2007-5121

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMERISOURCE CORPORATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON APPEAL FROM
THE UNITED STATES COURT OF FEDERAL CLAIMS

PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC OF PETITIONER AMERISOURCE CORPORATION

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June 16, 2008

CERTIFICATE OF INTEREST

Counsel for the Petitioner AmeriSource Corporation certifies the following:

1. The full name of every party or amicus represented by me is:

AmeriSource Corporation

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

AmeriSource Corporation

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

AmerisourceBergen

4. ☐ There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Prior Appearances:

Eric F. Spade, Esquire; Frey, Petrakis, Deeb, Blum, Briggs & Mitts, P.C.

Expected to appear: Ronald J. Mann, Esquire

Dated: June 16, 2008

Maurice Mitts /mal

Signature of Counsel

Maurice Mitts

Printed Name of Counsel

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STATEMENT OF ISSUES PURSUANT TO FED. R. APP. PROC. 35(b)

1. Based on my professional judgment, I believe the panel decision is contrary to the following precedent(s) of this court. En banc consideration is necessary to secure uniformity in the court's decisions, because the decision of the panel in this case conflicts with the prior decision of this Court in *Acadia Technology v. United States*, 458 F.3d 1327 (2006).

2. Based on my professional judgment, I believe this appeal requires an answer to the following precedent setting question of exceptional importance: whether it is a taking compensable under the Fifth Amendment for the Government to seize an innocent third party's property for use in a criminal prosecution, if the property is not itself contraband, is not the fruits of criminal activity, and has not been used in criminal activity. The decision of the panel holding that the conduct is not a taking conflicts with the decisions of the Ninth Circuit in *United States v. Martinson*, 809 F.2d 1364 (1987), and the Tenth Circuit in *Lowther v. United States*, 480 F.2d 1301 (1973).

Dated: June 13, 2008

Maurice Mitts /mal

Signature of Counsel

Maurice Mitts

Printed name of Counsel

REASONS FOR GRANTING REHEARING AND REHEARING EN BANC

1. The facts in this case fall squarely within the language of the Takings Clause of the Fifth Amendment. The Government forcibly took physical possession of petitioner's property (prescription pharmaceuticals) and held the property until it lost all of its value (because of the expiration of the time period during which the pharmaceuticals could be sold). The justification for the taking was unrelated to any conduct of petitioner. The Government has not alleged that the property in question was misbranded, mislabeled, or illegal in any way. Rather, the Government took the property for the public purpose of potential use as evidence in the prosecution of third parties. As the panel recognized, under the plain meaning of the Constitution, "private property [has been] taken for public use, without just compensation." *See* Slip op. 6 ("If we confined our reasoning to a literal reading of the text, [petitioner]'s argument might have considerable force.").

2. The panel's opinion is permeated by its recognition that the policies reflected in the Takings Clause call for compensation here. *See* Slip op. 9 (acknowledging that the outcome seems "unfair"), 11 (noting the "considerable appeal of [petitioner's position] as a matter of policy"), 14 (characterizing the outcome as "unfair" and "intensely undesirable"). As the panel understood, law enforcement is the quintessential public activity. The necessity of collective

mechanisms to suppress harmful conduct is at the heart of the social contract that justifies a public monopoly on coercive force. *See* THOMAS HOBBES, LEVIATHAN ch. xvii (1651). No one would suggest that the Government could commandeer the land or buildings in which this Court sits. Nor could the Government acquire the goods and services necessary to perform those functions without compensating the owners. The evidence the Government may wish to present in its prosecutions is no different. The cost of the criminal process is almost by definition a "public burde[n] which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Moreover, a system in which the Government is free to shift the costs of prosecution to innocent taxpayers is one in which the Government has no obligation to pursue law enforcement in a cost-effective way. This case illustrates the point well. The Government confiscated hundreds of boxes of pharmaceuticals shipped by AmeriSource, and insisted that it needed to hold all of the pharmaceuticals for years, past the date on which they expired. Ultimately, however, the Government never used any of this material as evidence.

As we emphasized in our briefing to the panel, we do not suggest that the court below should have reviewed the reasonableness of the Government's decision to retain the property, or that trial courts routinely should order the

Government to release property held for potential use as evidence. Courts are not well-placed to engage in judicial second-guessing of the reasonableness of those kinds of prosecutorial decisions. It is sensible, however, to obligate the Government to pay when it confiscates property from innocent third parties as mere evidence. That arrangement combines Executive discretion to articulate prosecutorial policy with a salutary incentive to act with reasonable consideration of the costs of implementing that policy. But the merits of that abstract view are beside the point here, because the Takings Clause has resolved the issue specifically: the Government's decision to confiscate the property of private individuals for public purposes is checked by its Constitutional obligation to pay compensation.

3. The panel's opinion articulates a stark dichotomy between actions taken under the police power (for which compensation is not due) and actions taken under the eminent domain power (for which compensation is due). For example, the panel states without qualification that "[p]roperty seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause." *See* Slip op. 7. As the discussion above, suggests, that remarkable dichotomy turns on its head the language and purpose of the Takings Clause – which mandate the payment of compensation in precisely those

circumstances. The panel justified that reductionist understanding of the Takings Clause as compelled by the decisions of this Court and the Supreme Court.

