

Excerpt of the Amicus Brief

filed on behalf of the Government of Japan, February 22, 2017

March 2017, excerpted by K. Hosoya (GAHT-US)

INTEREST OF AMICUS CURIAE

This case involves the question whether it is constitutionally permissible for respondent City of Glendale (Glendale) to disrupt the United States' foreign policy of impartially encouraging an amicable resolution of the issue between Japan and the Republic of Korea concerning comfort women during World War II. The federal government has long sought to support the two countries as their ally in their efforts toward a diplomatic solution to this issue. To that end, the United States has carefully and consistently avoided making inflammatory statements about the issue.

The issue of comfort women is contentious and politically sensitive. In 2013, when the City of Glendale installed a public monument in its central park that commemorates comfort women and accuses Japan of international human rights violations, Japan and the Republic of Korea were engaged in bilateral discussions seeking to resolve the issue and find a path forward. The United States was encouraging the two countries to reach a resolution through these diplomatic channels. Installation of the monument provoked a concerned response from high-ranking Japanese officials.

That agreement was achieved with the support of, and welcomed by, the United States. Secretary of State John Kerry emphasized the United States' "belie[f that] this agreement will promote healing and help to improve relations between two of the United States' most important allies."

The monument in Glendale Central Park presents a significant impediment to Japan's diplomatic efforts on this issue. Because the monument is not in line with the spirit of the 2015 Agreement between Japan and the Republic of Korea, it has also been an impediment to smooth implementation of the Agreement. In the view of the Government of Japan, that fact has diplomatic significance not only for the Government of Japan, but also the Government of the Republic of Korea and the Government of the United States.

Japan is an important ally of the United States.

Practically speaking, Japan has a significant interest in the United States' foreign policy being made by the federal government rather than by States or localities with whom Japan "cannot negotiate" about foreign policy.

The Government of Japan urges that the petition be granted and wishes to convey the importance of this Court's review of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

The historic practice of the United States has been to address the comfort women issue, like other residual issues from World War II, "through a settled foreign policy of state-to-state negotiation with Japan." *Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005). One reason for this settled foreign policy is that it respects rather than disrupts "Japan's 'delicate' relations with *** Korea." *Id.* (quoting Statement of Interest of the United States at 34–35). The Glendale monument represents an interference with, and a departure from, that settled foreign policy.

The Ninth Circuit affirmed the legality of the Glendale monument, in a decision that finds no support in precedent or principle. Precedent shows that courts, including this Court, have been consistently wary of actors other than the federal government playing a role in foreign affairs. And first principles show that courts are right to be wary: foreign policy is a sensitive domain. The Government of Japan seeks this Court's review of the Ninth Circuit's decision. That decision gives States and localities an "expressive" exemption in the domain of foreign policy—a domain in which the United States' role is constitutionally established as exclusive—and thereby risks harm to the United States and its close allies, such as Japan.

ARGUMENT

THE FEDERAL GOVERNMENT'S AUTHORITY TO CONDUCT FOREIGN AFFAIRS IS EXCLUSIVE

A. Foreign Affairs Preemption

Several cases decided by this Court have defended the exclusive foreign affairs authority of the federal government against state encroachment.

These foreign affairs preemption cases confirm the venerable proposition that exclusive foreign affairs authority is vested in the United States government.

The decision below departs from this Court's consistent position and merits review and reversal on that basis.

B. The Ninth Circuit's Invention Of An "Expressive" Exception To Foreign Affairs Preemption Warrants Review

The Ninth Circuit's decision does not square with the above-mentioned position of the United States, as demonstrated by a comparison to this Court's decisions. The Court has held that state laws pertaining to insurance regulation and estate law did not serve traditional state responsibilities when those rules were tailored toward addressing foreign policy.

Furthermore, the Ninth Circuit gave no weight to the fact that "various Japanese officials have expressed disapproval of the monument," Pet. App. 14a, despite the weight given to that consideration in Crosby.

The Ninth Circuit further contorted foreign affairs preemption by creating an exception to the preemption for "expressive" acts.

Moreover, such a limitation on foreign affairs preemption would make little sense because the speech of a city like Glendale is not constitutionally protected.

As the United States has emphasized before in support of Japan, "on matters of international relations, the United States needs to speak with one voice."

The appearance of the word "speak" in that last sentence is not accidental: foreign policy is as much about words as it is about actions. Glendale installed its statue to send a message to the world, to take a stand on foreign policy.

C. Japanese-Korean Relations Are Delicate And Could Be Disrupted By Conflicting United States Pronouncements On The Comfort Women Issue

Japan strongly disagrees that the inscription on the Glendale monument accurately describes the historical record, which Japan has studied at length. Last year at the Committee for the Convention on the Elimination of All Forms of Discrimination Against Women, in Geneva, Japan's Deputy Minister for Foreign Affairs testified about the results of Japan's full-scale fact-finding study in the 1990s. See Summary of Remarks by Mr. Shinsuke Sugiyama, Deputy Minister for Foreign Affairs, Question and Answer Session, Convention on the Elimination of All Forms of Discrimination Against Women (Feb. 16, 2016) (discussing the results of Japan's investigation, including a lack of evidence to support a claim that 200,000 women were coerced into sexual slavery).

Indeed, Japan and Korea's ongoing diplomacy on the issue, supported by the United States, led to an aforementioned agreement in 2015 as well.

It is of the utmost importance to Japan that States or localities like Glendale may not insert themselves into foreign relations, especially on sensitive subjects like this one, so that they cannot undermine the unified message that the United States of America must send in its foreign policy making.

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted.