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Board Games: Germany's Monopoly on the Two-Tier System of Corporate Governance and Why the Post-Enron United States Would Benefit from Its Adoption

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Comments

About Face: American Ex-POWs Turned Away by the United States Government; After Denial of Reparations, What Does the Future Hold?

Matthew C. Stone

*“Sleep my sons, your duty done . . .
For freedom’s light has come.
Sleep in the silent depths of the sea
Or in your bed of hallowed sod.
Until you hear at dawn,
The low clear reveille of God.”
— Unknown**

I. Introduction

Choosing between competing interests is simply a fact of life for most politicians. In 1951, President Harry Truman, during his second presidential term, was faced with such a decision. In an effort to make the Second World War a thing of the past, rather than a headline topic of

current events, President Truman signed a document¹ which since has been interpreted to have relieved Japan of its obligation to pay reparations to the captured soldiers that were forced to labor at Japanese facilities and in the private mines of several prominent Japanese corporations during World War II.² Almost fifty years later, the prisoners-of-war (“POWs”), who had long ago returned home, were but a few elderly individuals; yet they would once again rise up to fight. Unlike the first round, in the swamps and on the beaches of foreign lands, they would now fight in wood-paneled court rooms and on the floor of the United States Congress, in their own backyard.

The State of California passed legislation allowing the ex-POWs to seek reparations, but the law was declared unconstitutional and the door was slammed shut in the face of our war heroes.³ California, however, was not alone. Even the federal government made a valiant effort to provide an avenue for the redress of the forced labor victims. After surpassing the two greatest challenges, namely the House and the Senate, the bill was faced with the threat of a Presidential veto, and soon disappeared, leaving the ex-POWs, once again, without repayment for years of forced labor.⁴ In the end, the United States government allowed only a limited time for the soldiers to petition for reparations through a strict procedure, of which many ex-POWs claim they were never notified. Despite having been given a significant amount of property to be liquidated for payment of reparations by the Japanese government, the United States government now forbids the ex-POWs from seeking reparations.⁵ This comment will address the inadequacy of the repayment to these soldiers, and the numerous courses of action that could lead to a just future for America’s ex-POWs.

II. History

A. *World War II : Events Stemming From the Confrontation on the Bataan Peninsula in the Philippine Islands.*

In 1941, only two years after German tanks forged into Poland,⁶ Ja-

* The author of the passage is unknown. The quote is inscribed on a monument in Corregidor, Philippines, that is dedicated to the Pacific War Dead. Every year, on May 6th, the day that Corregidor fell to the Japanese, sunlight falls directly into the center of the monument exactly at noon. See Bataan, Corregidor, and the Death March: In Retrospect, at http://home.pacbell.net/fbaldie/In_Retrospect.html (last visited May 11, 2003).

1. See *infra* Sec. II(B).

2. See *infra* Sec. II(D)(E) and (F).

3. See *infra* Sec. II(C) and (D).

4. See *infra* Sec. II(E).

5. See *infra* Sec. II(F).

6. RICHARD GOFF ET AL., *THE TWENTIETH CENTURY: A BRIEF GLOBAL HISTORY* 254

pan issued *The Way of Subjects*,⁷ in which the nation described the China Affair⁸ as “a step toward the construction of a world of moral principals by Japan.”⁹ Throughout *The Way of Subjects*, Japan reiterates a strong desire for the restoration of world peace, while simultaneously discussing the need for a national war framework.¹⁰ But Japan’s attitude toward peace would drastically change, as evidenced by the events that took place on the Bataan peninsula.

On April 9, 1942,¹¹ in the Bataan Peninsula in the Philippines, Japanese forces captured as many as 78,000 enemy troops,¹² mostly American and Filipino,¹³ who landed there planning to await relief from troops expected to arrive shortly from Hawaii.¹⁴ Because the Japanese had only expected 40,000 troops to be occupying the peninsula,¹⁵ they were without sufficient food, water, or transportation for those taken captive in Bataan.¹⁶ The lack of supplies meant a 55-mile, week-long march to the railroad,¹⁷ which then took the prisoners of war to Camp O’Donnell, a base that had been converted into a prison camp for the captured soldiers.¹⁸ The soldiers contracted malaria,¹⁹ dysentery,²⁰ and beriberi,²¹ and

(5th ed., McGraw Hill 1998) (1983).

7. IRWIN HALL AND THE DEPARTMENT OF HISTORY, UNIVERSITY OF CALIFORNIA, RIVERSIDE, TWENTIETH CENTURY WORLD CIVILIZATIONS 153 (American Heritage Custom Publishing 1997) [hereinafter “TWENTIETH CENTURY WORLD CIVILIZATIONS”] acknowledging DAVID JOHN LU, *IMPERIAL JAPAN: THE WAY OF SUBJECTS* (1974). “The way of subjects of the Emperor issues from the policy of the Emperor, and is to guard and maintain the Imperial Throne coexistent with the Heavens and the Earth. . . . The life and activities of the nation are all attuned to the task of giving great firmness to the foundation of the Empire.” *Id.*

8. The China Affair was a conflict between Japan and China that began in July, 1937, and consumed enormous Japanese resources. GERHARD L. WEINBERG, *A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II* 497 (Cambridge University Press 1994) [hereinafter “A WORLD AT ARMS”].

9. TWENTIETH CENTURY WORLD CIVILIZATIONS, *supra* note 7, at 155.

10. *Id.* at 155-56.

11. R.A.C. PARKER, *STRUGGLE FOR SURVIVAL: THE HISTORY OF THE SECOND WORLD WAR* 92 (Oxford University Press 1989).

12. GERALD ASTOR, *THE GREATEST WAR: AMERICANS IN COMBAT* 142 (Presidio Press Inc. 1999) [hereinafter “THE GREATEST WAR: AMERICANS IN COMBAT”]. Other authors contend that the figure was closer to 76,000, but most agree that more than 70,000 troops were captured by the Japanese. *See, e.g.* SARAH BRASH, *THE AMERICAN STORY: WORLD WAR II* 26 (Time Life Books 1997) [hereinafter “THE AMERICAN STORY”].

13. LEN DEIGHTON, *BLOOD, TEARS AND FOLLY: AN OBJECTIVE LOOK AT WORLD WAR II* 570-71 (Harper Collins Publishers 1993).

14. *A WORLD AT ARMS*, *supra* note 8, at 311.

15. *THE GREATEST WAR: AMERICANS IN COMBAT*, *supra* note 12, at 142.

16. *Id.*

17. MAURICE ISSERMAN, *WORLD WAR II: AMERICA AT WAR* 46 (Facts On File, Inc. 1991).

18. *THE AMERICAN STORY*, *supra* note 12.

19. Malaria is a disease that is caused by a parasitic protozoan called Plasmodium, which enters the human circulatory system when an infected Anopheles mosquito pierces

were beaten and robbed, both on their journey to, and after their arrival at the camp.²² Only 54,000 of the captured soldiers made it to the prison camps, where another 400 men died each day from starvation, disease, torture, and executions.²³

During the summer of 1942, the Japanese began shipping the remaining prisoners from the Philippines to Japan.²⁴ The boats, carrying only those prisoners fit for manual labor, were labeled "Hell Ships" because of the deplorable treatment the captives received onboard, on which 5,000 POWs lost their lives.²⁵ Upon arriving in Japan, the prisoners of war were forced to work in mines and factories, replacing Japanese workers that were being shipped off to war.²⁶ Many of the American troops worked in foundries, steel plants, and mines, where they were given only enough food, including monkey and dog meat,²⁷ to ensure that they would survive to work another day.²⁸ Some of the workers found their shortest days lasting 15 hours, leaving little time for their weekly visit to the 'bathhouse' where everyone bathed at the same time.²⁹ The accounts of almost everyone who survived clearly illustrate the inhumane conditions experienced by the prisoners during this grueling period of forced labor.

In addition to being subjected to forced labor by the Japanese government, the captive soldiers were also sold to Japanese corporations.³⁰

the skin of the individual in search of blood. The parasitic Plasmodium find their way to cells in the liver and the lymphatic system and attack red blood cells. The cells are burst by the parasite and new swarms of the Plasmodium are released and begin seeking other red blood cells. W. PURVES, ET AL., LIFE: THE SCIENCE OF BIOLOGY 562 (5th ed. Sinauer Associates, Inc. 1998) (1983) [hereinafter "THE SCIENCE OF BIOLOGY"].

20. Dysentery is a disorder "marked by inflammation of the intestines, especially of the colon, and attended by pain in the abdomen, tenesmus, and frequent stools containing blood and mucus." The disorder is caused by chemical irritants, bacteria, protozoa, and/or parasitic worms. See, e.g., Galaxy Health Medical Dictionary, at <http://www.galaxyofhealth.com/dictionary/dictionaryd.html> (last visited Jan. 15, 2003).

21. Beriberi is a disease that causes extreme weakness. A reduced diet or inadequate nourishment results in a lack of Vitamin B1, which is a coenzyme in cellular respiration. The condition causes a loss of appetite and extreme fatigue. THE SCIENCE OF BIOLOGY, *supra* note 19, at 892 (Chart 50.2).

