Nos. 03-334; 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *ET AL.*,
Petitioners,
v.
GEORGE W. BUSH, *ET AL.*,
Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *ET AL.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE*, HON. NATHANIEL R. JONES, HON. ABNER J. MIKVA, HON. WILLIAM A. NORRIS, HON. STEPHEN M. ORLOFSKY, HON. H. LEE SAROKIN, HON. HAROLD R. TYLER, JR., CONRAD K. HARPER, DEBORAH L. RHODE AND JEROME J. SHESTACK IN SUPPORT OF PETITIONERS

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

These cases involve the limits of the Executive's powers to detain citizens of allied countries without charge, without access to counsel, and without any right to challenge the basis for their detention before a United States judge. Amici curiae, former federal judges, former government officials and lawyers, believe that in these two cases, the Executive has advanced, and the lower courts have accepted, a core position that threatens the role of the judiciary in safeguarding the rule of law in our national government. Therefore, pursuant to this Court's Rule 37.3, amici respectfully submit this brief in support of the petitioners Safiq Rasul, *et al.*, and Fawzi Khalid Abdullah Fahad Al Odah, *et al.*[2]

Hon. Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002. Prior to taking the bench, he served as General Counsel, National Association for the Advancement of Colored People (NAACP) from 1969 to 1979, and as Co-Chair, U.S. Department of Defense Civil-Military Task Force on Military Justice in 1972.

Hon. Abner J. Mikva served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as Chief Judge from 1991 to 1994. He also served as White House Counsel from 1994 to 1995. Prior to taking the bench, he served five

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[1] All parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, Amici state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than Amici and their counsel contributed monetarily to the preparation or submission of this brief.

[2] Case Numbers 03-334 and 03-343, respectfully.

terms as a member of Congress, representing portions of Chicago and its suburbs.

Hon. William A. Norris served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

Hon. Stephen M. Orlofsky served as a judge on the United States District Court for the District of New Jersey from 1996 to 2003.

Hon. H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

Hon. Harold R. Tyler, Jr. served as a judge on the United States District Court for the Southern District of New York from 1962 to 1975. He has also served as the Deputy Attorney General of the United States, an Assistant Attorney General of the United States Department of Justice Civil Rights Division, and an Assistant United States Attorney.

Conrad K. Harper, a lawyer in private practice in New York City, served as Legal Adviser of the United States Department of State from 1993 to 1996 and is currently a member of the Permanent Court of Arbitration at The Hague. He has previously been a member of and held leadership positions in a range of other bar, human rights and international organizations.

Deborah L. Rhode is the Ernest W. McFarland Professor of Law at the Stanford University School of Law and served as Senior Counsel to Minority Members of the Judiciary Committee of the U.S. House of Representatives in 1998.

Jerome J. Shestack, a lawyer in private practice in Philadelphia, served as president of the American Bar Association and in numerous other leadership positions of the ABA, including chair of the Section on Individual Rights and Responsibilities.

SUMMARY OF THE ARGUMENT

In these consolidated cases, the Government maintains that the judiciary may not even inquire as to justifications, since the courthouse door is forever closed to foreign nationals who have not set foot within the "ultimate sovereignty" of the United States. The Government's position is misguided as these cases contemplate indefinite Executive detention without adequate process. While the process due will vary with the circumstances, in no event may the Executive claim the unfettered power to imprison people indefinitely – that is, unless that power is checked by affording the prisoners the correlative right to the rule of law.

The Petitioners seek judicial review of their indefinite incarceration by the Executive Branch of government. The decision of the Circuit Court below disregards one of the most basic and fundamental foundations of our system of government: the rule of law. In addition, the court below, in granting unprecedented deference to the decisions and statements of the Executive Branch, has ignored the responsibilities of the judiciary fairly and adequately to review those decisions when faced with a *habeas corpus* petition.

Amici recognize the paramount importance of our national safety. Amici also share the strong desire that our Government enjoy the necessary power and flexibility to prevent future terrorist attacks. But Amici respectfully suggest that the Due Process Clause is not

an enemy of those efforts. Rather, it is an integral part of the values and liberty that this nation holds dear. Amici respectfully suggest that we should not forsake this defining heritage.