The panel view rested on its interpretation of this Court's decision in *Acadia*. *See* Slip op. at 7-8 (discussing *Acadia*). But even a glance at the opinion in *Acadia* shows that *Acadia* provides no support for the panel's analysis. The court in *Acadia* emphasized that "it is insufficient to avoid the burdens imposed by the Taking Clause simply to invoke the 'police powers' of the state, regardless of the respective benefits to the public and burdens on the property owner." 458 F.3d at 1333. The *Acadia* court explained that the action at issue there (confiscation of alleged contraband at an international border) did not warrant compensation because it "is the *kind of exercise of the police power* that has repeatedly been treated as legitimate even in the absence of compensation to the owners of the * * * property." 458 F.3d at 1333-34 (emphasis added). The activity at issue here of course has not repeatedly been treated as legitimate. No federal court previously has accepted the taking of property as mere evidence without some obligation of compensation to the owner.

4. *Acadia* follows directly upon the Supreme Court's longstanding understanding of the relation between the police power and the Takings Clause. That jurisprudence derives from Justice Holmes's opinion in *Pennsylvania Coal*

Co. v. Mahon, 260 U.S. 393 (1922), in which the Court invalidated a statute that limited the ability of mining companies to exercise mineral rights in residential areas. Justice Holmes acknowledged the "public interest" that supported the statute (260 U.S. at 413-14), but nevertheless held that the Takings Clause required compensation:

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss * * * should fall.

Id. at 415-16.

We recognize that the Court has not articulated clear rules for determining precisely *when* activity under the police power requires compensation under the Takings Clause. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 200 n.17 (1985). But however hard it might be to discern the correct answer in some cases, this case bears all the hallmarks of activity for which compensation is due. It indisputably involves physical occupation of the property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982) (explaining that cases "uniformly have found a taking" for "permanent physical occupation of property" because it "is perhaps the

most serious form of invasion of an owner's property rights"). Also, because the Government retained the property here until it lost all value, the applicable doctrine is "that a regulation which denies all economically beneficial or productive use of [property] will require compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)). As this Court well knows, Takings law often presents hard cases, in which the relevant concerns are closely balanced. This case is simply not one of them. *Cf. Cienega Gardens v. United States*, 503 F.3d 1266, 1278 (Fed. Cir. 2007) (describing the problem as "a classic exercise of judicial balancing of competing values") (quoting *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994)).

5. Contrary to the panel's reasoning (Slip op. at 8-10), the Supreme Court's decision in *Bennis v. Michigan*, 516 U.S. 442 (1996), does not support, much less compel, the denial of compensation. To be sure, the Court in *Bennis* did hold that forfeitures under a Michigan criminal statute did not require compensation under the Fifth Amendment, even when the forfeiture affected the property of an allegedly innocent third party. 516 U.S. at 446. The Court emphasized, however, that the property in that case, "it is conceded, facilitated and was used in criminal activity." 516 U.S. at 453; *see also id.* at 457 (emphasizing

that the case did not present "an experiment to punish innocent third parties") (Ginsburg, J., concurring). As the Court had recognized previously,

> it would be difficult to reject the constitutional claim of an owner * * * who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 (1974).

When the Government confiscates property because of unlawful activity of the property owner or because of unlawful use of the property, it is fair to say that the burden of the Government action should be borne by the owner. But that justification is exhausted when the Government confiscates property of an innocent third party that is useful merely as evidence of criminal activity.

As Justice Thomas noted in his concurrence in *Bennis*, the boundaries of that rule rest not only on logic but also on historical practice. *See Bennis*, 516 U.S. at 454 (Thomas, J., concurring) (characterizing the result in *Bennis* as "intensely undesirable" but accepting it based on "settled usage" "in England and in this country" permitting forfeiture of property "because it was 'used' in or was an 'instrumentality' of crime"). Indeed, four members of the Court dissented from the decision in *Bennis* based on their view that the connection to the property holder's

conduct was too tenuous and the historical practice insufficiently settled to justify the forfeiture at issue in *Bennis*. *See id.* at 458 (Stevens, J., dissenting, joined by Souter & Breyer, JJ.); *id.* at 472 (Kennedy, J., dissenting).

Whatever the merits of the debate regarding the statute at issue in *Bennis*, there is no settled usage permitting the Government to confiscate property merely as evidence of criminal activity. Indeed, until *Warden v. Hayden*, 387 U.S. 294 (1967), the Court's view of the Fourth Amendment made such seizures unusual. The Court's decision to permit warrants for that purpose in *Hayden* hardly can be read as a validation of the practice as wholly exempt from constitutional scrutiny. Thus, a fair reading of *Bennis* suggests that the Court that decided that case would require compensation on the facts of this one.

6. The panel's opinion identifies no prior decision exempting seizures of property for evidentiary purposes from scrutiny under the Takings Clause. To the extent the other courts of appeals have considered the question, they have been unwilling to grant the Government the unreviewable discretion sanctioned by the panel. *E.g.*, *United States v. Martinson*, 809 F.2d 1364, 1368-69 (9th Cir. 1987) (holding that a court has power to award damages to compensate for an unjustified seizure of property for evidentiary purposes); *Lowther v. United States*, 480 F.2d 1031, 1033 (10th Cir. 1973) (affirming award of damages "to remedy a taking of

property contrary to the Fifth Amendment" when the Government confiscated property that was "neither narcotics nor other contraband" and "determined by the trial court to have been innocently used and to have not been illegal per se"). Thus, the panel's decision stands apart from the normal course of judicial decisions reviewing evidentiary seizures.

CONCLUSION

As the panel recognized, "[i]t is unfair that any one citizen or small group of citizens should have to bear alone the burden of the administration of a justice system that benefits us all." *See* Slip op. at 14. The panel fails to identify any prior decision of this Court or the Supreme Court that supports the panel's denial of compensation, much less compels it. The panel's analysis squarely conflicts with the analysis of the panel in *Acadia*. We respectfully suggest that rehearing and rehearing en banc are warranted to correct the patent error in the panel's opinion.

Respectfully submitted,

/s/ Maurice Mitts /mal

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