22. THE AMERICAN STORY, *supra* note 12.

23. *Id.*

24. DONALD KNOX, DEATH MARCH: THE SURVIVORS OF BATAAN 337 (Harcourt Brace Jovanovich Publishers 1981) [hereinafter "DEATH MARCH"].

25. *Id.* at 337-38.

26. *Id.* at 359-62.

27. *Id.* at 368, containing a Recollection of events by Cpl. Ishmael Cox while in a temporary prisoner camp in Hoten, Manchuria.

28. *Id.* at 360-62.

29. DEATH MARCH, *supra* note 24, at 369. Recollection of events by Pfc. William Wallace while in Niigata.

30. Some individuals have conducted extensive research to determine exactly which Japanese corporations employed foreign citizens who were captured during the war and

At the factories and mines of such companies as Mitsubishi,³¹ Mistu, Ishihara,³² and Nippon Steel,³³ American soldiers were held captive as forced laborers.³⁴ The captured soldiers were told to “work or die” despite the fact that some as tall as 6 foot 4 weighed only 95 pounds. Such conditions led to death rates in Japanese prison camps 30 times higher than those of German prison camps.³⁵ At the Mitsu corporation, medical care was very limited³⁶ because the Japanese required such a rigorous work schedule.³⁷ Many of the men would remain captive, working unbearably long shifts in the mines and plants until the end of the war in 1945.³⁸

When World War II came to a close, 16,000 surviving American

forced to labor. An astonishing 135 such companies have been identified. See *Korean Laborers Sue For WWII Pay*, SAN DIEGO UNION-TRIB., Feb. 28, 2001, at A8.

31. Mitsubishi Corporation currently has enterprises extending into numerous countries throughout the world and lists one of its ‘Standards of Conduct’ as the desire to “give due consideration to the social impact of its corporate business activities and [to] always remember that it is an integral part of the communities and international society in which it operates. . . .” Mitsubishi claims that a Basic Principle of the company is to “[r]espect human rights. . . .” See Mitsubishi Corporation’s Corporate Profile: “Philosophy and Principles” at <http://www.mitsubishi.co.jp/En/corpo/philo/index.html> (last visited May 11, 2003).

32. Ishihara Sangyo Kaisha, Ltd. was founded in September, 1920 and incorporated in June, 1949. They specialize in chemical engineering and have over 1,400 employees as of March, 1997. See “About Ishihara Techno Corp.” at <http://www.ijjnet.or.jp/itc-fmp/company.html> (last visited May 11, 2003).

33. Nippon Steel has a history of mergers and divisions that somewhat cloud the past activities of the company. “The government-owned Yawata Works started operations in 1901, marking the first step in the Japanese steel industry. Japan Iron & Steel Co., Ltd., formed with Yawata Works as the nucleus, was split to Yawata and Fuji Steels in 1950 under the Law for the Elimination of Excessive Concentration of Economic Power. Twenty years later in 1970, the two companies merged again and the present Nippon Steel Corporation was born.” Nippon Steel homepage, at <http://www.nsc.co.jp/> (last visited May 11, 2003).

34. *POW Victims of Japanese Slave Labor Testify Before Senate Judiciary Committee*, AEROTECH NEWS AND REVIEW: JOURNAL OF AEROSPACE AND DEFENSE INDUSTRY NEWS, June 30, 2000, available at http://www.aerotechnews.com/starc/2000/063000/Japan_POWs.html (last visited May 11, 2003).

35. *Id.*

36. See, e.g. Justin Pritchard, *U.S.-Japan Treaty Anniversary Marked*, A. P. ONLINE, Sept. 7, 2001 [hereinafter “*U.S.-Japan Treaty Anniversary Marked*”]. Part of the article discusses the experiences of a 6 foot 4 man who weighed only 95 pounds. He was so weak from the limited diet that he broke one of his frail legs while working in the mines. Instead of putting a cast on the leg to repair it, a doctor amputated his leg with a hacksaw. The tourniquet was then packed with maggots to eat away at the gangrenous flesh so that he might survive to work another day. *Id.*

37. DEATH MARCH, *supra* note 24, at 377.

38. L. Ling-chi Wang, *No Legacy of Peace: U.S.-Japan Treaty Represents 50 Years of Denial*, S. F. CHRON., Sept. 5, 2001 at A-21. L. Ling-chi Wang is a professor of Asian American Studies at the University of California at Berkeley, see, e.g., *U.S.-Japan Treaty Anniversary Marked*, *supra* note 36.

prisoners of war, captured on the peninsula of Bataan, were freed and returned to the United States.³⁹ Many of the prisoners lost between 60⁴⁰ and 100 pounds⁴¹ during their captivity in Japan, and as one of the 6,000 ex-prisoners still alive today recalls, “[w]e were all just skin and bones.”⁴² The massive amount of suffering and the vast number of deaths that took place at the hands of both the Japanese government and private Japanese corporations are among the worst records of abusive treatment of POWs in recorded history.⁴³

B. The United States and Japan Sign the 1951 Peace Treaty, Formally Concluding the War in the Pacific.

Several years later, representatives from Japan, the United States, and 47 other countries⁴⁴ met at the War Memorial Opera House in San Francisco, California.⁴⁵ There, on September 8, 1951, during a televised ceremony,⁴⁶ the representatives of the numerous nations signed a peace treaty⁴⁷ formally concluding World War II in the Pacific.⁴⁸ The treaty established a defense alliance between the United States and Japan, which remains a vital part of America’s foreign policy, and gave Japan political independence.⁴⁹ Some countries, such as the USSR, Czechoslo-

39. *Right of World War II POWs to Sue for Wages: Testimony Before the House Judiciary Subcomm. on Immigration and Claims Regarding HR 1198*, 107th Cong. (Sept. 25, 2002) (Statement of Rep. Dana Rohrabacher) [hereinafter “*Right of World War II POWs to Sue for Wages*, Statement of Rep. Dana Rohrabacher”].

40. Edward Klump, *Bill Would Let Ex-POWs Sue Japanese Firms*, THE ORANGE COUNTY REG., Mar. 23, 2001 at p-G [hereinafter “*Bill Would Let Ex-POWs Sue Japanese Firms*”].

41. John A. Patterson, *Apologies, Reparations for Bataan, etc. – Hold Japan Accountable for U.S. POWs*, PROVIDENCE J., Aug. 13, 2001 at B-6.

42. *Bill Would Let Ex-POWs Sue Japanese Firms*, *supra* note 40, at p-G. Quote by Bowers of Seal Beach, California, a former POW. Bowers was 79 when interviewed.

43. *Right of World War II POWs to Sue for Wages*, Statement of Rep. Dana Rohrabacher, *supra* note 39.

44. The other attending countries were Argentina, Australia, the Kingdom of Belgium, Bolivia, Brazil, Cambodia, Canada, Ceylon, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Indonesia, Iran, Iraq, Laos, Lebanon, Liberia, the Grand Duchy of Luxembourg, Mexico, the Kingdom of the Netherlands, New Zealand, Nicaragua, the Kingdom of Norway, Pakistan, Panama, Paraguay, Peru, the Republic of the Philippines, Saudi Arabia, Syria, the Republic of Turkey, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela, and Viet Nam. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 [hereinafter “*Peace Treaty*”].

45. *War Legacy Remains Under San Francisco Treaty*, JAPAN POL’Y & POL., Sept. 3, 2001 [hereinafter “*War Legacy Remains*”].

46. Annie Nakao, *Gala Reopens Wounds for Japanese Americans*, S. F. CHRON., Sept. 5, 2001, at A-1 [hereinafter “*Gala Reopens Wounds for Japanese Americans*”].

47. *Peace Treaty*, *supra* note 44.

48. *War Legacy Remains*, *supra* note 45.

49. *Bad Feelings Cloud Peace Pact Fest*, SAN ANTONIO EXPRESS-NEWS, Sept. 8,

vakia, and Poland, elected not to sign the Peace Treaty,⁵⁰ and India and Burma refused to even attend the conference.⁵¹ Japan actually took proactive steps to convince some nations to attend the conference and sign the treaty.⁵²

The Netherlands was apprehensive about signing the treaty, because the nation was concerned that it may be interpreted, as it now is, to deny reparations to the victims of Japanese forced labor practices.⁵³ The Japanese prime minister at the time, Shigeru Yoshida, persuaded the Netherlands to sign the treaty by stating that “the government of Japan does not consider that the government of the Netherlands by signing the treaty has itself expropriated the private claims of its nationals so that, as a consequence thereof, after the treaty comes into force these claims would be nonexistent.”⁵⁴ Thus, as the treaty was being signed, Japan was luring nations into the treaty with promises that the agreement would not preclude the very action that the U.S. government now prohibits: reparations suits by private individuals. This Multilateral Treaty of Peace with Japan, as well as a Security Treaty between the United States and Japan,⁵⁵ took effect on April 28, 1952.

