

Testimony of Charles J. Ogletree, Jr.

Before the

Inter-American Commission on Human Rights,
Organization of American States

On the

Petition Alleging Violations of the Human Rights
Of John Melvin Alexander *et. al.* by the United States of America

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*For identification purposes only

Dear Members of the Inter-American Commission on Human Rights,

I am delighted to submit to this commission additional information that I believe can be helpful and useful in addressing the petition filed on October 26, 2005, by the survivors of the 1921 Tulsa Race Riot. Beyond the matters covered in our petition, I want to address the issue of new matters that this commission should consider in granting our request to provide a judgment in favor of the Tulsa Race Riot survivors.

Sincerely,

Charles J. Ogletree, Jr.

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I. The Tenth Circuit's Theory of Accrual Rewards Those Who Successfully Cover-Up The Wrongs They Perpetrate, and Is Contrary to the Justifications Underlying Statute of Limitations

Statutes of limitation serve an important purpose: they balance the defendant's — and society's — interest in certainty and stability against the plaintiff's enjoyment of his right. Such statutes work best when they protect the diligent defendant who has acquired and relied upon the right against the careless or neglectful plaintiff who fails adequately to prosecute his claim. They work a wrong when they divest the plaintiff of a right without vesting a corresponding right in a defendant.

There has been little advance made upon the theoretical justifications of statutes of limitation since Oliver Wendell Holmes asked and answered the question: “what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?” OLIVER WENDELL HOLMES, *THE PATH OF THE LAW* 29 (1996) (1897) (emphasis added). The two sets of justifications Holmes identified differ in weight according to the plaintiff's and defendant's perspectives. When viewed from the plaintiff's perspective, he suggested, “the loss of evidence . . . desirability of peace . . . [or] neglect[ing] to enforce his rights” generally provide an insufficient reason for barring suit. *Id.* The real reason for such statutes is to be found in the defendant's perspective, the person who acquires the right through the passage of time and acts upon it without any warning from the plaintiff. *Id.*

Holmes's rationales were essentially adopted by the Court in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944). The primary plaintiff-focused justification for divesting a plaintiff of his rights using statute of limitations is that the plaintiff is “slumber[ing],” *Order of R.R. Telegraphers*, 321 U.S. at 348, and so relying upon a “garden variety claim of excusable neglect.” *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990). The Court then adopted the “evidentiary” justification in defendant-centered terms, recasting it as a means of “prevent[ing] surprises . . . [when] evidence has been lost, memories have faded, and witnesses have disappeared.” *Order of R.R. Telegraphers*, 321 U.S. at 348-49. A slightly different defendant-centered justification depends upon “peace” or “repose”: what the Court called “the right to be free of stale claims.”

Equitable remedies also take a plaintiff- or defendant-centered perspective and are routinely available to toll the statute of limitations. When filing suit is untimely due to the defendant's affirmative misconduct, defendants are estopped from relying upon the statute; when the relevant facts are unavailable to the plaintiffs through no fault of their own, equity permits the statute to toll. *See Young v. United States*, 122 S. Ct. 1036, 1041 (2002) (citing *Irwin*, 498 U.S. at 96). Extraordinarily, both justifications are present here, along with other equitable considerations that require tolling of the statute of limitations. *See Young*, 122 S. Ct. at 1041 (2002) (citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) (per curiam)) (“tolling might be appropriate in other cases” as well); *see also Rosner v. United States*, 231 F. Supp. 2d 1202, 1209 (S.D. Fla. 2002) (tolling warranted where there are extraordinary circumstances); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 135 (E.D.N.Y. 2000) (same).