Section I of this amicus brief demonstrates that the Court of Appeals' decision is contrary to the rule of law and ignores the purposes of the Great Writ in protecting the rule of law. Section II demonstrates that providing petitioners with due process will not interfere with legitimate military interests. Section III demonstrates that, contrary to the decision below, no policy or precedent warrants denying basic due process rights to citizens of friendly nations imprisoned by and in a territory under the exclusive jurisdiction and control of the United States.

ARGUMENT

I. THE DECISION OF THE COURT BELOW IS CONTRARY TO THE RULE OF LAW AND IGNORES THE PURPOSES OF THE GREAT WRIT IN PROTECTING THE RULE OF LAW

It is fundamental that the government may not take the life, liberty or property of a person without authority from the law itself. This fundamental precept is one of the cornerstones of our democracy. The Court of Appeals' decision below has ignored the important role that the rule of law must play in times of crisis as well as peace.

A. The Decision Below Is Contrary to the Rule of Law

The rule of law broadly encompasses both "procedural and substantive" limitations on government power. Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 457 (2003). It is generally agreed that

the rule of law requires: 1) the supremacy of legal authority over officials as well as ordinary citizens; and 2) the availability of the courts to enforce the law and employ fair procedures. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 (1997). When officials act to deprive individuals of liberty without legal authority and seek to deny the availability of the courts to review their actions, the rule of law is violated.

Petitioners in these cases have been subjected to indefinite detention by the Executive, under conditions created by the Executive and will most likely not face any sort of judgment regarding their continued detention. This consolidation of power is antithetical to the rule of law and our Founders warned against circumstances such as these in advocating for the adoption of our Constitution: "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47 (James Madison). Instead of an absolute executive, our system is a system of checks and balances. *Nixon v. United States*, 506 U.S. 224, 234-35 (1993).

It has been a hallmark of Anglo-American legal tradition that an independent and impartial judiciary be available to protect against abuses of power carried out by the Executive. The guarantee that no man should be deprived of his liberty or property without review by the judiciary was extracted from King John and enshrined in the Magna Carta. The availability of fair and impartial courts to enforce the law is of particular importance in the American tradition and this Court has recognized that importance throughout its long history. *See*

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

Courts must also remain faithful to the rule of law, particularly when the popular political will calls for its elimination. In a case related to the treason trial of former Vice-President Aaron Burr, Chief Justice Marshall recognized that circumstances in which popular passions are high required more from the judiciary: "[a]s there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807) (Marshall, C.J.).

The rule of law demands that the judicial process function in both times of crises and times of calm. Chief Judge Cranch's words in *United States v. Bollman*, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622), provide guidance in these proceedings:

> [i]n times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times

> more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude. Whenever an application is made to us in our judicial character, we are bound, not only by the nature of our office, but by our solemn oaths, to administer justice, according to the laws and constitution of the United States. No political motives, no reasons of state, can justify a disregard of that solemn injunction. In cases of emergency it is for the executive department of the government to act upon its own responsibility, and to rely upon the necessity of the case for its justification; but this court is bound by the law and the constitution in all events.

Bollman, 24 F. Cas. at 1192 (Cranch, C.J., dissenting).

Courts are entrusted with the duty of upholding the rule of law in the face of political or popular attempts to erode it. As the first Justice Harlan stated: "[i]t will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds

lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution." *Downes v. Bidwell*, 182 U.S. 244, 382 (1901) (Harlan, J., dissenting). The detention of the Petitioners should be subjected to plenary review by this Court to ensure that the rule of law and our system of checks and balances prevail.

B. The Writ of Habeas Corpus Provides Petitioners with Judicial Review of Executive Branch Detentions

The writ of habeas corpus is a fundamental right critical to ensuring access to the rule of law. As Blackstone explained, the writ requires the government to furnish to a court a legal basis for its decision to deprive an individual of liberty:

> the glory of the English law consists in clearly defining the times, the causes, and the extent when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *133. The objective of the writ "is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.). The writ upholds the rule of law "since it is the

appropriate remedy to ascertain whether any person is rightfully in confinement or not." Joseph Story, *Commentaries on the Constitution of the United States* § 1333 (1833).

It is undisputed that the writ applies to persons who have been detained pursuant to the orders of the Executive Branch. In fact, a more searching inquiry is appropriate in a habeas proceeding challenging the actions of Executive officials than when habeas is invoked as a remedy for post-conviction relief. *See Developments in the Law – Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1238 (1970) ("While habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.").