The treaty contained several noteworthy provisions, two of which are found in Article 14. First, Japan recognized that it should pay reparations.⁵⁶ Second, except for territories which Japanese troops occupied during the war, the Allied powers waived all reparations claims against Japan.⁵⁷ Such provisions have been interpreted as absolving Japan of any obligation to pay reparations, allowing the country to realize substantial economic benefits.⁵⁸ Just five years later, in 1956, Japan became

2001, at 16-A.

50. See, e.g., History Central Timeline, at <http://www.multied.com/dates/1950.html> (last visited May 11, 2003).

51. See Chronology of Japan: Timeline, at http://www.ghazali.net/world/japan/html/body_1951_-_2000_ad.html (last visited May 11, 2003).

52. Steven C. Clemons, *U.S. Role in Japanese Amnesia*, FAR EASTERN ECONOMIC REVIEW, Oct. 25, 2001, at 32.

53. *Id.*

54. *Id.*

55. Security Treaty with Japan, Sept. 8, 1951, U.S.-Japan, 3 U.S.T. 3329.

56. Peace Treaty, *supra* note 44, at ch. 5, art. 14(a). “It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. . . .” *Id.*

57. *Id.* at ch. 5, art. 14(b). “Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war. . . .” *Id.*

58. Mark Magnier, *The World 50 Years Later, Japan Finds Peace and Uncertainty Treaty: The Nation Rose After World War II to be a Major Economic Player, But the Past Decade Has Seen a Slump. Many Wonder When it Will End*, L. A. TIMES, Sept. 8, 2001 at A5 [hereinafter “*The World 50 Years Later*”].

a member of the United Nations, and later became the world's second largest economy.⁵⁹

C. *The State of California Enacts a Law Giving Ex-POWs the Right to Sue Japanese Corporations to Recover Reparations for Their Imprisonment.*

In 1999, the State of California passed a statute⁶⁰ which recognized individual claims by ex-POWs that were held captive as forced laborers during World War II against the multi-national corporations that enslaved them.⁶¹ The law allowed not only the ex-prisoners themselves, but also the heirs of the victims, to sue, in California state courts, the firms that used the soldiers as forced labor.⁶² Mike Honda, a co-author of the law and then a State Representative in the California Legislature, reasoned that “[i]n this country, people have the right to have their day in court,” describing the right as “a guarantee.”⁶³ The California statute, which extended the deadline for filing claims until 2010, opened the door to reparations suits by those held captive as prisoners in Japan, Germany, and their allies, which would otherwise be barred by the statute of limitations.⁶⁴ Many suits that otherwise would not have been filed were permitted by the statute in the State of California, which became “a spearhead in an international campaign to confront Japan over its wartime sins.”⁶⁵

D. *Conflict: The Federal Government Prepares to Do Battle With the State of California.*

After the enactment of California Code of Civil Procedure § 354.6, numerous suits⁶⁶ were filed in state courts by former POWs held captive by the Japanese and forced to work for Japanese Corporations.⁶⁷ The

59. *Id.*

60. CAL. CIV. PROC. CODE § 354.6 (1999) “Second World War slave forced labor victims; heirs; actions for recovery of compensation; limitations.”

61. *U.S. Rejects Basis for Wartime Compensation Suits*, JAPAN POL’Y & POL., Sept. 10, 2001 [hereinafter “*U.S. Rejects Basis*”].

62. Mark Austin, *War Not Over for Ex-POWs Suing Japanese Firms*, THE YOMIURI SHIMBUN, Sept. 1, 2001.

63. *Id.*

64. *U.S. Congressmen Push Bill For Ex-POWs Against Japanese Firms*, JAPAN POL’Y & POL., Mar. 26, 2001.

65. Charles Burrell, *State is Ground Zero for WWII Lawsuits: California Lets Ex-POWs Take Aim at Japan*, S. F. CHRON., Apr. 22, 2001, at A1.

66. To date, there have been 26 such cases filed in the United States. This number is expected to increase significantly in the future. See, e.g., The Center for Internee Rights, Inc. homepage, at <http://www.expows.com/> (last visited May 11, 2003).

67. *U.S. Rejects Basis*, supra note 61.

federal government almost immediately intervened in many of those suits.⁶⁸ One POW filed suit against a Japanese Corporation less than one month after the California Legislature enacted the statute.⁶⁹ His claims were consolidated into a class action lawsuit after he was joined by six other ex-POWs, and the State Department submitted a "Statement of Interest" arguing that the case should be thrown out.⁷⁰ U.S. District Court Judge Vaughn R. Walker acknowledged the existence of removal jurisdiction.⁷¹ Despite plaintiffs' attempts to argue only state law, the judge held that the claims implicated the federal common law of foreign relations which thereby gave rise to federal jurisdiction.⁷² He went on to dismiss the claims, holding that, "the 1951 Treaty constitute[d] a waiver of the instant claims."⁷³

Similarly, almost a year later, before the same judge, several Filipino ex-POWs brought suit against the same Japanese Corporations, in part based on the same California state law.⁷⁴ While many of the claims made by the Filipino plaintiffs closely mirrored those of the previous litigation, they also asserted that the court had jurisdiction to hear their claims, as opposed to those of the American ex-POWs, under the Alien Tort Claims Act.⁷⁵ The Act provides federal district courts with original jurisdiction over claims by aliens for torts committed in violation of the law of nations or a treaty of the United States.⁷⁶ Judge Walker remained unconvinced however, holding that "the [Alien Tort Claims Act] may enable [the] court to hear the Filipino plaintiffs' claims, but it does not eliminate the preclusive effect of the [1951 Peace Treaty]."⁷⁷

In a decision handed down the same day, Chinese and Korean nationals, who were victims of Japanese forced labor practices during World War II, had their claims dismissed based on the same reasoning

68. Mark Austin, *War Not Over for U.S. Ex-POWs Suing Japan Firms*, THE YOMIURI SHIMBUN, Sept. 1, 2001.

69. *Id.*

70. *Id.*

71. Defendants are permitted to remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a) (1994).

72. In re World War II Era Japanese Forced Labor Litigation, 114 F.Supp. 2d 939, 942-43 (N.D. Cal 2000), *judgment affirmed by* Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003), *opinion amended and superceded on denial of rehearing by* Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003).

73. 114 F.Supp. 2d at 948.

74. In re World War II Era Japanese Forced Labor Litigation, 164 F.Supp. 2d 1153 (N.D. Cal 2001), *judgment affirmed by* Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003), *opinion amended and superceded on denial of rehearing by* Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003).

75. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1993).

76. 164 F.Supp. 2d at 1159.

77. *Id.* at 1159-60.

used against the Filipino plaintiffs.⁷⁸ Judge Walker struck down as unconstitutional the 1999 California state law allowing such suits, holding that the law “infringe[d] on the federal government’s exclusive powers over foreign affairs.”⁷⁹ The court reasoned that without the California state law, which had been declared unconstitutional, the plaintiffs’ claims were time-barred, and therefore were dismissed.⁸⁰

On January 21, 2003, the 9th Circuit Court of Appeals affirmed the court’s decision that the California law⁸¹ was unconstitutional.⁸² The 9th Circuit held that the 1999 California statute violated the foreign affairs doctrine and that because the statute did not provide an avenue for relief, the claims of the ex-POWs were barred by the statute of limitations.⁸³ The appellate court confirmed the reasoning of the U.S. District Court Judge, stating that the law allowing the ex-POWs to sue was contrary to U.S. foreign policy and that the 1951 Peace Treaty prevented the soldiers from seeking restitution.⁸⁴ But as Joseph Cotchett, attorney for the ex-POWs, tried to explain, “These people were enslaved by multinational corporations. This has nothing to do with foreign policy.”⁸⁵

E. Congress Contends that Article 26 of the Peace Treaty Has Been Invoked, Authorizing House Resolution 1198, Which Allows Ex-POWs to Sue in Federal Court for Reparations From the Japanese Corporations That Employed Them as Forced Laborers.

Article 26 of the 1951 Peace Treaty with Japan states that “[s]hould Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties of the present Treaty.”⁸⁶ Since the Peace Treaty went into effect, Japan has entered into other treaties with numerous nations, including South Korea, the Soviet Union, Denmark, Sweden, Spain, and Switzerland.⁸⁷ Debates

78. In re World War II Era Japanese Forced Labor Litigation, 164 F.Supp. 2d 1160 (N.D. Cal 2001), *judgment affirmed by* Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003), *opinion amended and superceded on denial of rehearing by* Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003).

79. K. Connie Kang, *Law Allowing Suits by Forced Laborers Voided Court: A Judge Rules That the State Measure on WWII Redress Violates the Constitution*, L. A. TIMES, Sept. 20, 2001.

80. 164 F.Supp. 2d at 1182-83.

81. CAL. CIV. PROC. CODE § 354.6 (1999).

82. Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003).

83. *Id.*

84. *Court Says Ex-POWs Can't Sue*, TIMES UNION, Jan. 22, 2003.

85. *Id.*

86. Peace Treaty, *supra* note 44, at ch. 7, art. 26.

87. See, generally, *Right of World War II POWs to Sue for Wages: Testimony Before the House Judiciary Subcomm. on Immigration and Claims Regarding HR 1198*, 107th

ensued among many politicians as to the language of the 1951 Peace Treaty and what exactly constituted “greater advantages.” The more recent treaties signed by Japan were carefully scrutinized to determine whether the language of those treaties, and the benefits conferred therein, triggered the Article 26 provisions of the 1951 Peace Treaty.

