IN THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 05-451C
No. 05-452C

(Filed: August 25, 2005)

LAZAR S. KOVACHEVICH,	)
Plaintiff,	)
v.	)
UNITED STATES,	)
Defendant.	)

OPINION AND ORDER

On April 7, 2005, plaintiff, Lazar Kovachevich filed two complaints ("Compl. 1" and "Compl. 2 ")[1] in this court. In the first, he alleges that all of his civil rights, including the rights to due process and equal protection, were violated by the Federal Bureau of Investigation ("FBI"). Compl. 1 at 1-3. Mr. Kovachevich avers that because of several papers and letters he wrote regarding mistakes the Clinton administration made in bombing Kosovo in 1999, the FBI labeled him a terrorist. *Id.* at 2-3, 5. As a result of this labeling, plaintiff alleges that he has been unable to obtain employment since 2000, that the FBI "ransacked" his apartment, and that he lives in constant emotional anguish. *Id.* at 3-5. Mr. Kovachevich's second complaint similarly stems from bombings that occurred in Kosovo in 1999. He claims that he possessed an intellectual property interest in several buildings that were destroyed in those bombings. Compl. 2 at 2. He seeks monetary compensation for their destruction under what appear to be claims of an unlawful seizure of property as well as for a taking of his intellectual property in the building designs. *Id.* at 5. Plaintiff also seeks damages for emotional suffering. *Id.* at 2, 5.

The government has responded with motions to dismiss both complaints ("Def.'s Mot. 1" and "Def.'s Mot. 2")[2] for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the

[1]Compl. 1 corresponds with *Kovachevich v. United States,* No. 05-451C (Fed. Cl. filed Apr. 7, 2005) and Compl. 2 with *Kovachevich v. United States,* No. 05-452C (Fed. Cl. filed Apr. 7, 2005). Both complaints were amended by Mr. Kovachevich on August 3, 2005. This decision addresses the complaints in each case as they were amended.

[2]Def.'s Mot. 1 corresponds with *Kovachevich v. United States,* No. 05-451C (Fed. Cl. filed July 6, 2005) and Def.'s Mot. 2 with *Kovachevich v. United States,* No. 05-452C (Fed. Cl.

Rules of the Court of Federal Claims ("RCFC"). In both motions, the government argues that this court lacks the power to hear all but plaintiff's takings claim under the Tucker Act, 28 U.S.C. § 1491. The government further states that Mr. Kovachevich has failed to state a takings claim, asserting that no taking occurred because the destroyed structures constituted "enemy property" immune from the Takings Clause of the Fifth Amendment to the Constitution under the "enemy property doctrine." Def.'s Mot. 2 at 4-5.

The government's motions are fully briefed and ready for disposition.

CONSOLIDATION

For the purposes of judicial efficiency, this court consolidates both cases brought by Mr. Kovachevich. A court may decide *sua sponte* to consolidate. Consolidation is governed by Rule 42 of the Rules of the Court of Federal Claims ("RCFC"), which provides in part that:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions; it may order all the actions consolidated . . . and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays.

RCFC 42(a). The court possesses "broad discretion to determine whether consolidation is appropriate." *Cienega Gardens v. United States*, 62 Fed. Cl. 28, 32 (2004) (citing *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284 (2d Cir. 1990); *Skirvin v. Mesta*, 141 F.2d 688, 672-73 (10th Cir. 1944)). In deciding whether to consolidate, the court must weigh the interest of judicial economy against the potential for delay, confusion, and prejudice that may result. *Karuk Tribe of Cal. v. United States*, 27 Fed. Cl. 429, 433 (1993) (citing *Bank of Montreal v. Eagle Assocs.*, 117 F.R.D. 530, 532 (S.D.N.Y. 1987)). When the court finds that the risks of prejudice and confusion are "overborne by the risk of inconsistent adjudication of common factual and legal issues, the burden on the parties, witnesses, and available judicial resources posed by multiple lawsuits," consolidation is appropriate. *Johnson*, 899 F.2d at 1285 (quoting *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982)).

In the case at hand, little if any delay, confusion, or prejudice would result from consolidation. Rather, consolidation would serve the interest of judicial economy, given that the complaints have been filed by the same plaintiff and contain common factual and legal issues. Mr. Kovachevich filed both complaints on the same day, and motions to dismiss are pending before this court in each case. Thus, there is no reason that consolidation would delay adjudication on any of Mr. Kovachevich's claims, nor is there any concern that consolidation would confuse the issues or cause prejudice to either party. Because judicial economy would

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filed July 6, 2005).

benefit from consolidation, while causing only minimal delay, confusion, or prejudice to the parties involved, this court hereby orders the consolidation of Case Nos. 05-451C and 05-452C.