The Framers of our Constitution specifically limited the situations in which the writ could be curtailed. *See*, U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). The Framers only provided the legislature with the power to suspend the writ. This ensured that an Executive with the power to detain could not on his own deprive the detained individual from having the detention examined by court. Past attempts by the Executive Branch to suspend the writ have met with judicial resistance. *Ex parte Merryman*, 17 F. Cas. 144, 148 (Cir. Ct. Md. 1861) (No. 9,487) (Taney, C.J.) ("I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus . . . ."). The Legislative Branch has not suspended

the writ. This Court should not countenance a *de facto* suspension by the Executive Branch.

II. PROVIDING PETITIONERS DUE PROCESS WILL NOT INTERFERE WITH LEGITIMATE MILITARY INTERESTS

The Executive asserts that undefined and amorphous exigencies of military conflict warrant the creation of a black hole in which the rule of law has limited, if any, application. The Executive's argument ignores the time honored principle, forged in the heat of prior armed conflicts, that combat does not eviscerate the Constitution. "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring).

The plan of divided and limited government set forth in our Constitution is, first and foremost a guarantee of liberty. The Constitution is applied "equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866); *accord United States v. Robel*, 389 U.S. 258, 263-64 (1967). Courts and their procedural safeguards were established by our founders to protect civil liberties. *Ex parte Quirin*, 317 U.S. 1, 19 (1942). The founders were categorically opposed to a system of government that would place in the hands of one man the power to make, interpret and enforce the laws. To guard against arbitrary executive detentions of the kind the Framers feared, the Constitution imposes multiple structural safeguards, including the right of habeas corpus, which subjects executive detention to review by an independent

judiciary. The right to habeas corpus was one of the few individual fights enshrined in the Constitution itself. Although habeas today typically involve collateral review of state convictions, at its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention. *Brown v. Allen*, 344 U.S. 443, 533 (1953) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.").

Of course, the Constitution is not a suicide pact. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Through the Suspension Clause, the Constitution provides a remedy for situations of rebellion or invasion when the nation temporarily cannot afford habeas. However, the Suspension Clause resides in Article I. Only Congress, not the President, has the power to suspend judicial scrutiny of executive detention. U.S. CONST. art. I, § 9 cl. 2. Vesting the power to suspend habeas corpus in the Legislature serves two important purposes. First, it ensures that no branch of government has the unilateral power to deprive persons of liberty. Second, it vests this important decision in the more representative branch. Therefore, the Constitution ensures that the power of habeas corpus to act as a restraint on executive detention is not an empty promise, as it would be if the Executive had the unilateral authority to exempt its own actions from judicial review.

Amici do not dispute that federal courts should afford deference to the Executive in matters related to the military and the conduct of the national defense. However, this deference is not unlimited. It diminishes by the degree to which the conduct at issue is remote from the threat alleged by the Executive to justify its actions; "[a]s necessity creates the rule, so it limits its

duration." *Ex parte Milligan*, 71 U.S. at 121-22 (finding military trial of a citizen to be unconstitutional in a state whose courts were open, "needed no bayonets to protect it, and required no military aid to execute its judgments"); *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946). The Executive Branch's authority with respect to war powers and national security does not make immune from judicial inquiry actions by the Executive Branch in the name of war powers or national security. *Morrison v. Olson*, 487 U.S. 654, 690 (1988).

The right to habeas corpus review is intended to check both military and civilian authority. James Madison stated that "unless these [military and civilian] departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." THE FEDERALIST NO. 48 (James Madison); *see also Parisi v. Davidson*, 405 U.S. 34, 49 (1972) ("One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds.")

Courts that have addressed habeas corpus petitions in similar contexts have consistently expressed little reticence to exercise judicial review. Justice Story cautioned that the President during war "has a discretion vested in him . . . but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims." *Brown v. United States,* 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting).

Later, in *Sterling v. Constantin*, 287 U.S. 378 (1932), the Court affirmed that the line between permissible

discretion and law is one that must be drawn by the judiciary:

> [i]t does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the . . . [Executive] may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, . . . is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken . . . [but] the officer may show the necessity in defending an action [before the judiciary].

Id. at 400-01.

Further, in *Ex parte Quirin*, the Court rejected the notion that the Government's classification of the petitioners foreclosed their ability to challenge the legality of their detention in federal court:

> [t]he Government challenges each of [petitioner's] propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our country as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class by persons defined by the Proclamation, which aptly describes the

> character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force, no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.