Congress believed that the subsequent actions of Japan gave the United States the right to seek the same advantages, and therefore drafted H.R. 1198, the “Justice for United States Prisoners of War Act of 2001.” Proponents of H.R. 1198 asserted that Japan’s war claims settlements, established after signing the 1951 Peace Treaty, permitted the citizens of several other countries to sue Japanese nationals without restriction or waiver.⁸⁸ This is the very same privilege that American soldiers were denied by the 1951 Peace Treaty. Thus, it was argued, the provisions of Article 26 had been invoked, entitling American citizens, who were used as forced laborers by the Japanese, to sue for reparations in federal courts.⁸⁹ The House Resolution itself stated that the “Government of Japan . . . entered into war claims settlement agreements with other countries that provide[d] terms more beneficial . . . with respect to claims by nationals of those countries.”⁹⁰

Congressional opponents to the bill argued that such an assertion was incorrect, and that the reason such other treaties were not cited in the resolution was because no such treaties existed.⁹¹ The opposition cited their own examples of treaties in order to demonstrate that Article 26 had not been implicated, claiming that agreements made between Japan and other countries, such as Burma and Indonesia, actually used the exact same language found in Article 14(b) of the 1951 Peace Treaty, and that, therefore, there could be no “greater advantages” conferred in such agreements.⁹²

Despite the objections raised by some members of Congress, The House of Representatives voted on the resolution in July, 2001, and overwhelmingly approved the measure by a vote of 395 to 33.⁹³ As the bill headed to the Senate, President George W. Bush indicated that he would veto the measure, notwithstanding the fact that the bill had been

Cong. (Sept. 25, 2002) (statement of Robert D. McCallum, Jr. Assistant Attorney General, Civil Division) [hereinafter “*Right of World War II POWs to Sue for Wages*, Testimony of Robert D. McCallum, Assistant Attorney General”].

88. *Right of World War II POWs to Sue for Wages*, Statement of Rep. Dana Rohrabacher, *supra* note 39.

89. *Id.*

90. *Right of World War II POWs to Sue for Wages*, Statement of Robert D. McCallum, Assistant Attorney General, *supra* note 87 (citing H.R. 1198 Sec. 2(6)).

91. *Id.*

92. *Id.*

93. *POWs’ Right to Sue Affirmed by Senate*, THE WASHINGTON POST, Sept. 11, 2001 at A06 [hereinafter “*POWs’ Right to Sue Affirmed by Senate*”].

introduced in the House of Representatives by congressmen from both the Republican and Democratic parties.⁹⁴ Nonetheless, the Senate approved the bill by a vote of 58 to 34 on September 10, 2001, just two days after the 50th anniversary of the signing of the Peace Treaty in San Francisco.⁹⁵ The approved bill essentially prevented the federal government, specifically the State Department and the Department of Justice, from spending any funds in an effort to oppose a civil suit filed by a World War II POW against Japanese Corporations.⁹⁶ The ex-POWs were happy to hear about the proposed legislation, as evidenced by one individual who said, "I am glad that my tax money can no longer be used to fight me."⁹⁷

With the terrorist attacks of September 11, 2001,⁹⁸ the perfect argument against H.R. 1198 landed squarely in the President's lap. The federal government argued that enacting such legislation would be harmful to the war on terrorism by creating tension between the United States and Japan, a key ally in the fight against terrorism.⁹⁹ In addition, several former U.S. ambassadors to Japan began voicing their opposition to the bill, arguing that such legislation would directly contradict the 1951 Peace Treaty, would permanently scar relations with Japan, and would bring the durability of other U.S. treaties into question.¹⁰⁰ The same Congress that had already voted on and approved H.R. 1198 agreed to remove it from the spending bill. President Bush then signed the appropriations bill into law on November 28, 2001, without giving ex-POWs the right to sue Japanese Corporations.¹⁰¹ Supporters of the bill were left in disbelief, having just learned a valuable lesson in politics: "Even what some call a righteous and sensible idea with bipartisan backing can run

94. *Bush to Veto Bill for Backing POW Suits Against Japan*, JIJI PRESS ENGLISH NEWS SERVICE, Aug. 31, 2001.

95. *POWs' Right to Sue Affirmed by Senate*, *supra* note 93, at A06.

96. *Id.*

97. Quoting ex-POW Lester Tenney of La Jolla, California who survived the Bataan Death March and is among those who sued Japanese corporations seeking compensation. Richard Simon, *Senate Bill Would Aid Ex-WWII POWs' Suits Reparations: Measure Bars Justice, State From Funding Opposition to Slave-Labor Complaints Against Japanese Firms*, L. A. TIMES, Sept. 11, 2001, at A9 [hereinafter "*Senate Bill Would Aid Ex-WWII POWs' Suits*"].

98. On September 11, 2001, terrorists hijacked four commercial airliners loaded with passengers and crashed two of the planes into the World Trade Center towers in New York City. Another jet was flown into the Pentagon and a fourth crashed, due to an on-board struggle, in Pennsylvania. Richard Willing and Jim Drinkard, *U.S. under attack*, USA TODAY, Sept. 12, 2001, at A01.

99. *U.S. Congress Drops WWII Forced Labor Provision*, JAPAN POL'Y & POL., Dec. 3, 2001 [hereinafter "*U.S. Congress Drops WWII Provision*"].

100. Edward Epstein, *Ex-POWs Fight for Right to Sue Japanese Companies, U.S. Say Rights Were Waived in '51 Pact*, S.F. CHRON., Sept. 25, 2002, at A.2 [hereinafter "*Ex-POWs Fight for Right to Sue Japanese Companies*"].

101. *U.S. Congress Drops WWII Provision*, *supra* note 99.

up against unyielding opposition from powerful interests.”¹⁰²

F. The Federal Government Will Not Allow Ex-POWs to Sue for Reparations, but The Peace Treaty of 1951 Gave the Federal Government the Authority to Acquire Property From Japan in Order to Pay Such Reparations. . . . So Where's the Money?

Another key provision of the 1951 Peace Treaty¹⁰³ gave the Allied Powers the right to seize nearly \$4 billion¹⁰⁴ worth of Japanese assets and dispose of them in exchange for the clause in the treaty waiving the rights of prisoners to sue Japanese Corporations.¹⁰⁵ The burden was then on the nation seizing the property to use the proceeds as reparations for the victims of forced labor.¹⁰⁶ In the United States, individuals held as prisoners by the Japanese government or Japanese Corporations were eligible to receive payments from a “War Claims Fund,” which was established by the federal government pursuant to the War Claims Act.¹⁰⁷ The War Claims Commission (“the Commission”)¹⁰⁸ established a fund and was to use payments to compensate entitled individuals.¹⁰⁹

The next step, however, in issuing such payments, would be to notify the ex-POWs of their ability to request such reparations. In one reparations suit, California Superior Court Judge Kathleen O’ Leary inquired about the notice procedure: “They come home in 1946 and in

102. *Ex-POWs Fight for Right to Sue Japanese Companies*, *supra* note 100.

103. Peace Treaty, *supra* note 44, at ch. 5, art. 14(a)(2). “. . . each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of (a) Japan and Japanese nationals, (b) persons acting for or on behalf of Japan or Japanese nationals. . . .” *Id.*

104. The actual amount derived from the property is in dispute. The FCSC contends that the actual amount received was only \$228,750,000. *See, e.g., War Claims and Enemy Property Legislation: Hearing Before the House Subcomm. on Commerce and Finance*, 86th Cong. (first session) (Statement by Whitney Gilliland, then head of the Foreign Claims Settlement Commission) [hereinafter “*War Claims and Enemy Property Legislation*, Statement by Whitney Gilliland, then head of the Foreign Claims Settlement Commission”].

105. *Right of World War II POWs to Sue for Wages*, Statement of Robert D. McCallum, Assistant Attorney General, *supra* note 87.

106. *Id.*

107. War Claims Act, 50 App. U.S.C.A. § 2005, et. seq. (1990).

108. The War Claims Commission merged with the International Claims Commission in 1954 to form the Foreign Claims Settlement Commission (“FCSC”) which is an independent agency within the Department of Justice. The FCSC and its predecessor agencies claim to have successfully completed 43 claims programs to resolve claims against various countries including the Federal Republic of Germany, Iran, Yugoslavia, Bulgaria, Romania, Hungary, the Soviet Union, Czechoslovakia, Poland, Italy, Cuba, China, East Germany, Vietnam, Ethiopia, Egypt, Panama, and Albania. Of substantial interest is the fact that Japan does *not* appear on the list. *See* War Claims Commission homepage, at <http://www.usdoj.gov/fcsc/> (last visited May 11, 2003).

109. *Right of World War II POWs to Sue for Wages*, Statement of Robert D. McCallum, Assistant Attorney General, *supra* note 87.

