an indemnity for the injury done. The value of the charter was estimated, and a just compensation was made."); *Kelo v. City of New London, Conn.*, 545 U.S. 469, 510 (2005) (Thomas, J., dissenting) ("only 'by giving [the landowner] full indemnification' could the government take property, and even then '[t]he public [was] now considered as an individual, treating with an individual for an exchange.'") (quoting 1 Blackstone 135).

The reports not only illustrate the mechanism through which citizens obtained just compensation in the early days of the Republic, the analysis employed by Congress illuminates the scope of the Takings Clause, as it was originally understood. On May 20, 1826, Secretary of State Henry Clay turned over a trove of original documents concerning the French Spoliations to Congress and outlined the question posed to the Senate:

> The fifth article of the amendments to the constitution provides, 'nor shall private property be taken for public use without just compensation.' If the indemnities to which citizens of the United States were entitled for French spoliations, prior to the 30th September, 1800, have been appropriated to absolve the United States from the fulfilment of an obligation which they had contracted, or from the payment of indemnities which they were bound to make to France, the Senate is most competent to determine how far such an appropriation is a public use of private property, within the spirit of the constitution, and whether equitable considerations do not require some compensation to be made to the claimants.

Message from the President of the United States ("Spoliation Papers"), *S. Doc. No. 102*, 19th Cong., 1st Sess. at 7 (May 20, 1826).

Chief Justice John Marshall stated that "having been connected with the events of that period, and conversant with the circumstances under which the claims arose, he

[Marshall] was, from his own knowledge, satisfied that there was the strongest obligation on the government to compensate the suffers by the French spoliation." *See App'x to Cong. Globe,* 29th Cong., 1st Sess. 864 (Apr. 23-24, 1846); *Gray*, 21 Ct. Cl. at 390. Secretary of State Pickering, who served in that role for both George Washington and John Adams, stated that because the United States bartered the "just claims of our merchants . . . the merchants have an equitable claim for indemnity from the United States" and "as our government applied the merchants' property to buy off those old treaties, the sums so applied should be reimbursed." *Gray*, 21 Ct. Cl. at 389. James Madison agreed that the claims appropriated by the United States were released "for a valuable consideration," *i.e.,* France's "release of the United States from certain claims on them" against the United States. *See* Spoliation Papers at 795; *Gray*, 21 Ct. Cl. at 388.

Henry Clay, who would go on to become Secretary of State for President John Quincy Adams, explained in 1821, in connection with the spoliation of related claims concerning Spain, that "the rule of equity, furnished by our Constitution, and which provides that private property shall not be taken for public purposes without just compensation, applies and entitles the injured citizen to consider his own country a substitute for the foreign power." *See* Committee on Foreign Affairs Report on Petition of Margaret Meade, *S. Rpt. 236*, 24th Cong., 1st Sess. at 33 (Mar. 11, 1836); *Gray*, 21 Ct. Cl. at 390. Senator Edward Livingston writes in his select committee report of 1830: "can there be a doubt, independent of the Constitutional provision, that the sufferers are entitled to indemnity? Under that provision is not this right

converted into one that we are under the most solemn obligation to satisfy?" Reports of Committees Made in the Senate and House of Representatives on the Claims of Individuals for Indemnity for Spoliations by France, *S. Doc. No. 51*, 22nd Cong., 1st Sess. (Jan. 31, 1832); *Gray*, 21 Ct. Cl. at 391. Senator Charles Sumner, writing in a foreign relations committee report of April 4, 1864, summarizes what had long been the consensus view on the issue:

> The Constitution also plainly requires what has seemed so obvious to sense, reason, and duty, when it declares that 'private property shall not be taken for public use without just compensation.' But here 'private property,' to a vast amount, was taken for a 'public use' of the highest character, involving the peace and welfare of the whole country; and down to this day the sufferers are petitioning Congress for that 'just compensation' which is solemnly promised by the Constitution.

Sumner Report at 24.[11]

In 1885, Congress turned to the judiciary for an advisory opinion on whether the aggrieved merchants were entitled to just compensation under the Fifth Amendment.

---

11. Congress twice enacted statutes requiring the payment of just compensation to the aggrieved merchants only to see those acts fall by Presidential veto. *See Gray*, 21 Ct. Cl. at 407. Moreover, while the obligation to indemnify the aggrieved merchants was long-acknowledged, the ability of the United States to pay such a large sum of money was often lacking. *See* Sumner Report at 3.

The leading case was *Gray v. United States*, 21 Ct. Cl. 390 (1886). *Gray* held that the settlement of the claims of U.S. nationals against France was unquestionably a taking that required the payment of just compensation:

> [T]he citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him. A right often exists where there is no remedy, and a most frequent illustration of this is found in the relation of the subject to his sovereign, the citizen to his Government.
>
> It seems to us that this 'bargain' (again using Madison's word), by which the present peace and quiet of the United States, as well as their future prosperity and greatness were largely secured, and which was brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation.

Id. at 392-93. Gray concludes by noting that its holding was "supported by resolutions passed in each of the thirteen original States, by twenty-four reports made to the Senate by its committees, [and] by over twenty similar reports made to the House of Representatives . . . " *Id.* at 407.

3. The Court Has Not Strayed from that Original Understanding

Gray's central holding is closely tethered to the original understanding of the Takings Clause. Nothing has changed in the last 135 years to justify the Federal Circuit's deviation from *Gray*. The regulatory takings paradigm developed as an expansion, not retraction, of the rights of aggrieved property owners to seek just compensation. *See Horne*, 135 S. Ct. at 2427 (explaining that *Pennsylvania Coal* and its progeny "expanded the protection of the Takings Clause, holding that compensation was also required for a 'regulatory taking'") (citing *Pennsylvania Coal Co. Coal v. Mahon*, 260 U.S. 393 (1922)). The Federal Circuit's application of the regulatory paradigm to espousal does the exact opposite; it contracts property rights.

Moreover, there is no general foreign policy exception to the categorical rules. The Court has held that the Fifth Amendment's just compensation requirement applies abroad. *See Reid v. Covert*, 354 U.S. 1, 8 (1957) (Fifth Amendment's requirement of just compensation applies to extraterritorial acts of the United States) (citing *Mitchell v. Harmony*, 54 U.S. 115, 134 (1851) (explaining that "there are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy . . . [but] [u]nquestionably, in such cases, the government is bound to make full compensation to the owner")). Even the appropriation of a foreign national's vessel in aid of the war effort during World War I was subject to the categorical rules. *See Russian Volunteer Fleet v. United States*, 282 U.S. 481, 488-89 (1931).

One exception to the categorical rules that may be characterized as a foreign policy exception is the defense of necessity during times of war. *See, e.g., United States v. Caltex*, 344 U.S. 149, 154 (1952) ("The necessities of the war called for and justified [the taking]. The safety of the state in such cases overrides all considerations of private loss") (quoting *United States v. Pacific R.R. Co.*, 120 U.S. 227, 234 (1887)). The exception is not applicable here as the United States was not at war with Libya and there was no imminent threat.

Finally, though the Court has never passed on the issue of espousal, Justice Powell writes in his concurrence in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), that the categorical property protections of the Takings Clause extend to claims traded away by the United States in connection with its foreign affairs:

> The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts. The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution

Id. at 691.

***

There is no textual basis for the Federal Circuit's relegation of espousal to the regulatory takings

paradigm. The approach is irreconcilable with the original understanding of the clause. And the Federal Circuit rule strays from the jurisprudence of this Court.

II. The Federal Circuit Rule Promotes Uncertainty in the Conduct Of Foreign Affairs

The Federal Circuit correctly observes that espousal touches upon important aspects of United States foreign policy. The Court has yet to pass on this critical area. The obvious tension between the Court's decision in *Horne* and the Federal Circuit's decision will promote only uncertainty absent review by this Court.

The United States has various tools available to interfere with lawsuits or claims against foreign states. Some may be constitutionally permissible and not run afoul of the Takings Clause because they amount to no more than a permissible regulatory impairment. Others, such as espousal, may require the remuneration of just compensation.

The government employed a variety of those tools in connection with the Claims Settlement Agreement. For American citizens, like Alimanestianu, their claims and judgments were espoused. The United States appropriated and took possession of their property. Alimanestianu no longer owned the claims because they belonged to the United States. On the other hand, for foreigners, like the *Aviation* petitioners in another case seeking review by the Court, the claims were not espoused, and there was no property transfer to the United States. Their claims were impaired through the restoration of Libya's sovereign immunity. The lawsuits were terminated but

the *Aviation* petitioners still own their claims and are free to assert them elsewhere. *See supra* at 14 n.5. The case of *Dames & Moore v. Regan*, arising out of the Algiers Accords, illustrates a third way that the United States may interfere with lawsuits. *Id.*, 453 U.S. 654. There, claims were impaired through the suspension of lawsuits. *Id.*

While these different approaches all have the effect of impairing lawsuits in the United States, the ultimate impact and means used to achieve that end are different. In *Horne*, the Court writes that "[t]he Constitution, however, is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be 'consist[ent] with the letter and spirit of the constitution.'" *Id.* at 2428 (*quoting McCulloch v. Maryland*, 4 Wheat. 316, 421(1819)). The Court should provide clarity on the means that the United States may use to appropriate, resolve, or interfere with the claims of Americans against foreign states and when those means would require the payment of just compensation under the Fifth Amendment.

The current state of the law, particularly in light of *Horne*, promotes uncertainty and will surely lead to numerous lawsuits on this very issue in the near-future. The Court should end that uncertainty by granting certiorari.

***

The Federal Circuit's nationwide rule stands for the proposition that the government may freely appropriate, use, settle, and benefit from the claims held by American citizens against foreign states without any meaningful restriction imposed by the Takings Clause.

Absent review by the Court that rule will remain the law of the land.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Richard N. Chassin
Counsel of Record
Jesse T. Conan
Becker, Glynn, Muffly, Chassin
& Hosinski LLP
299 Park Avenue
New York, NY 10171
(212) 888-3033
rchassin@beckerglynn.com

Counsel for Petitioners

August 31, 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED MAY 7, 2018

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2017-1667

ALEXANDER ALIMANESTIANU, IOANA ALIMANESTIANU, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF MIHAI ALIMANESTIANU, IRINA ALIMANESTIANU, JOANNA ALIMANESTIANU, KATHY ALIMANESTIANU, EXECUTRIX OF THE ESTATE OF SERBAN ALIMANESTIANU, NICHOLAS ALIMANESTIANU, PAULINE ALIMANESTIANU, EXECUTRIX OF THE ESTATE OF CONSTANTIN ALIMANESTIANU, SIMONE DESIDERIO, EXECUTRIX OF THE ESTATE OF CALIN ALIMANESTIANU,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in No. 1:14-cv-00704-MCW, Judge Mary Ellen Coster Williams.

May 7, 2018, Decided

Appendix A

Before PROST, *Chief Judge*, CLEVENGER and LINN, *Circuit Judges.*

CLEVENGER, *Circuit Judge.*

Members of the Alimanestianu family ("Appellants"), who are U.S. nationals, appeal the final decision of the United States Court of Federal Claims ("the trial court"), which denied their claim that the United States Government committed a taking of their property by espousing their district court claims and vacating their judgment. *Alimanestianu v. United States*, 130 Fed. Cl. 137 (2016). On appeal, Appellants argue that the Government's actions constituted a compensable *per se* taking, and that the Supreme Court decision in *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015), overruled this court's governing precedent and mandates payment of just compensation in this case. We disagree, and affirm the trial court's ruling.

BACKGROUND

Mihai Alimanestianu, a U.S. citizen, was killed in the bombing of UTA Flight 772 by terrorists of the Abu Nidal Organization ("ANO") in 1989. The United States Department of State determined that the Libyan government sponsored the bombing by providing considerable support to ANO, including providing a safe haven, training, logistical assistance, and monetary support. At the time of the bombing, Libya enjoyed sovereign immunity from suit in the United States pursuant to the Foreign Sovereign Immunities Act

("FSIA"). But in 1996, Congress amended the FSIA to permit claims for money damages for personal injury or death caused by acts of foreign sovereigns designated as state sponsors of terrorism. 28 U.S.C. § 1605(a)(7) (1996). Libya had been designated as such a foreign sovereign by the Department of State as of December 29, 1979. As a result of the 1996 amendment to FSIA, Libya lost its immunity to suit in the United States.