A. Defendants Engaged in a Process of Intimidation Designed to Prevent Plaintiffs Filing Suit

To rebut the inference that plaintiffs were neglectfully slumbering upon their rights, plaintiffs need only show that they were deprived of vital information bearing on the existence of a claim and that their ignorance was caused without any fault or lack of diligence on their part by circumstances beyond their control,, see, e.g. *Rosner v. United States*, 231 F.Supp.2d 1202, 1209 (S.D. Fla. 2002), and that these circumstances go beyond a “garden variety claim of excusable neglect.” *Irwin*, 498 U.S. at 96.

The plaintiffs in this case were the victims of government-sponsored violence and repression that lasted long after the Riot itself. On the one hand, the government sought to deny the plaintiffs access to evidence of government culpability; on the other, the government sought to intimidate the plaintiffs from filing suit. The government only made the necessary evidence available in 2001; it has never demonstrated a willingness to open the courts to the plaintiffs. Accordingly, plaintiffs’ failure to file suit before 1921 is the result of circumstances other than neglect.

Compare *Moore v. Dempsey*, 261 U.S. 86 (1923)

Even a cursory summary discloses that the Riot represented an unprecedented breakdown of the rule of law, in which police officers, special deputies, and local units of the National Guard joined together to put down what was termed a “negro uprising.” In the process, those governmental officers — representatives of the Oklahoma state and local government — used the mechanism of law and all the power **of that the state could to** round up every Black person in Greenwood, take them into custody, then loot and burn Greenwood.

No other riot manifested the level of governmental involvement in both perpetrating and covering up the Riot. As a direct consequence of the Riot, the 8,000 African American citizens of the Greenwood District of Tulsa lost their homes; 5,000 of those were detained in camps by the State and City; the other 3,000 fled Tulsa, many never to return. In the aftermath of the Riot, the state and federal relief was so completely unavailable to the victims that they could not achieve justice through the court system. See *Alexander*, Civ. No. 03-133, Order at 21-22 (apportioning responsibility for the Riot); *Alexander*, 382 F.3d at 1219 (same). The Tulsa Riot was, quite simply, a singular event in American history — unique in terms of violence, governmental culpability, and the inability of riot victims to later obtain redress.

The Riot victims did attempt to obtain redress in the aftermath of the violence. Nonetheless, those who filed suit found their cases held in legal limbo. The District Court unequivocally found that the State and City’s actions precluded the plaintiffs from timely filing their claim for the approximately fifty years following the Riot:

[The] legal system . . . was openly hostile to them, courts . . . were practically closed to their claims, [the] City . . . blamed them for the Riot and actively suppressed the facts, [in] an era of Klan domination of the courts and police force, and the era of Jim Crow. . . . Both the Commission Report and the Legislative Findings and Intent resulting from that Report catalog the horror

and devastation of the Riot as well as the intimidation, misrepresentation and denial that took place afterward. The political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights.

Alexander, Civ. No. 03-133, Order at 21-22.

The record is replete with evidence of “intimidation, fear of a repeat of the Riot, inequities in the justice system, Klan domination in the courts, [and] an the era of Jim Crow, *id.* at 22, all of which contributed to an environment inimical to timely filing. Plaintiffs reasonably believed that the courts would not grant relief to African Americans whom public opinion had settled were responsible for the Riot. For eighty years the State and City enforced the belief that that the Greenwood community was to blame for the Riot and that they had no right to relief.

These Plaintiffs in particular continued to labor under extraordinary conditions. The Tulsa Riot victims, specifically, were subjected to a set of circumstances unlike any other African-Americans in Oklahoma or nationwide. Many of them fled Oklahoma in the wake of the Riot and were too disturbed by the Riot to return. Those who remained in Oklahoma lived in the lap of their tormentors. They were required to remain silent: their suffering was denied, their reality revised to fit a racist myth.

Having imposed this code of silence, having enforced it by brutal repression, defendants seek to hold plaintiffs responsible for not realizing that the code was lifted at the end of Jim Crow. There was, however, no announcement, no apology, and no acknowledgement by the State, the City or the citizens of Tulsa. There was no publicizing the Riot, no conversation begun. The schoolbooks which are adopted by the State of Oklahoma continued — and continue — to elide the Riot from the State’s history or to misrepresent governmental participation in and responsibility for the Riot.