1951 they have [the] right to the claims. . . . Were they notified they had this right?"¹¹⁰ The federal attorney appearing for the government in the case could not explain the methods used, or lack thereof, to inform the soldiers of their right to request reparations from the fund, but one ex-prisoner, Carlos Montoya,¹¹¹ said that he never heard from anyone about any reparations fund: "We came back in 1945 and here it is 2002, and I've never heard that. Not once."¹¹²

On the other hand, the Commission claims to have gone to great lengths to notify the ex-POWs of their right to reparations. The Commission alleges that they sent letters to members of Congress, the directors of several major veterans' organizations, the governor of each State, each member of every State Legislature that was then in session, weekly newspapers, and radio stations.¹¹³ They reported mailing a total of 35,426 letters and recording 8,286 column inches of war claims items in newspapers across the country between January 20, 1950, and February 28, 1951.¹¹⁴ But while the Commission is confident that its efforts were adequate, some organizations, such as the National American Ex-POWs Association, Inc., and the Center for Internee Rights, Inc., argue that the effort expended by the Commission to find and notify potential claimants was insufficient.¹¹⁵

One reason that relatively few claims were made for reparations from the fund may be the perceived inadequacy of the compensation. Prior to 1952, the maximum recoverable amount under The War Claims Act was \$1.00 per day, which amounts to less than \$2,000 for an ex-POW forced to work in mines or factories as forced labor for Japanese Corporations, up to fifteen hours per day, for five years.¹¹⁶ After 1952, The War Claims Act was amended, but still only allowed a maximum recovery of \$2.50 per day of imprisonment, and the amount was still limited to \$1.00 per day unless the individual could demonstrate that he was subjected to "inhumane treatment."¹¹⁷ Even adjusting for inflation, such

110. Chelsea J. Carter, *Feds Argue Against Suits by POWs*, THE ASSOCIATED PRESS, July 11, 2002, at A-11 [hereinafter "*Feds Argue Against Suits by POWs*"].

111. Carlos Montoya, 87 when interviewed, is an ex-POW who resides in San Diego, California. *Id.*

112. *Id.*

113. *Semi-Annual Report to the Congress from the War Claims Commission for the Period Ending March 13, 1951*, War Claims Commission, at 14.

114. *Id.*

115. Gary K. Reynolds, *CRS Report for Congress: U.S. Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan*, Updated July 27, 2001, at CRS-9.

116. LEON FRIEDMAN, *THE LAW OF WAR: A DOCUMENTARY HISTORY* 488-522 (Random House 1972).

117. *An Act to Amend Sections 6 and 7 of the War Claims Act of 1948*, Ch. 167, 66 Stat. 47.

a nominal amount hardly can be considered adequate repayment of Japan's indebtedness to the soldiers.

Despite opening up the reparations fund to not only the POWs, but also to civilian internees,¹¹⁸ American merchant seamen, interned civilian contractor employees,¹¹⁹ and Guamanians captured by the Japanese, the total amount reportedly awarded on claims made by those eligible was still only \$141,951,492.¹²⁰ Even if the Commission only received \$228,750,000 from the liquidation of seized Japanese assets,¹²¹ \$86,798,508 should still be available to potential claimants. And if the sale of the Japanese assets generated \$4 billion, as some argue, then as much as \$3,858,048,508 should be left to compensate the ex-POWs.¹²²

When between \$86 million and \$3.8 billion remains in a reparations fund for ex-POWs taken captive by Japan, why are individuals suing Japanese Corporations if they could simply make a claim to the Commission for an award? The simple answer is because they can't. The POWs were permitted to petition for an award of \$1.00 per day from January 30, 1950, through March 31, 1951, and any claims made after that limited period were regarded as untimely.¹²³ Similarly, requests for the additional \$1.50 per day for forced labor were accepted from April 9, 1952, through August 1, 1954.¹²⁴ Thus, not only were the prisoners allowed a very limited period of time in which to seek these meager reparations, but the two periods did not overlap, therefore requiring multiple efforts by the ex-POWs to traverse the hierarchy of the federal government.

118. Civilian internees interned or in hiding were entitled to \$60 per day, an amount far in excess of that attainable by the forced labor victims. *See, e.g., The 1998 Annual Report of the Foreign Claims Settlement Commission*, at 68-69 [hereinafter "1998 FCSC Report"].

119. Interned civilian contractor employees were entitled to \$60 per day, an amount far in excess of that attainable by the forced labor victims. *See, id.*

120. *Id.*

121. The FCSC contends that the amount received from the sale of Japanese assets was only \$228,750,000. *See, e.g., War Claims and Enemy Property Legislation*, Statements by Whitney Gilliland, then head of the Foreign Claims Settlement Commission, *supra* note 104.

122. Some argue that the amount realized from the liquidation of seized Japanese assets was actually \$4 billion. \$4 billion less the \$141,951,491 paid out as awards on claims leaves a total of \$3,858,048,508 remaining in the reparations fund. *See, e.g., Right of World War II POWs to Sue for Wages*, Testimony of Robert D. McCallum, Assistant Attorney General, *supra* note 87.

123. *1998 FCSC Report, supra* note 118, at 69.

124. *Id.* at 68-69.

III. Was the Court's Decision to Deny Reparations Justified?¹²⁵

A. *Japan's other deals: Invocation of Article 26 of the 1951 Peace Treaty.*

In 1951, Japan signed the Peace Treaty and agreed that if, at any time, greater benefits were conferred on the citizens of another nation, those same benefits would be conferred on the citizens of the nations that were signatories to the 1951 Peace Treaty.¹²⁶ Since then, Japan has entered into such treaties with Burma, Switzerland, Indonesia, the Philippines, the Soviet Union, the Netherlands, Spain,¹²⁷ Vietnam, Denmark,¹²⁸ Sweden,¹²⁹ and Korea.¹³⁰ According to Article 26, only *one* treaty conferring greater advantages on the citizens of that nation by Japan is needed to justify extending greater benefits to the American ex-POWs.

By the terms of the 1951 Peace Treaty, Japan permitted the United States government to seize certain limited property in Japan in order to pay reparations,¹³¹ but in exchange, the Japanese government required the release of all claims against Japanese nationals by the citizens of the United States.¹³² When Japan entered into a *somewhat* similar treaty with Denmark in 1959, Japan agreed not only to allow the seizure of property to pay reparations, but actually agreed to make payments for

125. The line of cases will not be discussed in great detail, because the focus of this comment is to simply provide enough background facts to lay the foundation for a detailed analysis of the options available for reconciliation of this ongoing dispute. A more detailed analysis of the relevant line of cases can be found in several commendable articles. See Jennifer Joseph, *POWs Left in the Cold: Compensation Eludes American WWII Slave Laborers for Private Japanese Companies*, 29 PEPP. L. REV. 209 (2001); Carolyn A. Eilers, *Article 14(b) of the 1951 Treaty of Peace with Japan: Interpretation and Effects on POWs' Claims Against Japanese Corporations*; 11 TRANSNAT'L L. & CONTEMP. PROBS. 469 (2001); Curtis A. Bradley, *World War II Compensation and Foreign Relations Federalism*, 20 BERKELEY J. INT'L L. 282 (2002); Russell A. Miller, *Much Ado, But Nothing: California's New World War II Slave Labor Law Statute of Limitations and its Place in the Increasingly Futile Effort to Obtain Compensation from American Courts*, 23 WHITTIER L. REV. 121 (2001).

126. Peace Treaty, *supra* note 44, at ch. 7, art. 26.

127. Exchange of Note Constituting an Agreement Regarding the Settlement of the Problem Concerning Certain Types of Spanish Claims, Jan. 8, 1957, Japan-Spain.

128. Arrangement Regarding Settlement of Certain Danish Claims, May 25, 1959, Japan-Den.

129. Arrangement Regarding Settlement of Certain Swedish Claims, Sept. 20, 1957, Japan-Swed.

130. *Commerce-Justice-State Appropriations/Day in Court For POWs: Senate Record Vote Analysis of H.R. 2500*, 107th Cong. (Sept. 10, 2001) available at <http://www.senate.gov/~rpc/rva/1071/1071276.htm> (last visited Nov. 19, 2002).

131. See Sec. II(F).

132. Peace Treaty, *supra* note 44, at ch. 5, art. 14(b) ". . .the Allied Powers waive all . . . other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals. . ." *Id.*

claims for injury to the Danish nationals. Japan did *not* require Denmark to make the same concessions the United States made in the 1951 Peace Treaty. In particular, Japan did *not* require Denmark to agree to release any claims against Japanese nationals¹³³ as was required by the 1951 Peace Treaty. Thus, even if the United States and Denmark received the same settlement value from the respective treaties, the United States was required to give up something that Denmark was permitted to retain: the right to sue. Two nations, paying a different price for essentially the same benefit, cannot logically be concluded to have received the same deal. In this case, Denmark clearly had the “greater advantage” and thereby implicated Article 26 of the 1951 Peace Treaty. Under Article 26, when such “greater advantages” are conferred upon another nation, “those same advantages shall be extended to the parties” of the 1951 Peace Treaty.¹³⁴ Denmark has retained the exact right that American citizens have been seeking: the right to sue.