In 2002, Appellants joined the families of other U.S. victims of the bombing, and filed an action against the Libyan government and six high-ranking Libyan officials ("the Defendants") in the United States District Court for the District of Columbia. Compl., *Pugh v. Socialist People's Libyan Arab Jamahiriya*, No. 1:02-cv-02026 (D.D.C. Oct. 16, 2002), ECF No. 1 ("*Pugh*"). The complaint asserted various state and federal common law and statutory claims against the Defendants. Am. Compl., *Pugh* (D.D.C. May 19, 2006), ECF No. 57. The Defendants appeared before the district court, and the court subsequently granted summary judgment in favor of the plaintiffs, entering final judgment on August 8, 2008. Order, *Pugh* (D.D.C. Aug. 8, 2008), ECF No. 152 (re-entering the Order, *Pugh* (D.D.C. Feb. 7, 2008), ECF No. 96, which amended the Judgment, *Pugh* (D.D.C. Jan. 24, 2008), ECF No. 93). The damages award for all plaintiffs totaled $6.9 billion, while Appellants received approximately $1.297 billion. Judgment, *Pugh*, ECF No. 93. Each of the Appellants received a multi-million dollar award, including: Mihai's estate; Mihai's wife, Ioana; Mihai's children, Joanna, Nicholas, Irina, and Alex; and the estates of Mihai's brothers, Calin, Serbin, and Constantin. *Id.*

The Defendants appealed six days after judgment, Notice of Appeal, *Pugh* (D.D.C. Aug. 14, 2008), ECF No. 156, but that same day, the United States entered into a Claims Settlement Agreement with the Libyan government. Claims Settlement Agreement Between the United States of America and The Great Socialist People's Libyan Arab Jamahiriya, Lb.-U.S., Aug. 14, 2008, T.I.A.S. No. 08-814 ("Claims Settlement Agreement"). As part of the Claims Settlement Agreement, Libya agreed to deposit $1.5 billion into a humanitarian fund, *id.* at 4, $681 million of which was "to ensure the fair compensation for the claims of nationals of the United States for wrongful death or physical injury in those cases described in the Act which were pending against Libya . . . as well as other terrorism-related claims against Libya." Certification Under Sec. 5(a)(2) of the Libyan Claims Resolution Act Relating to the Receipt of Funds for Settlement of Claims Against Libya, U.S. DEP'T OF STATE, 2 (Oct. 31, 2008) ("Certification"); *see also* Dep't of State Pub. Notice 6476, 74 Fed. Reg. 845 (Jan. 8, 2009). Each country agreed that the deposit would constitute "a full and final settlement of its claims and suits and those of its nationals," Certification at 2, and each party would be required to "[s]ecure . . . the termination of any suits pending in its courts . . . (including proceedings to secure and enforce court judgments) . . . preclude any new suits in its courts," and restore "sovereign, diplomatic, and official immunity to the other Party . . . ." Claims Settlement Agreement, at 2. Congress codified the Claims Settlement Agreement through the Libyan Claims Resolution Act ("LCRA"), providing that, upon receipt of the funds pursuant to the Claims Settlement Agreement, Libya's sovereign

immunity would be restored. 28 U.S.C. § 1605A note, Pub. L. No. 110-301, 122 Stat. 2999 (2008).

On October 31, 2008, the Secretary of State certified receipt of the Libyan funds, Certification at 2, thereby restoring Libya's sovereign immunity under the FSIA, pursuant to the LCRA. President George W. Bush also issued an Executive Order, providing that any pending suit by U.S. nationals, "including any suit with a judgment that is still subject to appeal . . . shall be terminated." Exec. Order No. 13,477 § 1(a)(ii), 3 C.F.R. 13477, 73 Fed. Reg. 65965 (2008). The Foreign Claims Settlement Commission ("the Commission")[1] retained jurisdiction to adjudicate and render final decisions over claims of U.S. nationals referred to the Commission by the Secretary of State. 22 U.S.C. § 1623(a)(1)(C) (1998). Once implemented, the Settlement Agreement both closed the doors of U.S. courts to suits against Libya (thus requiring Appellants' suit against Libya to be dismissed) and espoused the existing claims of U.S. citizens against Libya (thereby substituting the United States for the Appellants as plaintiffs in the espoused claims against Libya).

---

1. The Commission is a quasi-judicial, independent agency within the Department of Justice which adjudicates claims of U.S. nationals against foreign governments pursuant to international claims settlement agreements or at the request of the Secretary of State. *See* Int'l Claims Settlement Act, 22 U.S.C. § 1621 *et seq.*, and War Claims Act, 50 U.S.C. App'x §§ 2001-2007. The Commission was established in 1954, *see* Reorg. Plan No. 1 of 1954, 5 U.S.C. App'x, when it assumed the functions of two predecessor agencies: The War Claims Commission and the International Claims Commission.

While Appellants' district court claims and judgment were on appeal, the United States filed a "motion to intervene, vacate judgment, and dismiss [the Appellants'] suit with prejudice," arguing that, pursuant to the Claims Settlement Agreement, LCRA, and Executive Order 13,477, U.S. courts no longer had jurisdiction over terrorism-related claims against Libya. U.S. Mot. to Intervene, Vacate J., and Dismiss Suit with Prejudice at 1, 11-16, *Pugh v. Socialist People's Libyan Arab Jamahiriya* (Nos. 08-5387, 08-5388), (D.C. Cir. Jan. 9, 2009), ECF No. 162-1 ("*Pugh II*"). In its motion, the Government stated that it had "espoused the terrorism-related claims of U.S. nationals against Libya, including plaintiffs' claims," and "made the plaintiffs' claims its own." *Id.* at 15. The United States Court of Appeals for the District of Columbia Circuit granted the Government's motion, vacated judgment, and directed the district court to dismiss the case. *Pugh II*, 2009 U.S. App. LEXIS 4142, 2009 WL 10461206, at *1 (D.C. Cir. Feb. 27, 2009) (per curiam). The district court dismissed the case shortly thereafter. Order, *Pugh* (D.D.C. Mar. 9, 2009), ECF No. 163.

As for the proceedings before the Commission, the State Department recommended an award of $10 million be paid to the estates of individuals who died as a result of the bombing, and Mihai's estate received $10 million. Final Decision at 2, LIB-II-047 (Foreign Claims Settlement Comm'n May 16, 2012) ("2012 Final Decision"). The State Department also established seven additional categories of claims for referral to the Commission. Letter from the Hon. John B. Bellinger, III, Legal Adviser, Dep't of State, to the Hon. Mauricio J. Tamargo, Chairman, Foreign

Claims Settlement Comm'n (Jan. 15, 2009). Appellants brought additional claims under one category for the "mental pain and anguish" of claimants who were both U.S. nationals and relatives of the decedent and who had pending claims against Libya that were dismissed. *Id.*; Compl., *Alimanestianu v. United States*, No. 1:14-cv-00704, at 8, ¶ 37 (Fed. Cl. Aug. 4, 2014), ECF No. 1 ("Complaint").[2] The Commission determined that each of Mihai's children should receive $200,000 under this category of recovery, but denied recovery to Mihai's wife, being the beneficiary of Mihai's estate, and the estates of Mihai's brothers, because they were deceased. Complaint at 8, ¶ 37.

Dissatisfied with the relief granted by the Commission, Appellants initiated a Fifth Amendment takings case against the Government in the Court of Federal Claims. Appellants alleged that the Government effected a *per se* taking by espousing their district court claims and vacating their judgment against Libya. Their claim demanded the Government pay over $1.286 billion—the difference between their district court judgment and the Commission's award—in just compensation.

The trial court denied their claim. When faced with cross-motions for summary judgment, the court determined that the categorical requirement to pay just compensation in *per se* takings did not apply to cases where the Government espouses claims against foreign sovereigns. *Alimanestianu*, 130 Fed. Cl. at 144.

---

2. Commission decisions that grant awards remove all personally identifiable information. Therefore, support for Appellants' awards may be found in Appellants' complaint before the trial court.

Instead, the trial court found our holding in *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed Cir. 1997), *cert. denied sub nom. Gurney v. United States*, 524 U.S. 941, 118 S. Ct. 2348, 141 L. Ed. 2d 719 (1998), controlled, and analyzed Appellants' claims under the regulatory taking framework. *Alimanestianu*, 130 Fed. Cl. at 144. Using this framework, the trial court found Appellants had no reasonable expectation to recover their nonfinal judgment against Libya because, at the time of injury, Libya maintained sovereign immunity and any potential recovery would be speculative. *Id.* at 144-45. The trial court then discussed the Government's paramount right to conduct foreign affairs and "concomitant right to compromise its nationals' claims in the process." *Id.* at 145. And finally, the trial court found there was no dispositive economic impact of the Government's conduct, because Appellants received over $10 million that they likely would not otherwise have had. *Id.* at 145-46. With all of the regulatory takings factors weighing in favor of the Government, the trial court concluded there was no compensable taking and granted summary judgment in favor of the Government.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3) (2012).

Appendix A

DISCUSSION

We review the trial court's grant of summary judgment *de novo, Nw. Title Agency, Inc. v. United States*, 855 F.3d 1344, 1347 (Fed. Cir. 2017) (citing *TEG-Paradigm Environmental., Inc. v. United States*, 465 F.3d 1329, 1336 (Fed. Cir. 2006)), applying the same standard as the trial court, *Palahnuk v. United States*, 475 F.3d 1380, 1382 (Fed. Cir. 2007). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Nw. Title*, 855 F.3d at 1347 (citing *Castle v. United States*, 301 F.3d 1328, 1336 (Fed. Cir. 2002)).

"Whether a taking has occurred is a question of law based on factual underpinnings. We conduct a plenary review of the legal conclusions of the [the trial court] while reviewing its factual conclusions for clear error." *Stearns Co. v. United States*, 396 F.3d 1354, 1357 (Fed. Cir. 2005) (internal citations and quotations omitted), *cert. denied*, 546 U.S. 875, 126 S. Ct. 385, 163 L. Ed. 2d 170 (2005). In the context of summary judgment, all factual inferences should be viewed in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

I

The Fifth Amendment prohibits the taking of "private property . . . for public use, without just compensation." U.S. Const. amend. V, cl. 4. To state a claim for a taking,

Appellants must establish: (1) that they had a cognizable property interest, and (2) that their property was taken by the United States for a public purpose. *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009). We assume, without deciding, that Appellants had a cognizable property interest in their district court claims and non-final judgment. Thus, we must decide only whether the Government's actions constituted a taking. We hold that, even if Appellants have a property interest in their claims and non-final judgment, no compensable taking occurred under the Fifth Amendment.

Takings claims typically come in two forms: *per se* or regulatory. A *per se* taking involves the appropriation of private property, including both real, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), and personal, *Horne*, 135 S. Ct. at 2426. To find a *per se* taking, there must be either a permanent physical invasion, *Loretto*, 458 U.S. at 426, or a denial of all economically viable uses of the property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). When the Government commits a *per se* taking, it has a categorical duty to pay just compensation. *Horne*, 135 S. Ct. at 2426.

A regulatory taking involves a "restriction on the use of property that [goes] 'too far.'" *Id.* at 2427 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)). To determine whether a Government action goes "too far," courts have traditionally utilized a three-pronged factual inquiry illuminated by *Penn Central Transportation Co. v. City of New York*, which

looks to: "the character of the governmental action," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "[t]he economic impact of the regulation on the claimant." 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

Since at least 1799, the President has exercised his constitutional authority to espouse and settle claims of U.S. citizens against foreign governments. *See Dames & Moore v. Regan*, 453 U.S. 654, 679 n.8, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 243-45 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir. 1985), *cert. denied* 474 U.S. 909, 106 S. Ct. 279, 88 L. Ed. 2d 243 (1985) (discussing the history of claim espousal). We have previously recognized that when claims are espoused and settled by the Government, they are effectively extinguished, rather than merely regulated. Our two leading cases involving governmental espousal of claims against foreign governments are *Belk v. United States*, 858 F.2d 706 (Fed. Cir. 1988) and *Abrahim-Youri*.

Both cases arose as a result of the Iranian hostage crisis of 1979-81, where U.S. citizens were held captive in the U.S. embassy in Tehran. *Belk*, 858 F.2d at 707; *Abrahim-Youri*, 139 F.3d at 1463. In *Belk*, we were asked whether the Government committed a compensable taking by entering the Algiers Accords, which espoused the claims of U.S. nationals against the Iranian government, thus extinguishing their right to sue Iran for damages done to them by captivity. *Belk*, 858 F.2d at 707-08; *see Belk v. United States*, 12 Cl. Ct. 732, 734 (1987).

Belk thus presented this court with the need to apply a test by which to measure the claim that the Government had caused a compensable taking of private property by espousing the plaintiffs' claims against Iran. The court turned to the Supreme Court's analysis of takings law as explicated in *Penn Central*. Before composing the well-known three-part test for assessing regulatory takings, the Supreme Court observed that whether a compensable taking has occurred largely depends on the circumstances of a particular case. *Penn Central*, 438 U.S. at 124 (citing *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S. Ct. 1097, 2 L. Ed. 2d 1228 (1958), and *United States v. Caltex, Inc.*, 344 U.S. 149, 156, 73 S. Ct. 200, 97 L. Ed. 157, 123 Ct. Cl. 894 (1952)). Understanding the fundamental difference between the circumstances of the case at hand and a typical domestic regulation, but respecting the three-part test in *Penn Central* for domestic regulatory takings, the *Belk* court observed that the takings analysis in the espousal setting should be approached with the following in mind:

> the degree to which the property owner's rights were impaired, the extent to which the property owner is an incidental beneficiary of the governmental action, the importance of the public interest to be served, whether the exercise of governmental power can be characterized as novel and unexpected or falling within traditional boundaries, and whether the action substituted any rights or remedies for those that it destroyed.

Belk, 858 F.2d at 709 (citations omitted).