STANDARD FOR DECISION

As plaintiff, Mr. Kovachevich bears the burden of proving the court's subject matter jurisdiction to consider his claims. *See McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army and Air Force Exchange Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Ware v. United States*, 57 Fed. Cl. 782, 784 (2003). In assessing whether jurisdiction exists, courts must accept all the facts alleged in the complaint as true and must "draw all reasonable inferences in favor of the plaintiff." *Goel v. United States*, 62 Fed. Cl. 804, 806 (2004) (citing *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995)). In complaints filed by persons appearing *pro se*, courts use less rigorous standards than those applied to formal pleadings prepared by attorneys. *Goel*, 62 Fed. Cl. at 806 (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). In such cases, the court searches the record "to see if plaintiff has a cause of action somewhere displayed." *Boyle v. United States*, 44 Fed. Cl. 60, 62 (1999) (quoting *Ruderer v. United States*, 188 Ct. Cl. 456, 468 (1969)).

For this court to have jurisdiction over a claim brought against the United States, Congress must have consented to suit through waiver of sovereign immunity. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The Tucker Act, 28 U.S.C. § 1491, constitutes consent to suit for claims "against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act alone, however, is insufficient to confer jurisdiction. The plaintiff must also identify a substantive right enforceable against the United States for money damages. *Mitchell*, 463 U.S. at 216-17; *United States v. Testan*, 424 U.S. 392, 398 (1976).

ANALYSIS

The government asserts that neither of the plaintiff's two complaints contain claims over which this court possesses jurisdiction. Mr. Kovachevich's first complaint alleges that the FBI violated his civil rights, including his rights to due process and equal protection. Compl. 1 at 1-2. He argues that his civil rights were violated when the FBI labeled him a terrorist, causing him to be harassed, followed, and obstructed from obtaining employment. Compl. 1 app., at 1-6A. Plaintiff also claims that the FBI ransacked his apartment and destroyed several disks of information. *Id.*

This court does not have jurisdiction to hear any of these claims. First, the constitutional rights that Mr. Kovachevich alleges were violated do not confer a money-mandating duty, which is required to confer jurisdiction. *See LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (holding that neither Due Process Clause nor Equal Protection Clause imposes a money-mandating duty); *Goel v. United States*, 62 Fed. Cl. 804, 808 n.4 (2004) (same). Even where an

individual's due process rights, protected by the constitution, may be shown to have been violated, this court lacks authority to grant relief because "except for the takings clause of the fifth amendment, the other amendments [to the constitution] do not require the United States to pay money for their alleged violation." *Elkins v. United States*, 229 Ct. Cl. 607, 608 (1981).

Second, the Tucker Act does not confer jurisdiction on this court over claims "sounding in tort." 28 U.S.C. § 1491(a)(1). Mr. Kovachevich's claim that he was obstructed from obtaining employment because the FBI labeled him a terrorist sounds in tort because Mr. Kovachevich argues that the FBI carelessly performed its duty. Similarly, plaintiff's claim that the FBI intentionally harassed him and ransacked his apartment sounds in tort. *Restatement (Second) of Torts* §§ 46; 158 (1965). Finally, plaintiff's claim for emotional damages that resulted from the FBI's incorrectly labeling him a terrorist sounds in tort. *Pratt v. United States*, 50 Fed. Cl. 469, 482 (2001); *see also Garner v. United States*, 230 Ct. Cl. 941, 943 (1982) ("[R]elief for mental distress and psychological damage is found in tort, which is outside the jurisdiction of this court."). Thus, the court lacks jurisdiction to hear the claims asserted by Mr. Kovachevich in his first complaint.

In his second complaint, Mr. Kovachevich urges that the United States's actions in bombing locations in Kosovo in 1999 resulted in the destruction of numerous structures in which he possessed an intellectual property interest. Compl. 2 at 2. While his claims for the unlawful seizure of physical property and emotional distress do not fall within this court's jurisdiction for the reasons recited above, Mr. Kovachevich also asserts that the government took his intellectual-property interest in the buildings in contravention of the Fifth Amendment of the United States Constitution. *Id.* at 5. Although an issue exists as to whether an intellectual property right may actually be "taken" in violation of the Fifth Amendment by the destruction of physical property, this court need not address that matter at this time.[3] Given the standard for motions to dismiss, even assuming that it is possible to take an intellectual property right in such a manner, Mr. Kovachevich's claim fails under the "enemy property doctrine."

The Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Property outside the United States is subject to the Takings Clause provided that it is owned by a citizen of this country. *See El-Shifa Pharm. Ind. Co. v. United States*, 378 F.3d 1346, 1351 (Fed. Cir. 2004). There are, however, exceptions to the general applicability of the Takings Clause. The just-compensation requirement does not apply to "enemy property." *El-Shifa*, 378 F.3d at 1355. Enemy property is that which "*actually* belongs to an enemy of the United States." *Id.* (emphasis in original). The United States "does not have to answer under the Takings Clause for the destruction of enemy property or, as the Court of Federal Claims termed it 'enemy war-making instrumentalities.'" *Id.*

[3]It is also unnecessary to the disposition of this case to consider the extent to which Mr. Kovachevich may have held an intellectual property interest in the design of buildings that were destroyed.

The "enemy property doctrine" does not, however, allow the government to avoid the Takings Clause merely by using its military force as a cover for activities that would otherwise constitute a taking had they been performed by one of its civilian agencies.[4] *Id.* at 1356. Thus, to determine whether the "enemy property doctrine" applies, courts must ascertain:

> the precise point at which the military conduct complained of is no longer coextensive with the state's civil power of eminent domain, but rather, enters the zone of conduct, outside the reach of the takings clause, where the United States appropriates the property of its enemies.

El-Shifa, 378 F.3d at 1355. *Cf. National Bd. of YMCAs v. United States*, 396 F.2d 467, 470 (Ct. Cl. 1968) (holding that "destruction of private property in battle or by enemy forces is not compensable" under the Takings Clause). To determine whether the facts of any military takings claim are sufficient to constitute a Fifth Amendment taking, courts look to:

> the general principles announced in the decisional law to find the narrow and sometimes indistinct line that separates losses that are necessary incidents for the ravages and burdens of war from those situations where the Government is obliged to pay compensation to the owner of private property that is taken for public use.

Nat'l Bd. of YMCAs, 396 F.2d at 471. Thus, no takings claim lies in instances where the destruction of a United States citizen's property is a necessary incident of war. *See Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1392 (Ct. Cl. 1970).

The determination of whether an area is "hostile" to the United States need not be determined by the court in all circumstances. *El-Shifa*, 378 F.3d at 1361. Decisions by the other political branches to take military action on foreign soil constitute an un-reviewable political question. *Id.* at 1361-1367 ("In our view, the President's power to wage war must also necessarily include the power to make extraterritorial enemy property designations because such designations are also an important incident to the conduct of war.").

In the instant case, the destruction of property alleged by Mr. Kovachevich as a basis for his takings claim falls within the scope of "enemy property" and thus is not compensable under the Fifth Amendment. The bombings occurred as a part of military action taken by the United States against a region designated as hostile by the President. As Mr. Kovachevich asserts, an act of Congress, dated March 23, 1999, authorized President Clinton to conduct bombing in Kosovo. Compl. 2 at 1. As discussed at length in *El-Shifa*, courts of the United States cannot review decisions of the President that designate land as "enemy property." *El-Shifa*, 387 F.3d at 1363-

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[4]The government cannot use the enemy property doctrine to shield itself from a plaintiff's takings claim when the property of citizens is taken for the service of the army, including the transport of troops and munitions, housing for soldiers, or storage for war materials. *United States v. Pacific R.R.*, 120 U.S. 227, 239 (1887).

1364. "It is up to the President to determine when he has received 'convincing' or 'compelling' information sufficient to justify the use of force to destroy private property located outside the territory of the United States." *Id.* at 1366. As such, plaintiff's takings claim must be dismissed because the property that was destroyed constituted "enemy property."

CONCLUSION

For the reasons articulated above, this court orders that Cases Nos. 05-451C and 05-452C be consolidated. The Court DENIES Mr. Kovachevich's motion for discovery filed April 29, 2005 in the first case (No. 05-451), his motions for sanctions filed June 13, 2005 in both cases, and his motion for default judgment filed June 15, 2005, in the second case (No. 05-452). The government's motions to dismiss the complaints pursuant to RCFC 12(b)(1) and 12(b)(6) are GRANTED. The Clerk is directed to enter judgment dismissing the complaints.

It is so ORDERED.

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Charles F. Lettow
Judge