A similar argument can be made for the treaty between Japan and the Soviet Union. While the two countries changed the language in an effort to mask their activities, the practical effects of the agreement are the same as those that Denmark received: the signing nation’s citizens retained the right to sue. Japan did include in the treaty with the Soviet Union a release of claims provision, but it was not absolute. The Soviet Union only was required to agree to release all claims that stemmed from events taking place *after* August 9, 1945.¹³⁵ Such a large window of opportunity was not offered to the citizens of the United States. When the U.S. signed the 1951 Peace Treaty, it was a complete and total waiver of claims, subject to Article 26, regardless of the time at which the claim arose.¹³⁶ So while the United States gave up all claims, the Soviet Union only gave up some; those arising after August 9, 1945. This, once again, can only be characterized as a “greater advantage” being given to another nation than was received in the 1951 Peace Treaty.

Thus, according to the plain language of Article 26, the United States is entitled to the same benefit: the right to sue on claims stemming from events taking place *before* August 9, 1945. The American and Allied soldiers were captured at Bataan in 1942 and subjected to forced labor far before 1945. If the United States were granted the same benefit

133. See, e.g., *Statement of Professor Harold G. Maier before the Senate Judiciary Committee*, June 28, 2000, available at <http://www.gainfo.org/SFPT/ExpertWitnessOnSFPTSenateJudiciaryComm28June2000.htm> (last visited May 11, 2003) [hereinafter “Statement of Professor Harold G. Maier before the Senate Judiciary Committee”].

134. Peace Treaty, *supra* note 44, at ch. 7, art. 26.

135. Statement of Professor Harold G. Maier before the Senate Judiciary Committee, *supra* note 133.

136. See Peace Treaty, *supra* note 44, at ch. 5, art. 14.

that was conferred in Japan's treaty with the Soviet Union, any ex-POWs that are citizens of any of the 48 countries that signed the 1951 Peace Treaty with Japan should be permitted under Article 26 to pursue their claims against the government, nationals, and corporations of Japan.

B. Worldwide Demand: Global Desire for Justice, Reparations, and Apology from Japan.

When members of a family, a community, and a nation are subjected to the kind of gruesome and deplorable treatment that prisoners-of-war were subjected to in Japan, no one is quick to forget. Half a century after the atrocities, in a new millennium, there is still an astonishing worldwide demand for a legitimate Japanese apology and for the payment of reparations to those individuals through whom the corporations, and the government of Japan, were unjustly enriched.

Every month, members of the Dutch Japanese Honorary Debt Foundation demonstrate in front of the Japanese Embassy and have even filed lawsuits, not in the United States, but in Tokyo's District Court.¹³⁷ In 2000, the Legislative Counsel of Hong Kong approved a motion demanding an apology from Japan.¹³⁸ When Emperor Akihito of Japan visited Great Britain in 1997, hundreds of British civilians and ex-POWs demonstrated, turning their backs as he passed,¹³⁹ performing an appropriate about face. All this is in addition to the abundance of action taken by the United States Congress. Besides the House Resolutions seeking reparations from Japan, already herein mentioned, another bill, House Resolution 126, specifically demanded that Japan "formally issue a clear and unambiguous apology for the atrocious war crimes committed by the Japanese military during World War II."¹⁴⁰

Even the citizens of Japan have begun arguing that their government should pay reparations for its wartime activities. More and more Japanese citizens are demanding that their government make amends for the atrocities of World War II.¹⁴¹ At a minimum, many Japanese believe that

137. Has Japan Offered an Apology for its War Crimes of the 20th Century?, Global Alliance for Preserving the History of WWII in Asia, available at <http://www.gainfo.org/SFPT/SFPTApology.htm> (last visited May 11, 2003) [hereinafter "Has Japan Offered an Apology?"]. The case was filed in 1995 and reported to have risen to the appellate level. See, e.g., The Center for Internee Rights, Inc. homepage, at <http://www.expows.com/> (last visited May 11, 2003), *supra* note 66.

138. Has Japan Offered an Apology?, *supra* note 137.

139. *Id.*

140. *Expressing the Sense of Congress Concerning the War Crimes Committed by the Japanese Military During World War II, H.R. 126*, 105th Cong., submitted by Mr. Lipinski, available at <http://www.gainfo.org/SFPT/HCR126.htm> (last visited May 11, 2003); See also, *Has Japan Offered an Apology?*, *supra* note 137.

141. *Process of Atonement*, SOUTH CHINA MORNING PRESS, Aug. 28, 2002, at 15 [hereinafter "*Process of Atonement*"].

their government should apologize.¹⁴² Each year, numerous nations encourage the Japanese government to make amends for the actions taken during World War II by means of an apology.¹⁴³

C. *What Others Have Done: When Citizens of Other Countries Rise Up and Demand Reparations From Those That Enslaved Them, Those Seeking Compensation Have Been Fairly Successful.*

The Australian government, which signed the 1951 Peace Treaty, recently heard almost the same exact challenge that the United States government addressed just a short time ago. Citizens that were forced into slave labor during World War II by the Japanese government and private Japanese Corporations demanded an apology and the payment of reparations.¹⁴⁴ After an investigation of the matter, Rusty Priest,¹⁴⁵ acting National President of the Returned and Services League for Australia, determined that the Japanese government could not be forced to compensate the war victims because such reparations were precluded by the 1951 Peace Treaty.¹⁴⁶ The Australian government, in order to address competing interests, chose to pay reparations itself, and distributed over \$247 million in Australian currency¹⁴⁷ to not only the ex-prisoners themselves, but also to widows of victims and non-military civil detainees.¹⁴⁸ Australia's Treasurer, Peter Costello, said that no amount of compensation could redress the pain and suffering of the POWs, and Rusty Priest acknowledged that those captured at Bataan and enslaved by Japan were a "special case," deserving of such compensation.¹⁴⁹ But even some of the ex-POWs that received compensation are not entirely satisfied, as demonstrated by one ex-POW who said that "the Australian taxpayer is paying what the Japanese government should be paying."¹⁵⁰

The amount received by the Australians pales in comparison to that

142. *Id.*

143. Mari Yamaguchi, *Japan to Mark World War II Bombings*, THE ASSOCIATED PRESS, Aug. 5, 2002.

144. *Australian POWs Welcome Compensation But Want Japanese Apology*, THE CANADIAN PRESS, May 23, 2001 [hereinafter "*Australian POWs Welcome Compensation*"].

145. Rusty Priest was the Acting National President of the Returned and Services League for Australia during the period when this matter was addressed. *See, id.*

146. *Id.*

147. The amount distributed, \$247,875,000 in Australian currency, is approximately equal to \$159,829,552 in United States currency (as of May 11, 2003) based on the exchange rate: 1 Australian Dollar = 0.644799 U.S. Currency. *See, e.g.*, Exchange Rate Information at <http://www.x-rates.com/d/AUD/table.html> (last visited May 11, 2003).

148. *Australian POWs Welcome Compensation*, *supra* note 144.

149. *Id.*

150. Quote from David Barrett, 79 when quoted, who spent over three years as a POW in Thailand. *See id.*

collected by the victims of slave labor during the Nazi Era. The German government and several German corporations entered into an agreement with the United States whereby they approved provisions requiring them to pay \$5 billion¹⁵¹ to establish a fund which would provide compensation for the slave laborers who worked in concentration camps and German factories.¹⁵² In *exchange for* the establishment of the reparations fund, President Bill Clinton agreed that the United States government would do everything in its power to prevent private lawsuits by U.S. citizens against German corporations for reparations.¹⁵³ This is dramatically different than the situation between the United States and Japan, where the federal government is attempting to prevent such lawsuits, *in spite of a lack of repayment*, rather than in *exchange for* such a compensatory disbursement. In addressing the agreement between the U.S. and Germany, the United States Deputy Secretary of Treasury, Stuart E. Eizenstat, who led negotiations on behalf of the United States, said, "This fills a void that has existed for 55 years. . . . This had never been dealt with. It had fallen off the agenda."¹⁵⁴ These words explain in hindsight what is still true with regard to Japan: forced labor victims are entitled to compensation for their suffering throughout World War II.

Even the United States is not entirely opposed to the concept of reparations. After the 1941 attack on Pearl Harbor, national panic ensued, which resulted in the incarceration of thousands of Japanese, the majority of whom were American citizens.¹⁵⁵ Almost 5,000 Japanese were taken from the city of San Francisco, California, alone.¹⁵⁶ At the time, the U.S. government perceived these individuals as a threat to security,¹⁵⁷ but later the United States gave \$1.2 billion¹⁵⁸ to the Japanese-Americans that were held captive.¹⁵⁹ Thus, the United States government is willing to pay reparations, but will not allow American citizens to seek

151. The German government and German Corporations agreed to contribute equally. See, e.g., Edmund L. Andrews, *Germans Sign Agreement to Pay Forced Laborers of Nazi Era*, July 18, 2000, N. Y. TIMES, at A-3 [hereinafter "*Germans Sign Agreement to Pay Forced Laborers*"]. The German businesses that were party to the agreement came up with \$2.55 billion Euros (approximately \$2.39 billion U.S. dollars). See, e.g., *German Industry Comes Up With Full 2.5 Billion Euros for Nazi Slave Fund*, AGENCE FR.-PRESSE, Mar. 13, 2001.