Belk described the foregoing considerations as an "explication, reflecting the unusual facts of this case" of the three-part *Penn Central* test: "the character of the government action, its economic impact, and its interference with reasonable investment expectations." *Id.* (citing *United States v. One (1) 1979 Cadillac Coupe de Ville*, 833 F.2d 994, 1000 (Fed. Cir. 1987)).

The court then determined that espousing a citizen's claim in the U.S. courts was not a "physical invasion" traditionally associated with *per se* takings, but rather was "the prohibition on the assertion by the appellants of their alleged damage claims against Iran." *Id.* We applied the *Penn Central* factors and found that, given the President's overwhelming authority in maintaining foreign relations, and the fact that claimants were the intended beneficiaries of the Algiers Accords and lacked any investment-backed expectations, the claimants did not suffer a compensable taking. *Id.* at 709-10.

The present case finds an even closer factual analog in *Abrahim-Youri*. After the Algiers Accords were entered into, numerous outstanding claims remained between U.S. nationals and Iran. *Abrahim-Youri*, 139 F.3d at 1464. The United States and Iran subsequently entered a Settlement Agreement, where the United States espoused and settled all of the claims of its citizens in exchange for a lump-sum payment from Iran. *Id.* Like the present case, Congress granted the Commission jurisdiction to adjudicate and distribute awards from the lump-sum to those who had their federal claims espoused. *Id.* When the fund was unable to satisfy the claims, some of those claimants

brought an action against the Government, alleging that the initial espousal of their claims constituted a *per se* taking. *Id.* at 1464-65. This court noted that, while the Government's actions shared some features of a *per se* taking, the *Penn Central* factors remained relevant to the takings inquiry in this limited context. *Id.* at 1465-66. As in *Belk*, the *Abrahim-Youri* court affirmed the judgment of no compensable taking. *Id.* at 1468.

The question for us, then, is whether the Supreme Court's decision in *Horne* overruled our existing body of law. We cannot now say that *Horne* requires a different result than we reached in *Belk* and *Abrahim-Youri*. *Horne* involved the Agricultural Marketing Agreement Act of 1937, which enabled the Secretary of Agriculture to promulgate marketing orders to regulate particular agricultural product markets. 135 S. Ct. at 2424. One order involving the raisin industry required growers to turn over title to a percentage of their crops to the Raisin Committee as part of a reserve requirement, without any compensation. *Id.* The Committee would then dispose of the reserved raisins as it deemed necessary, and distribute a portion of any proceeds back to the growers. *Id.* A family of raisin growers and handlers sued the Government, arguing the reserve requirement was an unconstitutional taking. *Id.* at 2424-25.

The Supreme Court began its analysis by noting that when the Government directly appropriates real or personal property for its own use, "such an appropriation is a *per se* taking that requires just compensation." *Id.* at 2425-26. The Court went further, however, stating that

the "physical *appropriation* of property [gives] rise to a *per se* taking, without regard to other factors." *Id.* at 2427. It is this statement upon which Appellants rely. If their claims and non-final judgment constitute cognizable property, and the Government entirely appropriated that property by entering and ratifying the Libyan Claims Settlement Agreement, then Appellants argue that *Horne* mandates the Government pay just compensation, without any consideration of the *Penn Central* factors.

But we have consistently held that prohibiting or espousing a litigant's claims by restoring a foreign sovereign's legal immunity is not a physical invasion of property. *See Aviation & Gen. Ins. Co. v. United States*, 882 F.3d 1088, 1097 (Fed. Cir. 2018) ("While we recognize the significant degree to which the Appellants' rights in maintaining their lawsuits were impaired—indeed, their lawsuits were terminated—the Government's action nonetheless was not a physical invasion of Appellants' property rights. Rather, the Government reinstated Libya's sovereign immunity for the common good . . . ."); *Belk*, 858 F.2d at 709 ("Here there was no physical invasion of property, but only the prohibition on the assertion by the appellants of their alleged damage claims . . . ."). Further, *Horne* addressed the physical invasion and categorical appropriation of entirely domestic, tangible property. 135 S. Ct. at 2429. The Supreme Court was not faced in *Horne* with events that involved the Government's plenary authority over foreign policy, or property entangled with international considerations. *See Dames & Moore*, 453 U.S. at 679 ("[T]he United States has repeatedly exercised its sovereign authority to settle the claims of

its nationals against foreign countries . . . [where] the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures."). This additional and quite substantial consideration supports our view that the *Penn Central* factors remain relevant to the takings inquiry in cases where the Government espouses its citizens' claims against foreign sovereigns. In short, without speaking to the Constitutional issues at play in these types of cases, we do not read *Horne* to have undermined our law set forth in *Belk* and *Abrahim-Youri*.

We now consider the *Penn Central* factors to see if Appellants suffered a compensable taking. Looking to the character of the governmental action, Appellants provided no evidence that this factor should weigh in their favor. As the trial court noted, the Executive has an overwhelming interest in conducting foreign affairs. *Alimanestianu*, 130 Fed. Cl. at 145. "Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns . . . [where] nations have often entered into agreements settling the claims of their respective nationals." *Dames & Moore*, 453 U.S. at 679. "[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries," whether it be by treaty or through executive action, and "Congress has implicitly approved th[is] practice." *Id.* at 679-80. Thus, the trial court correctly observed that the Government was working well within its Constitutional prerogative in

conducting foreign affairs when it espoused and settled Appellants' claims.

As for the extent to which the regulation has interfered with distinct investment-backed expectations, Appellants have provided no evidence that they had an investment-backed expectation in their claims and nonfinal judgment. First, as *Abrahim-Youri* points out, "those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity." 139 F.3d at 1468. Further, the claims at issue were based on a "tenuous jurisdictional grant," *Alimanestianu*, 130 Fed. Cl. at 145—the State Sponsor of Terrorism exception to FSIA and the government's designation of Libya as a state-sponsor of terrorism—which was always subject to the ever-evolving relationship between the two nations, *see Republic of Iraq v. Beaty*, 556 U.S. 848, 864-65, 129 S. Ct. 2183, 173 L. Ed. 2d 1193 (2009) (noting that the state of foreign sovereign immunity "reflects current political realities and relationships . . . [which] generally is not something on which parties can rely in shaping their primary conduct," and that "[t]he President's elimination of Iraq's later subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts" (internal quotations omitted)). Furthermore, any recovery by Appellants of their judgment would depend on a cooperative Libyan court ordering its government to pay the judgment, or failing such cooperation, a coercive act against Libya by some

other governmental body to compel Libyan satisfaction of the judgment. However, Appellants do not provide any evidence that such efforts have been successful in the past, or would have been successful in this case. Thus, the trial court did not err by concluding that such recovery was speculative, and that espousal did not interfere overall with any investment-backed expectation in Appellants' claims and non-final judgment.

Finally, addressing the economic impact of the regulation on the claimant, the only evidence Appellants provide is that the Commission's award was less than their nonfinal judgment. But this evidence in no way disputes the trial court's observation that Appellants still received more than they would have without the Government's action. *Alimanestianu*, 130 Fed. Cl. at 145-46. As noted by the trial court, Mihai's estate received $10 million, and each of Mihai's children received $200,000 through the Commission, which is likely more than could have been expected had Appellants attempted to enforce any U.S. judgment themselves.[3] *Id.* Instead, "the Government provided an alternative [adjudicatory forum] tailored to the circumstances which produced a result as favorable to the [Appellants] as could reasonably be expected."

3. While this court acknowledges that the estates of Mihai's brothers were denied recovery before the Commission, arguably tipping the balance of the third factor in favor of those Appellants, "the question of whether Appellants were entitled to proceeds from the Libya Claims Settlement Agreement presents a nonjusticiable political question." *Aviation*, 882 F.3d at 1094. Therefore, we cannot reach the question of whether those Appellants should have recovered under the Agreement.

Abrahim-Youri, 139 F.3d at 1468. Thus, "[w]here, as here, the private party is the particular intended beneficiary of the governmental activity, fairness and justice do not require that losses which may result from that activity be borne by the public as a whole, even though the activity may also be intended incidentally to benefit the public." *Belk*, 858 F.2d at 709 (internal quotations omitted). "[T]he fact that [Appellants] are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States." *Abrahim-Youri*, 139 F.3d at 1468. Upon considering the *Penn Central* factors, Appellants have failed to show any evidence to demonstrate that they suffered a compensable taking. Therefore, the trial court did not err by granting summary judgment in favor of the Government.

AFFIRMED

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS, FILED DECEMBER 29, 2016

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 14-704C

ALEXANDER ALIMANESTIANU, *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

December 29, 2016, Filed

OPINION AND ORDER[1]

WILLIAMS, Judge.

Plaintiffs in this Fifth Amendment taking case are family members of Mihai Alimanestianu, who was killed in 1989, when, in an act of state-sponsored terrorism, the Socialist People's Libyan Arab Jamairya ("Libya") bombed United Trans Aeriens Flight 772. Plaintiffs were awarded a nearly $1.3 billion judgment against Libya

1. This is the second opinion in this action. On October 29, 2015, the Court denied Defendant's motion to dismiss. *Alimanestianu v. United States*, 124 Fed. Cl. 126 (2015).

for the wrongful death of Mihai Alimanestianu. *Pugh v. Socialist People's Libyan Arab Jamahirya*, 530 F. Supp. 2d 216, 267-68 (D.D.C. 2008), *vacated*, Nos. 08-5387, 08-5388, 2009 U.S. App. LEXIS 4142, 2009 WL 10461206, at *1 (D.C. Cir. Feb. 27, 2009) (per curiam). Plaintiffs allege that the Government effected a taking by espousing and settling their claims with Libya and obtaining a vacatur of their judgment.

As part of the United States' settlement with Libya, Plaintiffs' claims were referred to the Foreign Claims Settlement Commission, and Plaintiffs received compensation of just over $10 million. Because Plaintiffs' settlement is far less than the $1.3 billion judgment they were awarded in their District Court action, Plaintiffs assert that the United States owes them additional just compensation for taking their property.

This matter comes before the Court on Defendant's motion for summary judgment and Plaintiffs' cross-motion for partial summary judgment. Because there are no genuine issues of material fact and Plaintiffs have failed to establish a compensable taking as a matter of law, Defendant's motion for summary judgment is granted.

BACKGROUND[2]

Plaintiffs are family members of Mihai Alimanestianu, who was killed in the 1989 explosion of United Trans

2. This background is derived from Plaintiffs' Complaint and the appendices and exhibits to the parties' motions papers.

Aeriens Flight 772 caused by Libya in an act of state-sponsored terrorism. Compl. ¶¶ 10-11. At the time of the explosion in 1989, there was no exception to the Foreign Sovereign Immunities Act ("FSIA") for state sponsors of terrorism, and Libya was immune from suit in the United States. In 1996, Congress amended FSIA to include an exception permitting claims for money damages for personal injury or death caused by acts of foreign sovereigns designated as state sponsors of terrorism. 28 U.S.C. § 1605(a)(7) (1996).

In 2002, Plaintiffs filed suit stemming from Mr. Alimanestianu's death in the United States District Court for the District of Columbia against Libya and six high-ranking Libyan officials.[3] On January 24, 2008, the District Court granted summary judgment in Plaintiffs' favor and on August 8, 2008, entered final judgment, awarding Plaintiffs approximately $1.3 billion.[4]

The defendants in the *Pugh* action filed a notice of appeal on August 14, 2008. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, Nos. 08-5387, 08-5388 (D.C. Cir.) (consolidated). That same date, "[i]n order to further the process of normalization of relations" the United States entered into a "Claims Settlement Agreement"

---

3. The Libyan officials sued in their individual capacities were Abdallah Senoussi, Ahmed Abdallah Elazragh, Ibrahim Naeli, Abras Musbah, Issa Abdelsalam Shibani, and Abdelsalam Hammouda El Ageli.

4. Plaintiffs were joined in the *Pugh* action by similarly situated parties. The total award to all *Pugh* plaintiffs was $6,903,683,445.

with Libya. Def.'s App. A1. The objective of the Agreement was to:

> (1) Reach a final settlement of the Parties' claims and those of their nationals (including natural and juridical persons);
>
> (2) Terminate permanently all pending suits (including suits with judgments that are still subject to appeal or other forms of direct judicial review); and
>
> (3) Preclude any future suits that may be taken to U.S. and Libyan courts.

Id.

The Agreement established a humanitarian settlement fund. *Id.* at A2. The United States deposited $300 million into the fund which was to be used to compensate Libyan victims of United States airstrikes. Libya deposited $1.5 billion into the fund. *Id.* at A4. The $1.5 billion included "$681 million . . . to ensure fair compensation for the claims of nationals of the United States for wrongful death or physical injury in those cases described in the Act which were pending against Libya . . . as well as other terrorism-related claims against Libya." *Id.* at A6. Each country agreed to accept these funds "as a full and final settlement of its claims and suits and those of its nationals," and each party was required to "[s]ecure . . . the termination of any suits pending in its courts . . . (including proceedings to secure and enforce court judgments), . . . preclude any

new suits in its courts," and restore "sovereign, diplomatic and official immunity to the other Party . . . ." *Id.* at A2.