These circumstances are truly extraordinary. It is disingenuous and unrealistic to expect that Tulsa Riot victims — victims of state-sponsored terror who had been told by official actors that they had no right to relief — would, upon the termination of formal Jim Crow, file claims against defendants. Only once the Tulsa Riot Commission issued its report in February 2001 — and the state legislature acted to accept and acknowledge the report in May 2001 — did Tulsa Riot victims have some measure of comfort that asserting their rights was a possibility.

The Tulsa Riot victims have for all intents and purposes been conditioned to believe — not unreasonably — that they had no realistic expectation of legal relief in the judicial system, and that if they attempted to assert their rights, they might be met with violence and retribution. The Complaint sets forth the extraordinary and unprecedented nature of the Riot and its aftermath that resulted in the plaintiffs’ continued fear long after the dismantling of Jim Crow. Those who even spoke of the Riot faced threats of violence.

The plaintiffs are certainly not at fault for failing to understand that circumstances had changed. These are not neglectful plaintiffs, but fearful ones; they were not slumbering, but all too awake to the reality of silence and intimidation. The mere passage of time and the

possibility of a change of heart on behalf of the government and people of Oklahoma are insufficient to break the code of silence imposed in 1921 and perpetuated by three generations of Oklahomans. The clear message was that the State, City, and people of Oklahoma wished to continue the silence, and until the publication of the Commission Report in 2001 no-one said otherwise.

In sum, given the unique brutality of the Tulsa Riot, the unique level of government culpability and the unique circumstances under which evidence was buried, Plaintiffs have adequately alleged facts that would support the conclusion that they were de facto prevented from bringing suit even after the end of Jim Crow segregation. The extraordinary conditions that prohibited the plaintiffs' timely filing continued long after Jim Crow laws were taken off the books. The courts erred in concluding otherwise.

For the victims of the Tulsa riot, the era of Jim Crow has not yet ended. The survivors were taught early on that efforts to obtain redress were futile. As so clearly documented in the attached Harvard BlackLetter Law Journal article by Professor Alfred Brophy, the events that impacted the Tulsa Race Riot survivors in 1921 continue to produce harm, suffering and lack of meaningful redress.

B. The State and City's Intimidation and Censorship Estop Them for Enforcing Statute of Limitations

It is a central tenet of the equitable nature of tolling — and one that comports with Holmes's defendant-centered justification — that “no man may take advantage of his own wrong. Deeply rooted in our jurisprudence, this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statute of limitations.” The Court permits equitable tolling “where the claimant has . . . been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass,” “or affirmative misconduct on the part of a defendant lulled plaintiff into inaction.”

Put simply, the estoppel doctrine explains why a defendant cannot rely upon his own misconduct to assert the statute of limitations. Where the defendant has misappropriated a right by his own affirmative acts, the passage of time fails to afford a strong justification for enforcing that right.

In the instant case, the equities are tipped more drastically against the defendants. Their actions in the aftermath of the Riot indicate that they executed a pattern and practice of censorship and repression to silence the Riot victims and frustrate their access to justice. The acknowledged goal of the State and City was to silence all talk of the Riot. According to the legislature:

Perhaps the most repugnant fact regarding the history of the 1921 Riot is that it was virtually forgotten . . . for seventy-five (75) years. This “conspiracy of silence” served the dominant interests of the state during that period which found the riot a “public relations nightmare” that was “best to be forgotten, something to be swept well beneath history's carpet” for a community which attempted to attract new businesses and settlers.

The State and City jointly engaged in the enterprise of hiding and suppressing the relevant evidence of their participation. Shortly after the Riot, the Oklahoma attorney general convened an all-white grand jury investigation that laid blame squarely on Greenwood residents. The Mayor likewise blamed Greenwood residents—and was seemingly pleased that Greenwood had been destroyed. The State issued indictments against a number of key Greenwood residents. Many of those Greenwood residents who did not flee because of the violence of the Riot were soon driven out by threats of prosecution or further violence. By 1923, the State and City were effectively under the control of the Ku Klux Klan. Although some Greenwood residents filed lawsuits in 1922 and 1923, they could not obtain relief because the courts were effectively closed to them.

The state in particular re-wrote the history, portraying the National Guard as the saviors of the African Americans, who were held “for their own protection” from the rioting white mob. In fact, the Guard systematically rounded up African Americans throughout the night of the Riot, going so far as to kill those who would not leave their houses. The proper description of the State and City action is not that they passively stood by while the Riot progressed, but one of bloody intervention by City and the State as part of a policy and plan of destruction. The systemic and planned nature of that intervention was not apparent to anyone, victim or historian, until the records became available, so successfully did the State and City’s conspiracy of silence work.

The State and City suppressed all evidence of that participation in the Riot and promptly engaged in a concerted cover-up. For example, a Grand Jury, at the behest of the State, passed indictments against a number of African Americans blaming them for the Riot. While the African American Riot victims filed over one-hundred lawsuits, many alleging claims against the State and City, all the suits were dismissed.

Evidence of official complicity in the Riot did not surface until the Riot Commission received the contents of the Attorney General’s Civil Case Files from the Oklahoma State Archives. Those files contained the testimony necessary to demonstrate that the Supreme Court was wrong to clear the State and City of responsibility. On the basis of documents that became available for the first time, Scott Ellsworth was able to engage in a painstaking reconstruction of the course of the Riot through Greenwood, hour by hour. So powerful and damning was this testimony, presented at a public hearing in Greenwood, that even the Riot Commission refused to incorporate it in its final Report.

Without the Commission’s Report, any attempts at legal redress were futile as a matter of law. The 1982 reference to “special deputies” in Ellsworth’s *Death in a Promised Land* conveyed no new information — certainly nothing not contained in Redfearn. Ellison’s account suggests that if the properly-deputized officers aided the rioters, they did so unlawfully. Such spontaneous activity on the part of the rioters could not impose liability in 1982 any more than it did in 1926.

C. State and City Participation in Re-Investigating the Causes of the Riot Negates Defendants’ Claim of Repose

Where, by commissioning and cooperating with the Riot Commission, defendants take affirmative steps to recreate an historical record and re-open a controversy that has been closed for eighty years, notions of surprise, lack of evidence and repose are inapposite. *See, e.g., Rosner*, 231 F. Supp. 2d at 1209 (“It was only in October 1999, when the Presidential Advisory Commission on Holocaust Assets released its report on the Gold Train that the facts necessary to file their Complaint came to light.”).

Defendants Oklahoma and the City of Tulsa themselves opened up the evidentiary record and liability issue through the creation, operation and participation in creating the record and Report of the Commission, thereby acknowledging that it does not have any significant, legitimate interest in repose with respect to its responsibility for harm suffered in the Tulsa Riot.

Statutes of limitations are “designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Order of R.R. Telegraphers*, 321 U.S. at 348-49.

But such evidentiary concerns are nonexistent in this case, where the record is more robust than it was in 1921. Evidence has been found, memories have been jogged and recorded, and witnesses have surfaced unlike any other time in history — all as a result of the Commission’s investigation and Report. Where Defendants have concealed vital information about their culpability and created conditions impeding Plaintiffs from seeking redress, Defendants should not be able to benefit by hiding behind the statute of limitations.

Furthermore, the State of Oklahoma has passed a statute acknowledging that neither the State nor the City have any significant, legitimate interest in repose with respect to its responsibility for harm suffered in the Tulsa Riot. In sum, the risk of surprise in this case is minimal and the need for equity great.