152. *Germans Sign Agreement to Pay Forced Laborers*, *supra* note 151.

153. *Id.*

154. *Id.*

155. *Gala Reopens Wounds for Japanese Americans*, *supra* note 46.

156. *Id.*

157. Dick Snider, *Should U.S. Pay Reparations to Slave Descendants?*, TOPEKA CAP. J., Sept. 10, 2001, at A4.

158. The \$1.2 billion was paid to approximately 60,000 individuals, which means that each individual received about \$20,000. See Ronald Roach, *Moving Towards Reparations*, BLACK ISSUES IN HIGHER EDUCATION, Nov. 8, 2001.

159. See *id.*

those reparations from foreign nations or the companies primarily located therein. This leaves few avenues of relief for the ex-POWs.

D. Unbiased View: Without the Federal Government Influencing Federal Courts, What Might the Outcome Have Been; What Have U.S. State Courts Done?

In the In Re World War II Era Japanese Forced Labor Litigation cases already discussed, the defendants were successful in removing the suits from state courts to U.S. District Courts.¹⁶⁰ There was, however, one ex-POW who managed to argue in a California state court.¹⁶¹ While the U.S. District Court for the Northern District of California held that removal jurisdiction was proper,¹⁶² the U.S. District Court for the Central District of California, in a case regarding similar claims based on the same 1999 California state statute,¹⁶³ denied that such removal jurisdiction would be necessary and left the case to the California state courts.¹⁶⁴

In a California state court, the law allowing the reparations suit overcame a challenge based on the United States Constitution and the plaintiff was permitted to advance his claims.¹⁶⁵ The defendant, a large Japanese Cement Company that allegedly enslaved the plaintiff during World War II, appealed the decision to the Court of Appeal in the 2nd District of California.¹⁶⁶ On January 15, 2003, the Court of Appeal affirmed the decision of the trial court, rejecting the claim that the 1951 Peace Treaty barred the suit and discarding the notion that the California statute infringed on the federal government's foreign affairs power.¹⁶⁷

While Jeong, the state court plaintiff, was a civilian internee during the war rather than a prisoner-of-war, the cases all challenged the validity of the same 1999 California statute.¹⁶⁸ Thus, while the 1951 Peace Treaty may not influence the court in the same way in each suit,¹⁶⁹ the

160. See 28 U.S.C. § 1441(a).

161. Robert Jablon, *Law Upheld Allowing WWII Slave-Labor Lawsuits*, THE SAN DIEGO UNION-TRIBUNE, Jan. 16, 2003 [hereinafter "*Law Upheld*"].

162. See, generally, In Re World War II Era Japanese Forced Labor Litigation, 164 F.Supp.2d 1153, 164 F.Supp.2d 1160, 114 F.Supp.2d 939.

163. CAL. CIV. PROC. CODE § 354.6 (1999).

164. Jeong v. Onada Cement Co. Ltd., No. CV 99-11092, slip-op. (C.D. Cal. May 17, 2000).

165. *Law Upheld*, supra note 161.

166. *Id.*

167. Taiheiyo Cement Corp. v. Superior Court, 105 Cal.App.4th 398, 129 Cal.Rptr.2d 451 (Cal. App. 2003).

168. CAL. CIV. PROC. CODE § 354.6 (1999).

169. The appellate court noted that the 1951 Peace Treaty did not expressly or impliedly bar or preempt claims by Korean nationals, such as Jeong, against Japanese corporations for events occurring during World War II. Taiheiyo Cement Corp. v. Superior Court, 105 Cal.App.4th 398, 409.

constitutional analysis of the law should remain uniform regardless of the circumstances under which the particular plaintiff was enslaved. Much like the federal system, the state court was confronted with arguments from the intervening federal government that the suit should be dismissed,¹⁷⁰ but unlike the cases in the federal system, the state court managed to view the arguments with the clarity they deserved and evaluated the merits of the case rather than the possible consequences of upholding the law.

IV. Implications of the 9th Circuit's Decision to Deny Reparations.

When World War II was in its early stages, young Americans were sent into combat to ensure the future of the United States. Many of those individuals had chosen to serve out of a desire to protect their families and their country, without knowing where the war might take them.¹⁷¹ Little did these soldiers know that they would be enslaved by the large corporations of the nation that took them captive during the war. This fact alone is sufficient to make many possible soldiers reconsider their decision. When prospective soldiers are deciding whether to join the armed forces, word of the court's decision to deny the POWs the right to seek reparations will curb their enthusiasm. It is more difficult to pledge your allegiance to a nation, and to a government, who will not stand behind you in your time of need.

Dr. Lester I. Tenney, one of the thousands of soldiers captured at Bataan, argued before Congress that the decision to deny reparations would drastically reduce enlistment figures in the armed forces.¹⁷² Dr. Tenney, who argued that the legislation permitting ex-POWs to seek compensation should be passed, explained that when a young man or woman enlists in the armed forces, there is an "implied promise that for what they give, they will never be forgotten."¹⁷³ Here, the denial of reparations demonstrates an unequivocal breach of this implied promise. Our veterans, those who fought for the country yesterday, are struggling against the government of the United States which is helping wealthy Japanese Corporations escape liability. And the impact of the denial of reparations is reaching and affecting those young men and women who

170. *Law Upheld*, *supra* note 161.

171. *Letters to the Editor: Public Forum Hard Work*, LOS ANGELES DAILY NEWS, Dec. 11, 2002 (letter from Henry P. Terusa of Burbank, California).

172. *Right of World War II POWs to Sue for Wages: Remarks by Dr. Lester I. Tenney, Former POW of Japan Before the House Judiciary Committee Subcommittee on Immigration and Claims*, 107th Cong. (Sept. 25, 2002) (remarks by Dr. Lester I. Tenney, former POW of Japan).

173. *Id.*

are currently entering the ranks, those who will fight for the country tomorrow. Dr. Tenney asked Congress, "What message is being sent to our young people as they learn that the same leaders who are sending them to faraway lands are denying us the right to pursue our claims?"¹⁷⁴ Congress, by failing to enact legislation allowing ex-prisoners to sue those who held them captive during World War II, has refused to answer that question.

V. How to Solve the Problem: Plausible Possibilities for the Future.

A. *Allow the Suits: If the U.S. Government Were to Simply Allow the Suits, the Ex-POWs Would Have an Avenue for Relief.*

With clear evidence that Article 26 of the 1951 Peace Treaty has been invoked by Japan's numerous other agreements, one solution to this entire debate is for the government of the United States to discontinue its efforts at intervening in such suits. This would allow the ex-POWs to present their cases in court, free of influence from the federal government. Otherwise, our nation's veterans will continue to be denied the basic right that has been awarded to citizens of Denmark and the Soviet Union by their respective treaties with Japan.¹⁷⁵ If the federal government were prohibited, either by statute or simply as a matter of policy, from intervening in the suits brought by ex-prisoners against the Japanese, the POWs would finally be given a fair opportunity to voice their positions and have their cases heard.

B. *Set up a Reparations Fund: The U.S. Government Could Simply Use the Money Left-Over from the Liquidation of Japanese Assets to Set-Up a Fund From Which Ex-POWs Could Obtain Reparations.*

The baffling fact still lurking is that the U.S. government has failed to account for the money not paid out to forced labor victims following World War II. With as much as \$3,858,048,508 still unaccounted for, it is clear that there are funds available for compensating the ex-POWs.¹⁷⁶ Why the government would intervene in lawsuits to prevent the soldiers from seeking reparations is beyond comprehension, especially when the money for reparations is in Uncle Sam's back pocket. Distributing the money to claimants would result in the U.S. government spending only the money received for such a purpose, and the ex-POWs would have the

174. *Id.*

175. See Sec. III(A)(1).

176. See Sec. II(F); *Right of World War II POWs to Sue for Wages*, Testimony of Robert D. McCallum, Assistant Attorney General, *supra* note 87.

sense of closure that they seek by filing such reparations suits. To allow the government to keep the money for itself would be to financially reward the government of the United States for not giving the money to the soldiers. This flies in the face of the 1951 Peace Treaty which specifically transferred the Japanese property to the U.S. so that it could be liquidated to pay such reparations.¹⁷⁷

The example set by the Australian government¹⁷⁸ should be carefully considered by the United States. Even though the Australian government determined that the 1951 Peace Treaty precluded the payment of reparations,¹⁷⁹ the fact that the nation's citizens were left without such payment was unacceptable to Australia.¹⁸⁰ As one of the countries signing the 1951 Treaty, Australia, like the U.S., was entitled to liquidate Japanese property in order to pay reparations.¹⁸¹ Thus, when Australian citizens held captive by the Japanese during the war sought reparations, despite the fact that it was approximately fifty years after the forced labor took place,¹⁸² Australia found a way to pay reparations without regard to the possible implications to Australian international relations. The United States should take notice of the method demonstrated by Australia and allow the ex-POWs to at least seek reparations from a U.S. government-established fund.