In 2008, Congress enacted the Libyan Claims Resolution Act. Pub. L. No. 110-301, 122 Stat. 2999 (2008) ("LCRA"). The LCRA codified the Agreement and provided that, upon the United States' receipt of funds pursuant to the Claims Settlement Agreement, sovereign immunity would be restored to Libya. *Id.* The LCRA provided that the funds had to be sufficient to ensure "fair compensation of claims of nationals of the United States for wrongful death or physical injury . . . ." *Id.*

On October 31, 2008, the Secretary of State certified receipt of the Libyan funds, and President George W. Bush issued Executive Order No. 13,477, providing that any pending suit by United States nationals and any pending suit in the United States by foreign nationals within the terms of the Claims Settlement Agreement - "including any suit with a judgment that is still subject to appeal . . . shall be terminated." Pls.' Mot. Ex. 5, at A99. The State Department established a fund to compensate individuals with wrongful death or personal injury claims against Libya caused by acts of state-sponsored terrorism and provided that the Foreign Claims Settlement Commission would adjudicate and render final decisions on claims of U.S. nationals referred to the Commission by the Secretary of State. 22 U.S.C. § 1623(a)(1)(C) (1998). The Commission was obligated to first apply the "provisions of the applicable claims agreement" and then apply "[t]he applicable principles of international law, justice, and equity." § 1623(a)(2).

Appendix B

At the time of the Claims Settlement Agreement, the enactment of the LCRA and the referral of claims to the Commission, the appeal in *Pugh* was proceeding in the United States Court of Appeals for the District of Columbia Circuit. On January 9, 2009, the United States filed a "motion to intervene, vacate judgment, and dismiss [the] suit with prejudice," arguing that, pursuant to the LCRA, the Claims Settlement Agreement, and Executive Order No. 13,477, U.S. Courts no longer had jurisdiction over terrorism-related claims against Libya. Pls.' Mot. Ex. 5, at A62-63. In its motion to intervene, the Government stated that it "espoused the terrorism-related claims of U.S. nationals against Libya, including plaintiffs' claims," and "made the plaintiffs' claims its own." *Id.* at A63. The Government further noted in this motion that administrative proceedings established by the Secretary of State for any terrorism-related injuries caused by Libya were available for U.S. nationals to seek compensation. *Id.* at A71-72.

On February 27, 2009, the D.C. Circuit granted the Government's motion to intervene, vacated the judgment in *Pugh*, and directed the District Court to dismiss the case. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 2009 U.S. App. LEXIS 4142, 2009 WL 10461206, at *1. On March 6, 2009, the District Court dismissed the *Pugh* action with prejudice.

The State Department determined that a $10-million payment per death to the estates of individuals who died in acts of Libyan sponsored terror was fair compensation, and the estate of Mihai Alimanestianu received $10

million. Compl. ¶ 37. Following such payment to all of the estates, the State Department established seven additional categories of claims for referral. Pls.' Mot. Ex. 6, at A105-07. On December 11, 2008, pursuant to his discretionary authority under 22 U.S.C. § 1623(a)(1)(C), the legal advisor to the Secretary of State referred one category of claims (physical injury) to the Commission for adjudication and certification. *Id.* at A105. On January 15, 2009, the State Department sent a referral letter to the Commission, referring six additional categories of claims (Categories A, B, C, D, E, and F) and requesting that the Commission make determinations on those claims. *Id.*

Plaintiffs brought claims pursuant to Category B, which covered "claims of U.S. nationals for mental pain and anguish who are living close relatives of a decedent whose death formed the basis of a death claim compensated by the Department of State," and had been the subject of pending litigation against Libya that was dismissed. *Id.* at A106.

The Commission determined that Mihai Alimanestianu's children should receive $200,000 each. Compl. ¶ 37. The Commission denied compensation to the estates of Mihai Alimanestianu's brothers under Category B, because the brothers were not living at the time of the referral and to Ioana Alimanestianu, because as the beneficiary of the Estate of Mihai Alimanestianu, she was "eligible for compensation from the associated wrongful death claim." Pls.' Opp'n 10; Pls.' Mot. Ex. 6, at A106.

Plaintiffs, along with the other *Pugh* claimants, also sought additional compensation under Category C,

permitting claimants with prior U.S. Court judgments to seek additional compensation, so long as the pending litigation against Libya had been dismissed. Pls.' Mot. Ex. 6, at A106. On May 16, 2012, the Commission denied the claims of all Category C claimants, concluding that no special circumstance warranted additional compensation. Def.'s App. A12. In a May 31, 2012 letter, Plaintiffs, along with other claimants, objected to the Commission's Proposed Decision, submitted a consolidated brief with supporting exhibits, and presented argument at an oral hearing the Commission held on the claimants' objections. *Id.* at A12-13.

On February 15, 2013, after it "reviewed all of the documents in the record and carefully considered claimants' arguments," the Commission issued a Final Decision, again denying the claimants' request for additional compensation. *Id.* at A11-A46. In its Final Decision, the Commission concluded:

> • The Claims Settlement Agreement, the LCRA, and the Secretary of State's Certification of the agreement established that the parties to the Agreement intended it to "satisfy the compensatory expectations of the two groups of claimants [those with settlements and those with cases pending], identified in . . . the LCRA" and did not intend additional funds for those who had a prior court judgment;
>
> • Because the Commission was tasked with determining whether the "mere existence" of a

> prior judgment entitled claimants to additional compensation, not whether a particular judgment warranted additional compensation, the fact that claimants' damages exceeded the compensation they had received was irrelevant;
>
> • Claimants did not submit sufficient evidence indicating that the United States received extra funds from Libya because of their judgment; and
>
> • Claimants' assertion that their judgment was a "catalyst" for the Claims Settlement Agreement, enough to warrant additional compensation, was unpersuasive.

Id. at A37-38, A42-45. Following the Commission's denial of their claims for additional compensation, Plaintiffs filed the instant action.

DISCUSSION

Legal Standard for Summary Judgment

In granting a motion for summary judgment, a court must find that there is no "genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). A genuine dispute is one which "may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is material if it "might affect the outcome of the suit . . . ." *Id.* at 248.

The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Once the burden is met, the onus shifts to the non-movant to point to sufficient evidence to show a dispute over a material fact that would allow a reasonable finder of fact to rule in its favor. *Liberty Lobby*, 477 U.S. at 256-57. When considering a motion for summary judgment, the court draws all factual inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

When opposing parties both move for summary judgment, "the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Mingus*, 812 F.2d at 1391. At the summary judgment phase, the court may not weigh any evidence but only "determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249.

The Law of the Case Doctrine Does Not Apply

Plaintiffs assert that under the law of the case doctrine, the Court should not revisit its decision denying Defendant's motion to dismiss, finding that Plaintiffs had sufficiently plead a cognizable property interest. Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S.

800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) (internal citation and quotation marks omitted). The purpose of the rule is to "encourage[] both finality and efficiency in the judicial process by preventing relitigation of already-settled issues." *Banks v. United States*, 741 F.3d 1268, 1276 (Fed. Cir. 2014).

However, as Defendant argues, a motion for summary judgment requires consideration of different "legally relevant factors" than a motion to dismiss. "An initial denial of a motion to dismiss does not foreclose, as the law of the case, the court's later consideration of those same claims on summary judgment." *Athey v. United States*, 123 Fed. Cl. 42, 50 (2015). As the Court explained in *Gould, Inc. v. United States*, the law of the case on a decision denying a dismissal is simply the Court's determination that a plaintiff's "allegations survive a motion to dismiss." 66 Fed. Cl. 253, 266 (2005). "Whether the merits of those very same claims survive summary judgment is an entirely different and undecided matter." *Id.* As such, the Court's denial of Defendant's motion to dismiss has no preclusive effect for purposes of the summary judgment phase of the case.

Legal Standard for Fifth Amendment Taking

On its face, the Fifth Amendment prohibits the taking of "private property . . . for public use, without just compensation." U.S. Const. amend. V. The purpose of this prohibition is to bar the few from shouldering a burden that should be borne by the public as a whole. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544, 125 S. Ct. 2074,

161 L. Ed. 2d 876 (2005) (noting that it is appropriate to inquire into whether plaintiffs have "been singled out to bear any particularly severe regulatory burden"); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (stating that "'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." (internal citation omitted)).

The Constitution "protects rather than creates property interests . . . ." *Philips v. Wash. Legal Fund*, 524 U.S. 156, 164, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998). Consequently, to "define the dimensions of the requisite property rights for purposes of establishing a cognizable taking," courts look to "existing rules and understandings" and "background principles derived from an independent source, such as state, federal, or common law." *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)). "The concept of property for purposes of the [F]ifth [A]mendment has been interpreted broadly and can include 'every sort of interest the citizen may possess.'" *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 240 (1983) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311 (1945)).

When the Government takes private property pursuant to a public purpose, it must pay the owner just compensation. *See Lingle*, 544 U.S. at 538-39 (finding that "where [G]overnment requires an owner

to suffer a permanent physical invasion of her property-however minor-it must provide just compensation," and where regulations "completely deprive an owner of all economically beneficial us[e] of her property," the Government must pay just compensation (internal citations and quotation marks omitted)).

Plaintiffs Have Not Established a Compensable Taking

The Standard: Consideration of the Penn Central Factors is Appropriate

The parties dispute whether Plaintiffs' takings claim should be analyzed as a *per se* taking or a regulatory taking. Plaintiffs allege that Defendant effected a *per se* taking of their property, which they characterize as their District Court judgment, when it settled their claims against Libya pursuant to the Claims Settlement Agreement for substantially less than their judgment and transferred their property to the Government. Plaintiffs assert that because they did not receive just compensation from the United States as a result of the Settlement, they are entitled to $1,286,336,632, the approximate amount of their District Court judgment.

Defendant argues that the *Penn Central* factors, traditionally applied in the regulatory taking context, govern the Court's determination of whether the Government's espousal and settlement of the claims of United States nationals constitutes a compensable taking. Def.'s Mot. 12, 16-19. In a takings analysis under *Penn Central*, the Court examines 1) the extent to which

the Government's action interfered with the plaintiffs' reasonable investment-backed expectations; 2) the character of the Government's action; and 3) the economic impact of that action on the plaintiffs.

The Federal Circuit in *Abrahim-Youri v. United States*, recognizing the dichotomy between the legal standards governing *per se* and regulatory takings, provided guidance on the analytical construct governing takings involving Government claim espousal in the foreign claims settlement context. 139 F.3d 1462, 1465-68 (Fed. Cir. 1997). In *Abrahim-Youri*, the United States and Iran entered into a Settlement Agreement, under which the United States espoused the small claims of U.S. nationals and later referred those claims to the Commission for consideration and payment. However, in paying the claims, the Commission did not award full interest, and the plaintiffs filed a takings action seeking their unawarded interest. *Id.* at 1465.

The Federal Circuit in *Abrahim-Youri* characterized the plaintiffs' causes of action against Iran as "property rights" and acknowledged that these property rights were extinguished (not simply regulated) when the Government espoused and settled their claims.[5] However, the Circuit

5. Defendant invokes *Adams v. United States*, 391 F.3d 1212 (Fed. Cir. 2004), to argue that Plaintiffs' District Court judgment does not constitute a cognizable property interest. The *Adams* plaintiffs asserted that they had a cognizable property interest both in payment of underpaid overtime compensation under the Fair Labor Standards Act ("FSLA") and in their administrative claim before the General Accounting Office ("GAO") to recover

concluded that a mechanistic application of a *per se* takings analysis was not appropriate given the nature of the property interest and the context in which the taking occurred. The *Abrahim-Youri* Court found that, even though the plaintiffs had superficially met the factors in a strict *per se* analysis, *i.e.*, they had established a property interest that was "extinguished" and did not receive the full value of that property, there was no compensable taking. *See id.* at 1466-67.

Without concluding that the Government's espousal and settlement of the *Abrahim-Youri* plaintiffs' claims constituted a regulatory taking, the Circuit nonetheless pragmatically looked to the *Penn Central* factors as relevant to its analysis. *See id.* 1465-66. The Court found the *Penn Central* factors relevant, recognizing that "takings claims . . . come in a variety of forms arising from a variety of fact patterns, some of which fit less than comfortably into the regulatory or physical takings

---

such overtime compensation. The Federal Circuit found that the *Adams* plaintiffs did not have a property interest in their GAO claim because the underlying subject matter of this claim - - entitlement to statutory compensation - - failed to qualify as a recognized property interest. *Id.* at 1226.

Adams is inapposite because the *Adams* plaintiffs' cause of action only protected a statutory entitlement to money. In this Court's view, *Adams* does not impact *Abrahim-Youri*'s dicta that a cause of action against a foreign government that the United States Government espoused as its "claim" and settled, was a property interest. However, in any event, as explained below, even assuming *arguendo* that Plaintiffs here have a cognizable property interest, there was no compensable taking.

dichotomy." *Id.* at 1466 (internal citations omitted). In so holding, the Federal Circuit rejected the *Abrahim-Youri* plaintiffs' "syllogism" that because they had a property interest, and the Government took their property and undervalued it, those plaintiffs were necessarily entitled to compensation for such taking. *Id.* at 1465-66.