Ex parte Quirin, 317 U.S. at 24-25. The Court continued by stating that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy . . . individuals." *Id.* at 25.

Still further, the Court in *Youngstown Sheet & Tube Co.* confirmed that the Founders purposefully failed constitutionally to grant the president unreviewable powers to be used as necessary in times of emergency. 343 U.S. at 588. Allowing the Executive Branch to operate under such a broad mandate would in effect make the president a monarch during times of crisis. Justice Jackson, in his concurrence, emphasized that the only way to ensure a free government is to require the Executive to be under the law. *Id.* at 655 (J. Jackson, concurring); *see also United States v. Lee*, 106 U.S. 196, 219 (1882) ("[T]he Constitution creates no executive prerogative to dispose of the liberty of the individual."); *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) ("[T]he shield of military necessity and

national security must not be used to protect governmental actions from close scrutiny and accountability.").

This Court should thus continue a consistent legacy in providing due process to the Petitioners irrespective of a military conflict abroad.

III. NO POLICY OR PRECEDENT WARRANTS THE DENIAL OF BASIC DUE PROCESS RIGHTS TO CITIZENS OF FRIENDLY NATIONS IMPRISONED BY AND IN A TERRITORY UNDER THE EXCLUSIVE JURISDICTION AND CONTROL OF THE GOVERNMENT.

Because no compelling policy or precedent justifies closing the courthouse doors to citizens of friendly nations imprisoned by the United States without charge and without access to friends, family or counsel, this Court should reverse the Court of Appeals' decision and affirm the Judiciary's power to hear the Petitioners' challenges to their detention. The rule of law mandates that another branch of the government, whether it be the Congress or the Judiciary, must oversee and check the unilateral actions of the Executive.

The Court of Appeals' decision permits the Government to detain indefinitely certain Petitioners without a forum to dispute the legality of their detention and without access to even the most basic of due process rights. *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003) ("The consequence is that no court in this country has jurisdiction to grant habeas relief."). This dubious decision is based upon the premise that Petitioners have not technically set foot within the "ultimate sovereignty" of the United States, although the

Petitioners are purposely[3] imprisoned just ninety miles south of the Florida border at Guantanamo Bay, a territory under the exclusive control and jurisdiction of the United States. Elevating form over substance, the Government argues that denying Petitioners court access and withholding all constitutional rights is proper because the "ultimate sovereignty" over Guantanamo Bay rests with Cuba.

By agreeing with the Government's argument, the court below misread and over-extended relevant precedent, failed to reconcile decisions involving other territories over which the United States has jurisdiction and control, afforded the Executive unchecked and unreviewable authority over nonresident aliens of friendly nations and failed to recognize the flexible application of the Due Process Clause.

A. The Court of Appeals' Decision Extends *Johnson* Beyond Its Proper Holding and Fails to Reconcile Conflicting Opinions Affording Rights to Nonresident Aliens in Territories Outside the "Ultimate Sovereignty" of the United States.

In denying Petitioners all access to American courts, the court below extended precedent beyond its proper holding and failed to reconcile cases wherein limited constitutional rights were granted to nonresident aliens outside of the United States' ultimate sovereignty.

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[3] American College of Trial Lawyers, *Report on Military Commissions for the Trial of Terrorists* 8 (Mar. 2003) ("[T]he placement of the detainees at Guantanamo, w[as] carefully designed to evade judicial scrutiny and to test the limits of the President's constitutional authority.").

The Court of Appeals' decision in relies heavily upon a strained reading of this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the Court held that German war criminals convicted and sentenced by a lawful military commission for violating the law of war in China could not seek habeas relief in the federal courts. Application of *Johnson* to Petitioners' cases is inappropriate because Petitioners here are not convicted war criminals, have not been charged with any crime and are not enemy aliens. Rather, Petitioners are citizens of nations friendly to our Government. And, unlike *Johnson*, Petitioners here are being held in a territory under the exclusive possession and control of the United States government.

By tying the federal court's jurisdiction to an artificial "ultimate sovereignty" test, the Court of Appeals elevates form over substance. Although Cuba retains titular sovereignty over the military base, the United States alone exercises power, control and jurisdiction over Guantanamo Bay and refuses to recognize the authority of any international tribunal or foreign court. In Guantanamo Bay, the United States has all "the basic attributes of full territorial sovereignty." *Duro v. Reina*, 495 U.S. 676, 685 (1990). This includes "the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Id*.