C. *Give the Money to a Non-Profit Organization: The United States has Several Organizations, Dedicated to Serving the Interests of Veterans and Prisoners of War, that are Uniquely Qualified to Assist the Government in Distributing the Left-Over Money to Those Held Captive During WWII.*

In 1942, as word spread that American soldiers had been captured on the Bataan Peninsula and were being held captive by the Japanese government, concerned relatives and other citizens back home began meeting to discuss the conditions facing their family and friends in the Japanese prison camps.¹⁸³ These gatherings paved the way for the establishment of the American Ex-POWs Association, Inc., which exists “to

177. Peace Treaty, *supra* note 44, at ch. 7, art. 26.

178. *Australian POWs Welcome Compensation*, *supra* note 144; see Sec. III(A)(3).

179. *Australian POWs Welcome Compensation*, *supra* note 144; see Sec. III(A)(3).

180. *Australian POWs Welcome Compensation*, *supra* note 144.

181. See Peace Treaty, *supra* note 44.

182. *Australian POWs Welcome Compensation*, *supra* note 144.

183. American Ex-Prisoners of War homepage, at <http://www.axpow.org> (last visited May 11, 2003).

help those who cannot help themselves.”¹⁸⁴ Such an organization is certainly concerned when the United States thrusts itself into reparations suits and prevents the ex-POWs from helping themselves. The American Ex-Prisoners of War, however, “does not have the resources to locate ex-prisoners, let alone their heirs.”¹⁸⁵ Thus, while the organization is designed to help ex-POWs “deal with the trauma through friendship of those who shared a common experience,”¹⁸⁶ it is “not structured to either accept or disburse funds” under such a program of distribution.¹⁸⁷

Another organization paying close attention to the reparations suits is the Center for Internee Rights, Inc. (“the Center”), which was established in 1990.¹⁸⁸ The Center is primarily concerned with obtaining an apology and reparations for POWs that were subjected to the atrocities committed by the empire of Japan during World War II.¹⁸⁹ In order to address these concerns, the Center has been actively involved in lawsuits filed in Tokyo pursuing reparations that have risen to the Japanese Appellate Court,¹⁹⁰ some of which have reached the Japanese Supreme Court. This is simply another example of an organization that is both willing and able to work with the U.S. government and other organizations to help ex-prisoners obtain reparations, from either the Japanese government or the United States government, from an escrow account or other fund set up for the victims of Japan’s wartime atrocities.¹⁹¹

If the U.S. government were to part with the money left over from

184. *Id.*

185. Email Correspondence with Pete Wygle, Chairman of the Civilian Internee Committee of the American Ex-Prisoners of War. (Jan. 3, 2003) (on file with author) [hereinafter “Email Correspondence with Pete Wygle”]. Mr. Wygle was captured by the Japanese in January, 1942, and placed in an internment camp where he remained for over 3 years. Upon release, Mr. Wygle graduated from the University of California, Berkeley and became Chairman of the Civilian Internee Committee in 1995. See Ex-POW Biography: Pete Wygle, at <http://www.axpow.org/wyglepeter.htm> (last visited May 11, 2003).

186. American Ex-Prisoners of War homepage, at <http://www.axpow.org> (last visited May 11, 2003), *supra* note 183.

187. Email Correspondence with Pete Wygle, *supra* note 185.

188. The Center for Internee Rights, Inc. homepage, at <http://www.expows.com> (last visited May 11, 2003), *supra* note 66.

189. *Id.*

190. *Id.*

191. Telephone Interview with Gil Hair, Executive Director of the Center for Internee Rights, Inc., in Miami Beach, Florida (December 28, 2002). Mr. Hair has been actively involved in seeking reparations for ex-POWs that have not been compensated for the time they spent as forced labor in Japan during World War II, working in conjunction with numerous law firms to bring suits in the United States and Japan against the U.S. government and the Japanese government. Mr. Hair, on behalf of the Center, indicated a reluctance to be directly involved in the actual payment of reparations, but expressed an overwhelming willingness to work in conjunction with other organizations, by providing necessary data and records for the most judicious distribution possible, in order to ensure that all ex-prisoners entitled to reparations would be able to receive compensation from the account. *Id.*

the liquidation of Japanese assets, between \$86,798,508 and \$3,858,048,508,¹⁹² these non-profit organizations¹⁹³ could assist in the distribution of the funds to the ex-prisoners and/or their heirs. This would satisfy the vast majority of the POWs and they would then be barred from filing reparations suits, because they would have already received reparations payments. But in this case, so far, rather than paying reparations, or even allowing the prisoners to seek such reparations from Japanese Corporations, the United States government is essentially using the funds left over from liquidation of Japanese assets to intervene in lawsuits filed by POWs and destroy the war heroes' chances of receiving compensation.

VI. Conclusion

In 1951, the United States signed a treaty with Japan which stated that reparations should be paid by Japan, but the treaty called for the Allied Powers to waive such reparations because Japan's resources were not sufficient, at the time, to make such payments while maintaining a viable economy.¹⁹⁴ Now, fifty years later, the resources of Japan are more than sufficient,¹⁹⁵ yet the government of the United States refuses to allow ex-prisoners to seek compensation, a right that the U.S. government claims it gave away in the Peace Treaty. It cannot be denied that a problem exists, and we as a nation, on behalf of our veterans, are in desperate need of a solution.

The need for reparations, and the denial of the ability to seek such compensation, has caused some of the soldiers who once put their lives on the line in defense of the United States, to turn their backs on their country, after the U.S. government turned its back on them. One ex-POW displayed his dismay with the governments' decision to intervene in reparations suits by declaring his disgust: "I hate our government's guts, personally."¹⁹⁶

192. The FCSC contends that the amount received from the sale of Japanese assets was only \$228,750,000. See, e.g., *War Claims and Enemy Property Legislation*, Statements by Whitney Gilliland, then head of the Foreign Claims Settlement Commission, *supra* note 104. But others argue that the amount realized from the liquidation of seized Japanese assets was actually \$4 billion. See, e.g., *Right of World War II POWs to Sue for Wages*, Testimony of Robert D. McCallum, Assistant Attorney General, *supra* note 87. These two amounts, minus the \$141,952,492 allegedly paid by the FCSC, result in the figures listed as left-over from the liquidation of Japanese assets but not paid as reparations to the ex-POWs. See *1998 FCSC Report*, *supra* note 118.

193. See American Ex-Prisoners of War homepage, at <http://www.axpow.org> (last visited May 11, 2003), *supra* note 183; The Center for Internee Rights, Inc. homepage, at <http://www.expows.com> (last visited May 11, 2003), *supra* note 66.

194. Peace Treaty, *supra* note 44, at ch. 5, art. 14(a).

195. *The World 50 Years Later*, *supra* note 59.

196. *Ex-POWs Fight for Right to Sue Japanese Companies*, *supra* note 102.

Inside the courtroom, the worst thing the United States government can do is take *action*. They have intervened in lawsuits, in which they are not a party, claiming that the 1951 Peace Treaty disallowed private citizens from suing Japanese Corporations. The government is wasting time and money, all in an effort to fight those that served in the armed forces and suffered on behalf of the U.S. government. Outside of the courtroom, the worst course of action for the government is *inaction*. By doing nothing, failing to pass legislation, and threatening reparations bills with presidential vetoes, the U.S. government defies these ex-POWs in an unimaginable way. The government whose interests were heroically served during World War II is now refusing to serve the interests of those soldiers.

When the United States was attacked by Japan at Pearl Harbor, President Franklin D. Roosevelt addressed the nation, and promised that “no matter how long it may take us to overcome this premeditated invasion, the American people in their righteous might will win through to absolute victory.”¹⁹⁷ But for thousands of soldiers taken captive during World War II on the Bataan Peninsula, who still fight to this very day to win a war of reparations against Japan *and* the United States, “absolute victory” is still merely a dream. We, as a nation, may have won the war, but many Americans are still losing battles everyday. This is not the “absolute victory” that was promised to us after the attack at Pearl Harbor and something must be done to assure that these war heroes do not die without the victory they were promised.

In closing, all readers should take a moment and put themselves in the place of the ex-prisoners who had their freedom stripped away by the Japanese government and large powerful Japanese Corporations during World War II. Imagine being denied compensation, not unsurprisingly, by the government that used you as forced labor for years. Then imagine coming home to the nation you served, only to have another door slammed shut in your face as you are again denied reparations, this time by your own government. Something must be done to provide these heroes with the recourse they seek. The U.S. government must realize that any effort to remedy this problem will benefit not only the ex-POWs, but the United States government itself, both as a democracy, and as a collective voice for *all* Americans. “Our honor as a nation depends on us all.”¹⁹⁸

197. President Franklin D. Roosevelt’s address to the Congress of the United States on December 8, 1941, available at <http://www.frontiernet.net/~pendino/WW-Two-History.htm> (last visited Apr. 5, 2003).

198. Quote from the POW/MIA Freedom Fighters homepage, at <http://www.powmiaff.org> (last visited Apr. 5, 2003).