Given the striking similarities between *Abrahim-Youri* and the instant case, this Court, consistent with *Abrahim-Youri*, considers the *Penn Central* factors as relevant in assessing whether Plaintiffs established a compensable taking.

The Extent to Which the Government's Actions Interfered with Plaintiffs' Expectations

In both *Abrahim-Youri* and the instant case, the plaintiffs claimed a taking based on the United States Government's espousal of its nationals' claims against a foreign government and settlement of those claims for less than their alleged full value. In *Abrahim-Youri*, the Federal Circuit examined the plaintiffs' reasonable expectations in their choses in action against Iran and determined that although the plaintiffs' choses in action were extinguished, "the Government provided an alternative tailored to the circumstances which produced a result as favorable to the plaintiffs as could reasonably be expected." *Id.* at 1468.

Similarly here, Plaintiffs had no reasonable expectation for recovery greater than what they received from the State Department and the Commission. After Defendant

espoused Plaintiffs' claims pursuant to the Claims Settlement Agreement, Mihai Alimanestianu's estate received $10 million from the settlement fund, and the children of Mihai Alimanestianu received $200,000 each.

In contrast to this actual recovery, Plaintiffs, at the time of Libya's terrorist act, had no reasonable expectation of any recovery at all. Because the jurisdictional rules abrogating Libya's sovereign immunity were enacted after Libya's terrorist act, Plaintiffs could not have sued Libya at the time of the injury or have had any expectation of monetary relief from Libya at that time. *Cf. Republic of Iraq v. Beaty*, 556 U.S. 848, 865, 129 S. Ct. 2183, 173 L. Ed. 2d 1193 (2009) (stating, in a non-takings context, that "[t]he President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts" (emphasis in original)). In addition, even after succeeding in their District Court action, Plaintiffs had no reasonable expectation to secure monetary payment from Libya for their claims. Plaintiffs' ability to secure payment was speculative and would have depended upon Plaintiffs' ability to enforce and collect their United States court judgment in Libya. In short, Plaintiffs lacked a realistic expectation of actually collecting their $1.3 billion judgment. As such, the Government's actions in espousing and settling their claims did not interfere with Plaintiffs' reasonable expectations in their cause of action, vacated judgment and claims against Libya.

Appendix B

The Character of the Government Action

Permeating the character of the Government actions here are the Government's conduct of foreign relations and exercise of its executive authority to compromise claims of its nationals against foreign governments to further national interests. The context in which the Government conduct here occurred is an important factor. That context of conducting international affairs colors both the extent of the property interests Plaintiffs have and the reasonableness of any expectations that a taking of these interests would give rise to compensation. Plaintiffs' property interests in their causes of action against foreign governments are necessarily constrained by their own Government's paramount right to conduct foreign affairs and concomitant right to compromise its nationals' claims in the process.

As the Federal Circuit clarified in *Abrahim-Youri*:

> Certain sticks in the bundle of rights that are property are subject to constraint by the government, as part of the bargain through which the citizen otherwise has benefit of government enforcement of property rights. As the trial court correctly observed, those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity.

139 F.3d at 1468.

The very real potential that the Government might have had to compromise individual nationals' claims against Libya diminishes any reasonable expectation that Plaintiffs would receive full compensation for their claims. As the Supreme Court recognized, "[n]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns . . . [and] nations have often entered into agreements settling the claims of their respective nationals." *Dames & Moore v. Regan*, 453 U.S. 654, 679, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981) (internal citation omitted).

Further, Plaintiffs brought their suit pursuant to the State Sponsor of Terrorism exception to FSIA and the Government's designation of Libya as a state sponsor of terror, which permitted suit against Libya - - a somewhat tenuous jurisdictional grant which could have been (and later was) eliminated by the United States. *See Beaty*, 556 U.S. at 864-65 (noting that as foreign sovereign immunity "'reflects current political realities and relationships,' . . . [it] generally is not something on which parties can rely 'in shaping their primary conduct.'" (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004))); *see also Shanghai Power*, 4 Cl. Ct. at 244. Given this landscape, Plaintiffs had no reasonable expectation that they would receive the full quantum of their District Court judgment in satisfaction of their claims against Libya.

Appendix B

The Economic Impact of the Government's Conduct on Plaintiffs' Property Rights

The Government's conduct benefited Plaintiffs economically here. The estate received $10 million and each child received $200,000. *See Belk v. United States*, 858 F.2d 706, 709 (Fed. Cir. 1988) ("'[W]here, as here, the private party is the particular intended beneficiary of the governmental activity, 'fairness and justice' do not require that losses which may result from that activity 'be borne by the public as a whole,' even though the activity may also be intended incidentally to benefit the public.'" (alteration in original) (quoting *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 92, 89 S. Ct. 1511, 23 L. Ed. 2d 117 (1969))).

Here, as in *Abrahim-Youri*, the Government's action in espousing and settling Plaintiffs' claims gave Plaintiffs as much compensation as they likely would have secured had they been left to their own devices. As the Federal Circuit recognized:

> Here, though the choses in action were extinguished, the Government provided an alternative tailored to the circumstances which produced a result as favorable to plaintiffs as could reasonably be expected.

139 F.3d at 1468.

It is speculative whether Plaintiffs would have secured any recovery from Libya absent the Government's espousal and settlement of their claims. *See United States v. Sperry Corp.*, 493 U.S. 52, 63, 110 S. Ct. 387, 107

L. Ed. 2d 290 (1989) (stating that plaintiff "benefit[ed] directly from the existence and functions of the Tribunal" because it "assured [plaintiff] that any award made to it, whether as the result of a settlement or otherwise, could be enforced in the courts of any nation and actually paid in this country"). When Plaintiffs' $1.3 billion District Court judgment was espoused, it was still on appeal, and no property had been attached. Here, as in *Sperry*, Plaintiffs' judgment was not "readily collectible." 493 U.S. at 63 (stating that "[h]ad the President not agreed to the establishment of the Tribunal and the Security Account, [plaintiff] would have had no assurance that it could have pursued its action against Iran to judgment or that a judgment would have been readily collectible."); *see In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 49 (D.D.C. 2009) (discussing the "number of practical, legal, and political obstacles [which] have made it all but impossible for plaintiffs in these FSIA terrorism cases to enforce their default judgments against Iran").

As the United States Court of Appeals for the First Circuit observed:

> There may well be situations when the President's extinction or "settlement" of a claim against a foreign government, without the consent of the claimant, would constitute a "taking" of private property for public "use." Here, of course, the President has not "extinguished" [Appellant's] claim, but has provided alternative means for its resolution and satisfaction. Thus, his actions could at very most constitute a "taking" of property only if the alternative method of satisfying

> the claim (i.e., submission to the Tribunal) is demonstrably and measurably inferior to the rights otherwise available to [Appellant] (i.e., the right to attempt to obtain an unsecured judgment in federal court).

Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 814-15 (1st Cir. 1981). It cannot be said that the alternative forum provided to Plaintiffs here was "demonstrably and measurably inferior" to Plaintiffs' right to pursue their claims against Libya in federal court and attempt to enforce any judgment sustained on appeal.

Plaintiffs' dissatisfaction with the settlement amount negotiated by the Government and the compensation awarded by the Commission do not establish a compensable taking. *See Abrahim-Youri*, 139 F.3d at 1468 ("[T]he fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States.").

CONCLUSION

Defendant's motion for summary judgment is **GRANTED**.

Plaintiffs' cross-motion for partial summary judgment is **DENIED**.

/s/ Mary Ellen Coster Williams
MARY ELLEN COSTER WILLIAMS
Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS, FILED DECEMBER 30, 2016

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 14-704 C

ALEXANDER ALIMANESTIANU, *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

JUDGMENT

Pursuant to the court's Opinion and Order filed December 29, 2016, granting defendant's motion for summary judgment and denying plaintiffs' cross-motion for partial summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant.

Lisa L. Reyes
Acting Clerk of Court

By: s/ Anthony Curry
Deputy Clerk

December 30, 2016

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS, FILED OCTOBER 29, 2015

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 14-704C

ALEXANDER ALIMANESTIANU, *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

October 29, 2015, Filed

Rule 8(a)(2); Rule 12(b)(6); Motion to Dismiss; Fifth Amendment Taking; Property Interest; Nonfinal Judgment; Justiciability; Political Question

OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

WILLIAMS, Judge.

This Fifth Amendment taking case comes before the Court on Defendant's motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs, family

members of an American citizen killed in an airplane explosion caused by Libyan-sponsored terrorism, obtained a favorable judgment on wrongful death claims in the United States District Court for the District of Columbia. Subsequently, in an international claims settlement agreement that normalized relations between the United States and Libya and restored sovereign immunity to Libya, the United States espoused Plaintiffs' claims against Libya and compromised them for far less than Plaintiffs' judgment. Now, Plaintiffs seek compensation under the Fifth Amendment for the Government's alleged taking of Plaintiffs' claims and judgment against Libya.

Defendant argues that Plaintiffs' Fifth Amendment taking claims should be dismissed for three reasons: (1) Plaintiffs' claims are not based upon a valid property interest; (2) restoration of jurisdictional immunity is not a taking; and (3) Plaintiffs' claims constitute nonjusticiable political questions. Because this Court finds that Plaintiffs have alleged a Fifth Amendment taking, Defendant's motion to dismiss is **DENIED**.

Background[1]

Plaintiffs are family members of Mihai Alimanestianu, a United States national who was killed on September 19, 1989, when Union de Transports Aeriens Flight 772 exploded over Niger due to an act of terror sponsored by the Libyan Government. In 1996, Congress amended

1. This background is derived from Plaintiffs' Complaint and the appendices and exhibits to the parties' motion papers.

the Foreign Sovereign Immunities Act to strip Libya of sovereign immunity with respect to claims for money damages for personal injury or death caused by acts of state-sponsored terrorism. 28 U.S.C. § 1605(a)(7) (1996).

In 2002, Plaintiffs filed a lawsuit stemming from Mr. Alimanestianu's death against Libya and six high-ranking Libyan officials[2] in the United States District Court for the District of Columbia, *Pugh, et al. v. Socialist People's Libyan Arab Jamahiriya*, Civil Action No. 02-2026-HHK (D.D.C.). The Court granted summary judgment in Plaintiffs' favor on January 24, 2008, and on August 8, 2008, entered final judgment, awarding Plaintiffs approximately $1.3 billion.[3] The District Court distributed the award among Plaintiffs as follows:

- Estate of Mihai Alimanestianu: $54,453,877 against Libya, $163,361,631 against the Libyan officials;

- Ioana Alimanestianu (wife of Mihai Alimanestianu): $76,728,208 against Libya, $230,184,624 against the Libyan officials;

- Joanna Alimanestianu (daughter of Mihai Alimanestianu): $30,091,546 against Libya, $90,274,638 against the Libyan officials;

---

2. The six Libyan officials sued in their individual capacities were Abdallah Senoussi, Ahmed Abdallah Elazragh, Ibrahim Naeli, Abras Musbah, Issa Abdelsalam Shibani, and Abdelsalam Hammouda El Ageli.

3. Plaintiffs were joined in the *Pugh* action by similarly situated parties. The total award to all *Pugh* plaintiffs was $6,903,683,445.

- Nicholas Alimanestianu (son of Mihai Alimanestianu): $30,091,546 against Libya, $90,274,638 against the Libyan officials;

- Irina Alimanestianu (daughter of Mihai Alimanestianu): $30,091,546 against Libya, $90,274,638 against the Libyan officials;

- Alex Alimanestianu (son of Mihai Alimanestianu): $30,091,546 against Libya, $90,274,638 against the Libyan officials;

- Estate of Calin Alimanestianu (brother of Mihai Alimanestianu): $24,261,963 against Libya, $72,785,889 against the Libyan officials;

- Estate of Serban Alimanestianu (brother of Mihai Alimanestianu): $24,261,963 against Libya, $72,785,889 against the Libyan officials; and

- Estate of Constantin Alimanestianu (brother of Mihai Alimanestianu): $24,261,963 against Libya, $72,785,889 against the Libyan officials.

Compl. ¶ 24.

The defendants in the *Pugh* action filed a notice of appeal on August 14, 2008. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, Nos. 08-5387, 08-5388 (D.C. Cir.) (consolidated).

Appendix D

On the same day that the *Pugh* defendants appealed, the United States entered into a "Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya," ("the Agreement"). Pls.' Resp. Ex. 1, at A3-A5. As a result of the Agreement, Libya was no longer subject to the exceptions to immunity from jurisdiction for terrorism-related wrongful death and physical injury claims. The Agreement "terminate[d] permanently all pending suits (including suits with judgments that are still subject to appeal or other forms of direct judicial review)," and precluded any future suits arising out of Libyan-sponsored terrorism. *Id.* at A3.

As part of the Agreement, the United States and Libya established a "humanitarian settlement fund." *Id.* at A4, A6. The United States deposited $300 million into the fund, which was used to compensate Libyan victims of U.S. airstrikes. Libya deposited $1.5 billion into the fund, which was used to compensate all United States claimants. The United States and Libya each agreed to accept these funds "as a full and final settlement of its claims and suits and those of its nationals," and each party was required to, among other things, "[s]ecure . . . the termination of any suits pending in its courts . . . (including proceedings to secure and enforce court judgments), and preclude any new suits in its courts," and restore "sovereign, diplomatic and official immunity to the other Party." *Id.* at A4.