The decision in *Al Odah* also conflicts with a long line of decisions relying upon this Court's decision in the *Insular Cases*, a series of cases from *Delima v. Bidwell*, 182 U.S. 1 (1901), to *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Various courts have afforded the protection of fundamental constitutional rights to residents, aliens and citizens of similar territories, where the United States exercises control and jurisdiction but does not have

ultimate sovereignty. *See, e.g., United States v. Husband R. (Roach)*, 453 F.2d 1054, 1057-61 (5th Cir. 1971) (holding the Due Process Clause is applicable to government action taken against an alien in the Panama Canal zone, an area leased by the United States); *Juda v. United States*, 6 Cl. Ct. 441, 458 (1984) (finding Takings Clause applicable to both aliens and citizens of Marshall Islands and holding that "[a]ll of the restraints of the Bill of Rights are applicable to the United States wherever it has acted"); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977) (holding fundamental constitutional rights applicable to non-resident of Trust Territory of the Pacific Islands, a territory under the complete control and jurisdiction, but not ultimate sovereignty, of the United States); *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) (extending constitutional rights to non-resident aliens within American sector of Berlin, Germany).

Here, the Court of Appeals' decision encourages manipulation of the legal process and strips the courts of jurisdiction under the guise of deferring to Cuba's titular, but unexercised, sovereignty.

B. The Court Should Reverse the Court of Appeals' Decision and Uphold the Judiciary's Power to Review the Unilateral Actions of the Executive Branch in Recognition of the Due Process Clause's Flexible Application.

By concluding that it was without authority to determine what process, if any, is due to Petitioners, the Court of Appeals in *Al Odah* also ignored the enormous practical flexibility which the Due Process Clause permits in its application. The Due Process Clause requires only such process as is due under the circumstances. *See Heller v. Doe*, 509 U.S. 312, 332 (1993) ("[F]lexibility is

necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.") (quoting *Greenholtz v. Inmates of Nev. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979)); *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (holding the process required depends on the balance of interests at stake).

Such flexibility ensures that the threshold determination – whether the Due Process Clause applies – will not compel imprudent results in circumstances involving national security. At its very core, the rule of law ensures that "there exists a fair, rational, process through which one can protect one's interest." James W. Torke, *What Is this Thing Called the Rule of Law?*, 34 IND. L. REV. 1445, 1447 (2001). Territorial considerations or the citizenship of the persons seeking due process alone should not be an exclusive basis for avoiding the provision of due process altogether. Rather, the key determination depends on the process rightfully due under the circumstances:

> [t]he proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place . . . [T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is "due" a defendant in the particular circumstances of a particular case.

Reid v. Covert, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring) (emphasis in original). In the present case, where the Government actively denies Petitioners all

liberty rights whatsoever, the "particular circumstances" cry out for the extension of at least the most basic of due process rights, including the right fairly to contest the legitimacy of their detention. The Government has denied Petitioners all basic due process rights for almost two years, and it argues that this Court should condone this limbo for an indefinite period.

In addition, the decision of the Court of Appeals ignores that the Government has alternatives for dealing with circumstances of war. It may treat detainees as prisoners of war, in which case the Geneva Convention would apply. It may also prosecute them under procedures specifically designed to safeguard national security. *See United States v. Bin Laden*, No. 98-Cr-1023, 2001 U.S. Dist. LEXIS 719 (S.D.N.Y. Jan. 25, 2001) (limiting access to confidential information). The Congress may suspend the Great Writ. Each of these courses permits detentions that are consistent with the rule of law. Instead, the Court of Appeals decision helps create an unprecedented alternative – a territory where the Executive may indefinitely imprison citizens of friendly nations without any compliance with the Geneva Conventions or any other rule of law of any kind. The notion that it is necessary to embrace lawlessness in order to defend liberty denigrates the practical wisdom of our founders in creating a tripartite sharing of authority, crafting a flexible Due Process Clause and affording Congress – not the Executive – the authority to suspend the Great Writ.

The decisions below effectively provide our Executive unbridled authority in dealings with foreign citizens whom it imprisons in light of the tragic events of September 11, 2001. But unbridled, unchecked authority

to any Executive, no matter how well-intentioned, runs counter to our system of law.

CONCLUSION

For the foregoing reasons, the this Court should reverse the judgments below.

Respectfully Submitted,

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