In 2008, Congress enacted the Libyan Claims Resolution Act. Pub. L. No. 110-301, 122 Stat. 2999 (2008) ("LCRA"). The LCRA codified the Agreement and

provided that, upon certification that the United States received the funds pursuant to the Claims Settlement Agreement, sovereign immunity would be restored to Libya. *Id.*

Secretary of State Condoleezza Rice issued the certification that the United States had received the Libyan funds, as required by the LCRA, on October 31, 2008. The same day, President Bush issued Executive Order No. 13,477, providing that any pending suit by United States nationals, and any pending suit within the United States by foreign nationals—"including any suit with a judgment that is still subject to appeal"—that came within the terms of the Claims Settlement Agreement "shall be terminated." Pls.' Resp. Ex. 7, at A93; 73 Fed. Reg. 65,965, 65,965-66 (Oct. 31, 2008).

Meanwhile, the appeal in *Pugh* was proceeding in the D.C. Circuit. The two appeals had been consolidated, but briefing had not yet begun. On January 9, 2009, the United States filed a motion to "intervene, vacate judgment, and dismiss suit with prejudice," arguing that, pursuant to the LCRA, the Claims Settlement Agreement, and Executive Order No. 13,477, "U.S. Courts no longer have jurisdiction over terrorism-related claims against Libya." Pls.' Resp. Ex. 5, at A63, A64. In its motion, the Government stated that it "espoused the terrorism-related claims of U.S. nationals against Libya, including plaintiffs' claims . . . . In espousing the claims against Libya, the United States has made the plaintiffs' claims its own." *Id.* at A64. The Government argued:

Appendix D

> As a result of the President's espousal of U.S. nationals' terrorism-related claims against Libya and the immunity provisions of the Libya Claims Resolution Act, claims against Libya such as those at issue in this case are no longer justiciable. U.S. nationals with claims covered by the Claims Settlement Agreement must instead seek compensation from the United States through administrative proceedings established by the Secretary of State for any terrorism-related injuries caused by Libya.

Id. at A72-A73.

On February 27, 2009, the D.C. Circuit granted the Government's motion, vacated the judgment in *Pugh* and directed the District Court to dismiss the case with prejudice in light of the Libyan Claims Resolution Act, the Claims Settlement Agreement, and "the President's espousal in Executive Order 13477 of the terrorism-related claims of U.S. nationals against Libya." *Pugh*, Nos. 08-5387, 08-5388, 2009 U.S. App. LEXIS 4142 *3-4 (D.C. Cir. Feb. 27, 2009). On March 6, 2009, the District Court dismissed the *Pugh* action with prejudice.

Following the receipt of $1.5 billion from Libya in October 2008, the State Department established a fund to compensate individuals with wrongful death or personal injury claims against Libya caused by acts of state-sponsored terrorism. The State Department determined that a $10 million payment per death would be "fair compensation" for wrongful death claims.

See Pls.' Resp. Ex. 5, at A72. The children of Mihai Alimanestianu received $200,000 each from the Foreign Claims Settlement Commission of the United States, and the Estate of Mihai Alimanestianu received $10 million. Mihai Alimanestianu's wife and the estates of his brothers received no compensation.

Discussion

Plaintiffs assert that, in entering into the Claims Settlement Agreement, the United States Government effected a Fifth Amendment taking by compromising their claims without their authorization, taking their billion-dollar judgment and awarding them, "at most, pennies on the dollar." Compl. ¶¶ 33, 37; Pls.' Resp. 4-5, 9. Defendant moves to dismiss this action for failure to state a claim upon which relief can be granted, arguing: (1) Plaintiffs do not possess a valid property interest upon which to base their takings claim; (2) assuming, *arguendo*, that Plaintiffs allege a cognizable property interest, restoration of jurisdictional immunity to Libya cannot be considered a "taking" of that interest; and (3) Plaintiffs' claims constitute nonjusticiable political questions.

Legal Standard

Pursuant to Rule 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(2); *see Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (construing Rule 8 of the Federal Rules of Civil Procedure, which is identical to RCFC 8). To survive

a motion to dismiss under Rule 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. This plausibility standard requires more than a "sheer possibility" that the defendant has violated the law. *Id.*

Whether Plaintiffs Possess a Valid Property Interest

Plaintiffs allege that the property interest taken is their $1,297,336,632 judgment awarded by the District Court in the *Pugh* action, and Defendant counters that a nonfinal judgment or a cause of action does not constitute a cognizable property interest.

The Fifth Amendment of the United States Constitution provides: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. Thus, "[t]he Fifth Amendment's Takings Clause prevents the Legislature (and other Government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (quoting *United States v. Brown*, 381 U.S. 437, 456-62, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965)). The Takings Clause "was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should

be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

The Federal Circuit established a two-part test to determine whether a governmental action constitutes a taking under the Fifth Amendment: "First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was 'taken.'" *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009). "It is essential in advancing a taking claim that a plaintiff establish that he is the owner of a compensable interest in property." *Payne v. United States*, 31 Fed. Cl. 709, 710 (1994) (citing *Armstrong*, 364 U.S. at 44-46). "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164, 118 S. Ct. 1925, 141 L. Ed. 2d 174, (1998) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). Federal law and common law can also define such property rights. *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

The Court must determine whether Plaintiffs' judgment stemming from "various state and federal

common law and statutory claims"[4] related to the death of Mr. Alimanestianu constituted a cognizable property interest. *See* Compl. ¶ 21. Defendant argues that the judgment awarded to Plaintiffs is not a cognizable property interest because it is nonfinal, i.e., the judgment had not vested and was still "subject to appeal or other available relief within the judicial system." Def.'s Mot. 6. Defendant contends that no "vested" right could attach "until there is a final, unreviewable judgment." *Id.*

Although at the time of the alleged taking, Plaintiffs' judgment was nonfinal and subject to appeal, Defendant's conduct prevented Plaintiffs' judgment from becoming final. Defendant intervened in the appeal and moved the Court to vacate the judgment and dismiss the action, based on the Settlement Agreement and the LCRA. Defendant's action in securing a vacatur of the judgment based upon nonjudicial conduct of the Executive and Legislature cut off the established judicial appellate process and rendered the trial court's judgment a nullity. This vacatur of a final trial court judgment via an international settlement agreement, while presumed to be legal, is a deprivation of the rights of litigants who had invested time and energy in the established legal process and had been awarded a monetary judgment. As the Supreme Court has recognized:

---

4. The plaintiffs in the *Pugh* action sought "money damages for extrajudicial killings, aircraft sabotage, and personal injuries." Order granting in part and denying in part Motion to Dismiss, *Pugh*, 290 F. Supp. 2d 54 (D.D.C. Oct. 27, 2003). Jurisdiction was predicated upon the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611 (2003). *Id.*

> To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would — quite apart from any considerations of fairness to the parties — disturb the orderly operation of the federal judicial system.

U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 27, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994).

Because what was taken was Plaintiffs' right to complete the appellate process to attain a final judgment, the lack of finality of Plaintiffs' judgment cannot form a basis for denying a taking. Rather, Defendant deprived Plaintiffs of their right to defend their judgment to finality, and this deprivation was part and parcel of the taking. Defendant took Plaintiffs' claims that they had pursued to a final trial court judgment, compromised those claims without Plaintiffs' consent, and deprived Plaintiffs of their right to pursue their claims on appeal. In effecting its espousal of Plaintiffs' claims, the Government took the claims, the judgment, and Plaintiffs' ability to obtain relief through the judicial system.

Defendant contends that causes of action in general do not constitute cognizable property interests. Defendant further argues that Plaintiffs' nonfinal judgment is not a cognizable property interest because it was inchoate in that Plaintiffs' cause of action did not provide a certain expectation of compensation. However, the Federal Circuit has recognized that a cause of action may be a

cognizable property interest. *See Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) ("Because a legal cause of action is a property interest within the meaning of the Fifth Amendment, claimants have properly alleged possession of a compensable property interest.") (internal citations omitted). *See also Aviation & Gen. Ins. Co. et al. v. United States*, 121 Fed. Cl. 357, 365 (2015) (finding that insurers had a property interest in their right to bring an indemnification suit for losses sustained in insuring the aircraft destroyed during a Libyan state-sponsored terrorist attack); *accord Armstrong*, 364 U.S. at 48-49 (recognizing that materialmen had a compensable property interest in their liens and that the Government's seizure of property subject to an unenforced lien abrogated the value of the lien and constituted a taking). *See generally* Emer de Vattel, *The Law of Nations* Bk. IV Ch. 2 § 12 at 435 (Béla Kapossy & Richard Whitmore eds. 2008) ("The necessity of making peace authori[z]es the sovereign to dispose of the property of individuals; and the eminent *domain* gives him a right to do it . . . . But as it is for the public advantage that he thus disposes of them, the state is bound to indemnify the citizens who are sufferers by the transaction.") (alteration in original).

As Justice Powell observed in his concurring opinion in *Dames & Moore v. Regan*, "[t]he Government must pay just compensation when it furthers the Nation's foreign policy goals by using as bargaining chips claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." 453 U.S. 654, 691, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981) (Powell, J., concurring in

part and dissenting in part) (internal quotation marks and footnote omitted).[5] Plaintiffs allege that this is precisely what occurred here, in that the Government furthered a foreign policy goal by normalizing diplomatic and legal relations with Libya, but in doing so, took the property interests of U.S. nationals in the form of their right to maintain claims for wrongful death or injury due to Libyan state-sponsored terrorism.

Whether Plaintiffs Have Alleged Acts that Constitute a Taking

Having found that the Plaintiffs alleged a cognizable property interest, this Court must determine whether Plaintiffs have alleged sufficient facts for the Court to find that the property interest was "taken." *Acceptance Ins. Cos.*, 583 F.3d at 854. "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (internal citations omitted). Defendant describes the alleged taking as the restoration of Libya's immunity from suit. This characterization of Plaintiffs' claim is too narrow, and ignores the gravamen of Plaintiffs' allegation that the United States' espousal of the judgment

5. The rationale in *Gray v. United States*, 21 Ct. Cl. 340 (1886), an advisory opinion and not binding precedent, would also support a conclusion that Plaintiffs have stated a claim for a taking. *See* Gray, 21 Ct. Cl. at 390-93, 398-99 (concluding that the United States' renunciation of U.S. merchants' claims against France for losses stemming from France's seizure of U.S. merchant vessels to effect an international agreement constituted a taking).

obtained by the plaintiffs in the *Pugh* action was a direct appropriation of their private property. In support of this allegation, Plaintiffs quote the Government's January 9, 2009 motion to intervene, emphasizing the Government's acknowledgment that "[i]n espousing the claims against Libya, the United States has made the plaintiffs' claims its own." *Id.* In essence, Plaintiffs claim that the Government transferred ownership of Plaintiffs' accrued cause of action to itself. Because Plaintiffs claim that the Government took their judgment and cause of action, and Federal Circuit precedent supports the conclusion that a cause of action is a property interest, Plaintiffs plausibly alleged a Fifth Amendment taking. *Alliance of Descendants of Tex. Land Grants*, 37 F.3d at 1481; *Aviation & Gen. Ins. Co.*, 121 Fed. Cl. at 362.[6]

Defendant attempts to muddy the issue by injecting a regulatory taking analysis into what should be an assessment of Plaintiffs' pleading — a Rule 12(b)(6) inquiry into whether Plaintiffs have stated a plausible claim for a Fifth Amendment taking.

---

6. Defendant invokes *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997) to argue that there can be no taking of a claim when the Government substitutes one adjudicatory forum for another. Plaintiffs do not view the Government's settlement of their claims without their input as an adjudication by an alternative forum and squarely dispute Defendant's characterization of the Agreement. For purposes of deciding a Rule 12(b)(6) motion, the Court accepts Plaintiffs' characterization that their cause of action was compromised without their participation — not Defendant's contention that Plaintiffs' claim was adjudicated in a substitute forum. *See Iqbal*, 556 U.S. at 678.

Presuming the applicability of such a regulatory taking analysis, Defendant argues that even if Plaintiffs have a property interest in their judgment, the Court should find that no regulatory taking occurred. In its motion to dismiss, Defendant argues that the Government's espousal of the Alimanestianu family's claims did not constitute a taking, under the analytic framework in *Penn Central Transportation Co. v. City of New York*, which requires consideration of Plaintiffs' reasonable expectation, the character of the Government's conduct, and the economic impact on the claimants. 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

In their response to Defendant's motion to dismiss, Plaintiffs argue that the Government's espousal of their claims against Libya was not a regulatory taking, but rather was a "per se" taking:

> [T]he *Penn Central* paradigm is inapplicable here because the government actually seized the property in question — a "classic taking" rather than a regulatory taking. Prior to the seizure, the Alimanestianu Plaintiffs held a judgment on appeal against the Libyan Defendants. After the seizure the judgment belonged to the United States. When an actual transfer is made from an individual to the government, the Supreme Court holds that the Fifth Amendment mandates the payment of just compensation[.]

Pls.' Resp. 18-19.

It would be premature to decide at this stage of the case whether Plaintiffs' allegations should be resolved under a "per se" takings analysis or the *Penn Central* test for regulatory takings. "While those factors may ultimately be relevant in deciding whether a taking has occurred, they do not assist the Court in deciding whether Plaintiffs have stated a plausible taking claim." *Aviation & Gen. Ins. Co.*, 121 Fed. Cl. at 366. As in *Aviation*, Plaintiffs in this case "have pled that their legal causes of action against Libya were terminated by the Claims Settlement Agreement between the United States and Libya, as well as Executive Order 13477," and "[t]hese facts are sufficient to establish a claim for a taking by the United States Government for the public purpose of 'normalizing' relations between the United States and Libya." *Id. See Iqbal*, 556 U.S. at 663; *Alliance of Descendants of Texas Land Grants*, 37 F.3d at 1480-81.

Whether Plaintiffs' Complaint Raises a Nonjusticiable Political Question

When a complaint presents a question that is constitutionally assigned to a political department — as opposed to the judiciary — that question cannot be resolved before a court. *Compare Nixon v. United States*, 506 U.S. 224, 228-29, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (holding that courts cannot review impeachment proceedings because Article I, Section 3 of the Constitution gives the Senate the "sole power to try all impeachments") *with Baker v. Carr*, 369 U.S. 186, 209, 226, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (finding that Tennessee's failure to redraw legislative districts every 10 years gave rise to a justiciable

question under the Fourteenth Amendment, since "the mere fact that the suit seeks protection of a political right does not mean it presents a political question.").

Defendant argues that the Court should dismiss this case on the ground that it presents a nonjusticiable political question. Defendant posits that Plaintiffs are attempting to second guess the President's authority to settle United States citizens' claims against Libya, stating that resolving Plaintiffs' claims "would undermine the President's ability to conduct foreign relations." Def.'s Mot. 19. Defendant invokes *Shanghai Power Co. v. United States*, where the plaintiff argued that the United States was required to pay the power company just compensation because the President should have negotiated a better settlement agreement with China. 4 Cl. Ct. 237, 248 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 909, 106 S. Ct. 279, 88 L. Ed. 2d 243 (1985). In *Shanghai Power*, the Claims Court found that the question was nonjusticiable, in that political questions were implicated because the court was asked to review the merits of the President's settlement. *Id.*

Here, in contrast, Plaintiffs acknowledge "[n]either the merits of the Claims Settlement Agreement with Libya, nor the authority of the President to enter into the Claims Settlement Agreement and espouse claims against Libya is questioned." Pls.' Resp. 28. Plaintiffs allege that they had a property interest in their cause of action and trial court judgment, the Government's espousal of their claim constituted a per se Fifth Amendment taking, and the Government now owes Plaintiffs just compensation.

This takings claim does not raise a nonjusticiable political question. *See Langenegger v. United States*, 756 F.2d 1565, 1570 (Fed. Cir. 1985) (recognizing that a takings claim for the expropriation of a United States citizen's property abroad is justiciable).

Conclusion

For the foregoing reasons, Defendant's motion to dismiss is **DENIED**. The Court will convene a telephonic status conference on **November 17, 2015, at 11:00 a.m. EDT** to discuss scheduling further proceedings in this matter.

/s/ Mary Ellen Coster Williams
MARY ELLEN COSTER WILLIAMS
Judge

APPENDIX E — CLAIMS SETTLEMENT AGREEMENT

CLAIMS SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE GREAT SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA

In order to further the process of normalization of relations on the basis of equality and mutual benefit, the United States of America and the Great Socialist People's Libyan Arab Jamahiriya (collectively "the Parties") have agreed on the following:

ARTICLE I

The objective of this Agreement is to:

(1) reach a final settlement of the Parties' claims, and those of their nationals (including natural and juridical persons);

(2) terminate permanently all pending suits (including suits with judgments that are still subject to appeal or other forms of direct judicial review); and

(3) preclude any future suits that may be taken to their courts

if such claim or suit is against the other Party or its agencies or instrumentalities, or against officials, employees, or agents thereof (whether such officials,

employees, or agents are sued in an official and/or personal capacity), or (where the claim or suit implicates in any way the responsibility of any of the foregoing) against the other Party's nationals; and such claim or suit is brought by or on behalf of a Party's nationals (including natural and juridical persons) or such suit is brought by or on behalf of others (including natural and juridical persons); and such claim or suit arises from personal injury (whether physical or non-physical, including emotional distress), death, or property loss caused by any of the following acts occurring prior to June 30, 2006:

> (a) an act of torture, extrajudicial killing, aircraft sabotage, hostage taking or detention or other terrorist act, or the provision of material support or resources for such an act; or
>
> (b) military measures.

ARTICLE II

1. The two Parties agree to authorize the establishment of a humanitarian settlement fund ("the Fund") as the basis for settling the claims and terminating and precluding the suits specified in Article I.

2. The Fund shall be established, operated, and financed as set out in the Annex to this Agreement. The Fund will allocate resources for distribution in accordance with the Annex.

Appendix E

ARTICLE III

1. Each Party shall accept the resources for distribution as a full and final settlement of its claims and suits and those of its nationals as specified in Article I.

2. Upon receipt of resources from the Fund in accordance with the Annex, each Party shall:

(a) Secure, with the assistance of the other Party if need be, the termination of any suits pending in its courts, as specified in Article I (including proceedings to secure and enforce court judgments), and preclude any new suits in its courts, as specified in Article I.

(b) Provide the same sovereign, diplomatic and official immunity to the other Party and its property, and to its agencies, instrumentalities, officials and their property, as is normally provided within its legal system to other states and their property and to their agencies, instrumentalities, officials and their property.

(c) Refrain from presenting to the other Party, on its behalf or on behalf of another, any claim specified in Article I. If any such claim is presented directly by a national of one of the Parties to the other Party, the other Party should refer it back to the first Party.

Appendix E

ARTICLE IV

Each Party shall take necessary measures to ensure that the Fund resources shall not be subject to attachment or any other judicial process that would in any way interfere with the Fund's possession of resources or the transfer of resources to the Fund or from the Fund in accordance with this Agreement.

ARTICLE V

The Annex attached hereto is an integral part of this Agreement. The Agreement shall enter into force on the date of signature.

This Agreement was signed on August 14th, 2008 at Tripoli, in duplicate, in the English and Arabic languages, both versions being equally authentic.

/s/	/s/
FOR THE UNITED STATES OF AMERICA	FOR THE GREAT SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA

Appendix E

ANNEX

1. The Parties have agreed to authorize the establishment of a humanitarian settlement fund (the "Fund") in furtherance of their Claims Settlement Agreement (the "Agreement"), of which this Annex is an integral part.

2. The Fund shall be established in accordance with the authorization. The Fund shall open an interest-bearing account (the "Fund Account") for the purpose of receiving contributions.

3. Each Party directly, or through its authorized representative, will direct the opening of an account for the purpose of depositing money received from the Fund Account. Account A will hold funds for distribution by the United States of America. Account B will hold funds for distribution by the Great Jamahiriya or its authorized representative. Funds held for distribution by each Party may be invested as is acceptable to the competent authorities of that Party.

4. Once contributions to the Fund Account reach the amount of U.S. $1.8 billion (one bi11ion eight hundred million U.S. dollars), the amount of U.S. $1.5 billion (one billion five hundred million U.S. dollars) shall be deposited into Account A and the amount of U.S. $300 million (three hundred million U.S. dollars) shall be deposited into Account B, which in both cases shall constitute the receipt of resources under Article III(2) of the Agreement.

5. No resources shall be distributed from Account A until the United States of America has implemented Article III(2)(b), and no resources shall be distributed from Account B until the Great Jamahiriya has implemented Article III(2(b).

6. No resources shall be distributed to any claimant from Accounts A or B unless any suit of that claimant within the scope of Article I is terminated 1n accordance with Article III(2)(a).

7. ·The Fund will have a duration of six months from its creation unless otherwise agreed by the Parties. In the event there are any residual balances in the Fund Account at the time of the Fund's expiration, those balances will be transferred pursuant to arrangements agreed between the Parties.

APPENDIX F — EXECUTIVE ORDER, DATED OCTOBER 31, 2008

Executive Orders

Executive Order 13477 of October 31, 2008

Settlement of Claims Against Libya

By the authority vested in me as President by the Constitution and the laws of the United States of America, and pursuant to the August 14, 2008, claims settlement agreement between the United States of America and Libya (Claims Settlement Agreement), and in recognition of the October 31, 2008, certification of the Secretary of State, pursuant to section 5(a)(2) of the Libyan Claims Resolution Act (Public Law 110–301), and in order to continue the process of normalizing relations between the United States and Libya, it is hereby ordered as follows:

Section 1. All claims within the terms of Article I of the Claims Settlement Agreement (Article I) are settled.

(a) Claims of United States nationals within the terms of Article I are espoused by the United States and are settled according to the terms of the Claims Settlement Agreement.

> (i) No United States national may assert or maintain any claim within the terms of Article I in any forum, domestic or foreign, except under the procedures provided for by the Secretary of State.

(ii) Any pending suit in any court, domestic or foreign, by United States nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of Article I shall be terminated.

(iii) The Secretary of State shall provide for procedures governing applications by United States nationals with claims within the terms of Article I for compensation for those claims.

(iv) The Attorney General shall enforce this subsection through all appropriate means, which may include seeking the dismissal, with prejudice, of any claim of a United States national within the terms of Article I pending or filed in any forum, domestic or foreign.

(b) Claims of foreign nationals within the terms of Article I are settled according to the terms of the Claims Settlement Agreement.

(i) No foreign national may assert or maintain any claim coming within the terms of Article I in any court in the United States.

(ii) Any pending suit in any court in the United States by foreign nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of Article I shall be terminated.

(iii) Neither the dismissal of the lawsuit, nor anything in this order, shall affect the ability of any foreign national to pursue other available remedies for claims coming within the terms of Article I in foreign courts or through the efforts of foreign governments.

(iv) The Attorney General shall enforce this subsection through all appropriate means, which may include seeking the dismissal, with prejudice, of any claim of a foreign national within the terms of Article I pending or filed in any court in the United States.

Sec. 2. For purposes of this order:

(a) The term "United States national" has the same meaning as "national of the United States" in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)), but also includes any entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches).

(b) The term "foreign national" means any person other than a United States national.

(c) The term "person" means any individual or entity, including both natural and juridical persons.

(d) The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

Sec. 3. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

GEORGE W. BUSH

The White House,
October 31, 2008.

APPENDIX G — LIBYA CLAIMS RESOLUTION ACT, DATED AUGUST 4, 2008

PUBLIC LAW 110-301

110TH CONGRESS

AN ACT

To resolve pending claims against Libya by United States nationals, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Libyan Claims Resolution Act".

SEC. 2. DEFINITIONS.

In this Act—

(1) the term "appropriate congressional committees" means the Committee on Foreign Relations and the Committee on the Judiciary of the Senate and the Committee on Foreign Affairs and the Committee on the Judiciary of the House of Representatives;

(2) the term "claims agreement" means an international agreement between the United States and Libya, binding under international law, that provides for the settlement of terrorism-related claims of nationals of the United States against Libya through fair compensation;

(3) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(4) the term "Secretary" means the Secretary of State; and

(5) the term "state sponsor of terrorism" means a country the government of which the Secretary has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism.

SEC. 3. SENSE OF CONGRESS.

Congress supports the President in his efforts to provide fair compensation to all nationals of the United States who have terrorism-related claims against Libya through a comprehensive settlement of claims by such nationals against Libya pursuant to an international agreement between the United States and Libya as a part of the process of restoring normal relations between Libya and the United States.

Appendix G

SEC. 4. ENTITY TO ASSIST IN IMPLEMENTATION OF CLAIMS AGREEMENT.

(a) DESIGNATION OF ENTITY.—

(1) DESIGNATION.—The Secretary, by publication in the Federal Register, may, after consultation with the appropriate congressional committees, designate 1 or more entities to assist in providing compensation to nationals of the United States, pursuant to a claims agreement.

(2) AUTHORITY OF THE SECRETARY.—The designation of an entity under paragraph (1) is within the sole discretion of the Secretary, and may not be delegated. The designation shall not be subject to judicial review.

(b) IMMUNITY.—

(1) PROPERTY.—

(A) IN GENERAL.—Notwithstanding any other provision of law, if the Secretary designates any entity under subsection (a)(l), any property described in subparagraph (B) of this paragraph shall be immune from attachment or any other judicial process. Such immunity shall be in addition to any other applicable immunity.

(B) PROPERTY DESCRIBED.—The property described in this subparagraph is any property that—

(i) relates to the claims agreement; and

(ii) for the purpose of implementing the claims agreement, is—

(I) held by an entity designated by the Secretary under subsection (a)(1);

(II) transferred to the entity; or

(III) transferred from the entity.

(2) OTHER ACTS.—An entity designated by the Secretary under subsection (a)(1), and any person acting

through or on behalf of such entity, shall not be liable in any Federal or State court for any action taken to implement a claims agreement.

(c) NONAPPLICABILITY OF THE GOVERNMENT CORPORATION CONTROL ACT.—An entity designated by the Secretary under subsection (a)(1) shall not be subject to chapter 91 of title 31, United States Code (commonly known as the "Government Corporation Control Act").

SEC. 5. RECEIPT OF ADEQUATE FUNDS; IMMUNITIES OF LIBYA.

(a) IMMUNITY.—

(1) IN GENERAL.—Notwithstanding any other provision of law, upon submission of a certification described in paragraph (2)—

(A) Libya, an agency or instrumentality of Libya, and the property of Libya or an agency or instrumentality of Libya, shall not be subject to the exceptions to immunity from jurisdiction, liens, attachment, and execution contained in section 1605A, 1605(a)(7), or 1610 (insofar as section 1610 relates to a judgment under such section 1605A or 1605(a)(7)) of title 28, United States Code;

(B) section 1605A(c) of title 28, United States Code, section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 122 Stat. 342; 28 U.S.C. 1605A note), section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (28 U.S.C. 1605 note), and any other private right of action relating to acts by a state sponsor of

terrorism arising under Federal, State, or foreign law shall not apply with respect to claims against Libya, or any of its agencies, instrumentalities, officials, employees, or agents in any action in a Federal or State court; and

(C) any attachment, decree, lien, execution, garnishment, or other judicial process brought against property of Libya, or property of any agency, instrumentality, official, employee, or agent of Libya, in connection with an action that would be precluded by subparagraph (A) or (B) shall be void.

(2) CERTIFICATION.—A certification described in this paragraph is a certification—

(A) by the Secretary to the appropriate congressional committees; and

(B) stating that the United States Government has received funds pursuant to the claims agreement that are sufficient to ensure—

(i) payment of the settlements referred to in section 654(b) of division J of the Consolidated Appropriations Act, 2008 (Public Law 110-161; 121 Stat. 2342); and (ii) fair compensation of claims of nationals of the United States for wrongful death or physical injury in cases pending on the date of enactment of this Act against Libya arising under section 1605A of title 28, United States Code (including any action brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (28 U.S.C. 1605 note), that has been given effect as if the action had originally been filed

under 1605A(c) of title 28, United States Code, pursuant to section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 122 Stat. 342; 28 U.S.C. 1605A note)).

(b) TEMPORAL SCOPE.—Subsection (a) shall apply only with respect to any conduct or event occurring before June 30, 2006, regardless of whether, or the extent to which, application of that subsection affects any action filed before, on, or after that date.

(c) AUTHORITY OF THE SECRETARY.—The certification by the Secretary referred to in subsection (a)(2) may not be delegated, and shall not be subject to judicial review.

Approved August 4, 2008

APPENDIX H — LETTER FROM THE THE LEGAL ADVISER, DEPARTMENT OF STATE, WASHINGTON, DATED JANUARY 15, 2009

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

January 15, 2009

The Honorable Mauricio J. Tamargo,
Chairman,
Foreign Claims Settlement Commission
of the United States
Department of Justice
Washington, DC 20579

Dear Mr. Tamargo:

On August 14, 2008, the United States entered into the Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya ("Claims Settlement Agreement"). On October 31, the Secretary of State certified, pursuant to the Libyan Claims Resolution Act ("LCRA"), that the United States Government "has received funds pursuant to the claims agreement that are sufficient to ensure ... payment of the settlements referred to in section 654(b) of division J of the Consolidated Appropriations Act, 2008 (Public Law 110-161; 121 Stat. 2342); and ... fair compensation of claims of nationals of the United States for wrongful death or physical injury in cases pending on the date of enactment of this Act against Libya ..." . Also on October

31, 2008, in Executive Order 13477, the President ordered that claims of United States nationals coming within the terms of the Claims Settlement Agreement "are espoused by the United States." Executive Order 13477 directed the Secretary of State to establish procedures governing applications by United States nationals with claims coming within the terms of the Claims Settlement Agreement, and it prohibited United States nationals from asserting or maintaining such claims "except under the procedures provided for by the Secretary of State." Following receipt of the settlement amount provided for in the Claims Settlement Agreement, the Department of State has undertaken to distribute payments for certain claims within the scope of Article I of the Claims Settlement Agreement: the Pan Am 103 and LaBelle Discotheque settlement claims, as well as death claims set forth by named parties in cases pending in U.S. courts on the date of enactment of the LCRA.

On December 11, 2008, pursuant to the discretionary authority under 22 U.S.C. § 1623(a)(1)(C) delegated to me by the Secretary of State, I referred one category of claims within the scope of Article I of the Claims Settlement Agreement to the Foreign Claims Settlement Commission of the United States ("Commission") for adjudication and certification: claims for physical injury. With this letter, under this same discretionary authority, I am referring additional categories of claims for adjudication and certification. Again, we believe the Commission is particularly well-suited to undertake this task. The Commission is -requested to make determinations with respect to six categories of claims (Categories A, B, C, D,

E and F, below) in accordance with the provisions of 22 U.S.C. § 1621 et seq., the Claims Settlement Agreement and the LCRA. I have enclosed at Attachment 1 a list of cases pending in U.S. courts on the date of enactment of the LCRA in which plaintiffs allege a claim relevant to this referral ("Pending Litigation").

Category A: This category of claims shall consist of claims by U.S. nationals who were held hostage or unlawfully detained in violation of international law, provided that (1) the claimant meets the standard for such claims adopted by the Commission; (2) the claim was set forth as a claim for injury other than emotional distress alone by the claimant named in the Pending Litigation; (3) the Pending Litigation against Libya[1] has been dismissed before the claim is submitted to the Commission; and (4) the claimant did not receive an award pursuant to our referral of December 11, 2008. Given the amount we recommended for physical injury claims in our December 11, 2008 referral, we believe and recommend that a fixed amount of $1 million would be an appropriate level of compensation for all damages for a claim that meets the applicable standards under Category A.

Category B: This category shall consist of claims of U.S. nationals for mental pain and anguish who are living close relatives of a decedent whose death formed the basis of

1. Except where specifically stated otherwise, for purposes of the criteria in Categories A, B, C, D, and F, "Libya" shall include Libya and its agencies or instrumentalities; officials, employees, and agents of Libya or Libya's agencies or instrumentalities; and any Libyan national (including natural and juridical persons).

a death claim compensated by the Department of State provided that (1) the claim was set forth as a claim for emotional distress, solatium, or similar emotional injury by the claimant named in the Pending Litigation; (2) the claimant is not eligible for compensation from the associated wrongful death claim, and the claimant did not receive any compensation from the wrongful death claim; (3) the claimant has not received any compensation under any other part of the Claims Settlement Agreement, and does not qualify for any other category of compensation in this referral; and (4) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission. We believe and recommend that a fixed amount of $200,000 would be an appropriate level of compensation for a claim that meets the applicable standards under Category B.

Category C: This category shall consist of claims of U.S. nationals for compensation for wrongful death, in addition to amounts already recovered under the Claims Settlement Agreement, where there is a special circumstance in that the claimants obtained a prior U.S. court judgment in the Pending Litigation awarding damages for wrongful death, provided that (1) the Commission determines that the existence of a prior U.S. court judgment for wrongful death warrants compensation in addition to the amount already recovered under the Claims Settlement Agreement; and (2) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission. If the Commission decides to award additional compensation for claims that meet these criteria, we recommend that the Commission award an

appropriate amount up to but no more than the amount of the part of the judgment awarded to the decedent's estate as against the state of Libya or its agencies or instrumentalities, minus any interest awarded in that judgment and minus any award to the decedent's estate given by the Department of State.

Category D: This category shall consist of claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by our December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to our December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission. If the Commission decides to award additional compensation for claims that meet these criteria, we recommend that the Commission award up to but no more than an additional $7 million per claim (offering the possibility that some injury cases will be compensated at the $10 million level of the wrongful death claims processed by the Department of State).

Category E: This category shall consist of claims of U.S. nationals for wrongful death or physical injury resulting from one of the terrorist incidents listed in Attachment 2 ("Covered Incidents"), incidents which formed the basis for Pending Litigation in which a named U.S. plaintiff alleged wrongful death or physical injury, provided

that (1) the claimant was not a plaintiff in the Pending Litigation; and (2) the claim meets the standard for physical injury or wrongful death, as appropriate, adopted by the Commission. If the Commission decides to award compensation for these claims, we recommend that the Commission take into account the fixed amounts awarded by the Department of State for wrongful death claims and recommended for physical injury claims in our December 11, 2008 referral.

Category F: This category shall consist of commercial claims of U.S. nationals provided that (1) the claim was set forth by the claimant named in the Pending Litigation; (2) the Commission determines that the claim would be compensable under the applicable legal principles; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

Please direct any inquiries you may have to the Department of State's Office of International Claims and Investment Disputes, Suite 203, South Building, 2430 E Street, NW, Washington, DC, 20037-2800.

Sincerely,

/s/

John Bellinger, III

Appendix H

Attachment 1[1]
("Pending Litigation")

Baker v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 03-cv-749; *Pflug v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08-cv-505.

Certain Underwriters at Lloyds London v. Great Socialist People's Libyan Arab Jamahiriya (D.D.C.) 06-cv-731.

Clay v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 06-cv-707.

Collett v. Socialist People's Libyan Arab Jamahiriya (D. D.C.) 01-cv-2103.

Cummock v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 02-cv-2134.

Estate of John Buonocore III v. Great Socialist Libyan Arab Jamahiriya (D.D.C.) 06-cv-727; *Simpson v. Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08-cv-529.

---

1. Included in this list are cases in which plaintiffs allege hostage taking or unlawful detention, emotional distress, wrongful death, physical injury, or commercial loss, without consideration of whether plaintiffs would meet the other criteria in the relevant category. For example, every case is included in which a plaintiff alleges emotional distress, without considering whether he or she would be eligible for compensation from an associated wrongful death claim.

Appendix H

Fisher v. Great Socialist People's Libyan Arab Jamahiriya (D.D.C.) 04-cv-2055.

Franqui v. Syrian Arab Republic, et al. (D.D.C.) 06-cv-734.

Hagerman v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 02-cv-2147.

Harris v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 06-cv-732.

Hartford Fire Insurance Company v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 98-cv-3096.

Kilburn v. Islamic Republic of Iran et al. (D.D.C.) 01-cv-1301.

Knowland v. Great Socialist People's Libyan Arab Jamahiriya (D.D.C.) 08-cv-1309.

La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 05-cv-1932.

McDonald v. Socialist People's Arab Jamahiriya (D.D.C.) 06-cv-729.

MacQuarrie v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 04-cv-176.

Patel v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 06-cv-626.

Appendix H

Pugh v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 02-cv-2026.

Simpson v. Socialist People's Libyan Arab Jamahiriya (D.D.C.) 00-cv-1722.

Appendix H

Attachment 2
("Covered Incidents" for Purposes of Category E)

May 30, 1972 attack at Lod Airport in Israel, as alleged in *Franqui v. Syrian Arab Republic, et al.* (D.D.C.) 06-cv-734.

December 17, 1983 vehicle bomb explosion near Harrods Department Store in Knightsbridge, London, England, as alleged in *McDonald v. Socialist People's Arab Jamahiriya* (D.D.C.) 06-cv-729.

November 30, 1984 (approximate) kidnapping and subsequent death of Peter C. Kilburn, as alleged in *Kilburn v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 01-cv-1301.

March 25, 1985 (approximate) kidnapping and subsequent death of Alec L. Collett, as alleged in *Collett v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 01-cv-2103.

November 23, 1985 hijacking of Egypt Air flight 648, as alleged in *Certain Underwriters at Lloyds London v. Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06-cv-731 and *Baker v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) *03-cv-749/Pflug v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08-cv-505.

December 27, 1985 attack at the Leonardo da Vinci Airport in Rome, Italy, as alleged in *Estate of John Buonocore III v. Great Socialist Libyan Arab Jamahiriya* (D.D.C.) 06-cv-727/*Simpson v. Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08-cv-529.

Appendix H

December 27, 1985 attack at the Schwechat Airport in Vienna, Austria, as alleged in *Knowland v. Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08-cv-1309.

April 5, 1986 bombing of the La Belle Discotheque in Berlin, Germany, as alleged in *Clay v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06-cv-707 and *Harris v. Socialist People's Libyan Arab Jqmahiriya* (D.D.C.) 06-cv-732.

September 5, 1986 hijacking of Pan Am flight 73, as alleged in *Patel v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06-cv-626.

Detention beginning February 10, 1987 of the passengers and crew of the private yacht, "Carin II," as alleged in *Simpson v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 00-cv-1722.

December 21, 1988 bombing of Pan Am flight 103, as alleged in *Cummock v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 02-cv-2134, *Fisher v. Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 04-cv-2055, *Hagerman v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 02-cv-2147, *Hartford Fire Insurance Company v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 98-cv-3096, and *MacQuarrie v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 04-cv-176.

September 19, 1989 bombing of UTA flight 772, as alleged in *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 05-cv-1932 and *Pugh v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 02-cv-2026.