No. 09-

IN THE
Supreme Court of the United States

DR. ROGER C.S. LIN, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the political question doctrine can validly bar a federal court from interpreting the San Francisco Peace Treaty (the "SFPT") to determine if the United States' designation in the SFPT as "the principal occupying Power" over "Formosa and the Pescadores" (now called Taiwan) means that the United States has *de jure* sovereignty over Taiwan and, if so, whether Petitioners have certain fundamental rights under the Constitution?

2. Whether the Immigration and Nationality Act (the "INA")—which defines non-citizen nationals as persons "born in an outlying possession of the United States on or after the date of formal acquisition of such possession," 8 U.S.C. § 1408, with "outlying possessions" defined by the INA to only include "American Samoa and Swains Island"—can validly deprive Petitioners of their non-citizen national status for purposes of determining their eligibility for non-citizen passports?

LIST OF PARTIES

The parties to the proceeding in *Dr. Roger C.S. Lin, et al. v. United States of America* in the United States Court of Appeals for the District of Columbia Circuit (No. 08-5078) and in the United States District Court for the District of Columbia (Civil Action No. 06-1825 (RMC)) were:

Dr. Roger C. S. Lin,
Chien-Ming Huang,
Chou Chang,
Ching-Yao Hou,
Chen-Hua Liu,
Chen-Ni Wu,
Yang-Lung Yang,
Yao-Jhih Ye,
Ching-Wen Yen,
A-Chu YuChiang, and
The Taiwan Nation Party on behalf of its more than 1,000 of members (Petitioners)

United States of America
(Respondent)

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Petitioners Dr. Roger C. S. Lin, Chien-Ming Huang, Chou Chang, Ching-Yao Hou, Chen-Hua Liu, Chen-Ni Wu, Yang-Lung Yang, Yao-Jhih Ye, Ching-Wen Yen, A-Chu YuChiang, and The Taiwan Nation Party ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Collyer, J.) (App. 14a-30a) dismissing Petitioners' Amended Complaint for Declaratory Judgment ("Complaint") is reported at 539 F. Supp. 2d 173. The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-13a) affirming the District Court's opinion is reported at 561 F.3d 502.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED IN THE CASE

The following Constitutional Provision, Treaties and Statutes are set forth in relevant part in the Appendix hereto:

1. *United States Constitution*:

A. Article III, Section 1 (App. 31a);

B. Article III, Section 2, paragraphs 1 and 2 (App. 31a-32a);

C. Article IV, Section 4 (App. 32a).

2. *Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45, (advice by Senate on April 15, 1952, ratified, proclaimed and entered into force on April 28, 1952) [hereinafter "San Francisco Peace Treaty" or "SFPT")]*:

A. Chapter II, Article 2(b) (App. 33a);

B. Chapter II, Article 4(b) (App. 33a);

C. Chapter VII, Article 23(a) (App. 33a-34a);

D. Chapter VII, Article 25 (App. 34a).

3. *United States Statutes*:

A. 8 U.S.C. § 1101(a)(21) (2006) (App. 34a);

B. 8 U.S.C. § 1101(a)(22) (2006) (App. 34a-35a);

C. 8 U.S.C. § 1101(a)(29) (2006) (App. 35a);

D. 8 U.S.C. § 1408 (2006) (App. 35a-36a);

E. 8 U.S.C. § 1522(b)(5)(A) (2006) (App. 37a);

F. 22 U.S.C. § 212 (2006) (App. 37a).

INTRODUCTION

The Court of Appeal's application of the political question doctrine was inconsistent with its obligations under the Constitution to "say what the law is," and threatens the entire system of checks and balances. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Court of Appeal's abstention from reading and interpreting the SFPT to determine the existence of Petitioners' fundamental Constitutional rights is especially troubling, given the Court's statement that, "[w]e do not disagree with Appellants' assertion that we *could* resolve this case through treaty analysis and statutory construction, . . . we merely decline to do so as this case presents a political question which strips us of jurisdiction to undertake that otherwise familiar task." *Lin v. United States*, 561 F.3d 502, 506 (emphasis in original) (internal citations omitted). App. 7a.

The political question doctrine has never prevented the Supreme Court from determining the existence of individual fundamental Constitutional rights.

The Supreme Court long ago recognized in *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) that while "the determination of sovereignty over an area is for the legislative and executive departments, *Jones v. United States*, 137 U.S. 202 [(1890)] [that] does not debar courts from examining the status resulting from prior action. *De Lima v. Bidwell*, 182 U.S. 1 [(1901)]; *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 [(1945)]."

In *Japan Whaling Assoc. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986), this Court noted,

> [a]s *Baker* [*v. Carr*, 369 U.S. 186 (1962)] plainly held . . . the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. . . . [U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and *we cannot shirk this responsibility merely because our decision may have significant political overtones.*

(Emphasis added.)

In contrast, the Court of Appeals refused to exercise its institutional duty to examine Petitioners' "status resulting from prior action" by interpreting the SFPT to give meaning and life to Petitioners' Constitutional rights. "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker*, 369 U.S. at 211.

If the Court of Appeals' misinterpretation of this Court's decision last year in *Boumediene v. Bush*, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008) and its misapplication of the political question doctrine is not corrected by this Court, the Court of Appeals decision will undermine the ability of individuals to obtain their fundamental Constitutional rights, leaving courts free to decline recognizing fundamental rights on the basis of the political question doctrine. "The accretion of dangerous power does not come in a day. It does come, however, slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952).

The roots of the political question doctrine can be traced to *Marbury v. Madison*, when Chief Justice Marshall proclaimed, "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. at 177.

> The judicial Power' created by Article III, § 1, of the Constitution [App. 31a] is not

> *whatever* judges choose to do, or even *whatever* Congress chooses to assign them. It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule.* Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.

Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (emphasis in original) (internal citations omitted).

While applicability of the doctrine in the foreign relations context is often firmly asserted, contentions that federal courts cannot be involved in cases with international, political consequences are meritless. "To some extent, 'all constitutional interpretations have political consequences,' . . . and indeed the same follows from any treaty interpretation." *Eain v. Wilkes*, 641 F.2d 504, 515 (7th Cir., 1981) (internal citation omitted). But the role of the judiciary is to review these questions from the legal, rather than political, perspective. "[T]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." *Japan Whaling Assoc.*, 478 U.S. at 230.

This Court does not—and should not—use the political question doctrine to avoid recognizing the existence of fundamental Constitutional rights, and has

recognized that in such cases, "[a]t the root of the . . . controversy is . . . a fundamental political right...." *Williams v. Rhodes*, 393 U.S. 23, 38 (1968) (internal quotation marks omitted).

In *Hamdi v. Rumsfeld*, the Court held that, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." 542 U.S. 507, 536 (2004) (internal citations omitted). Questions involving the determination of fundamental Constitutional rights are the province of the Judicial Branch—and not the Political Branches—as the Court made abundantly clear in *Boumediene v. Bush*, 128 S. Ct. 2229.

STATEMENT OF THE CASE

Petitioners Dr. Roger C. S. Lin, a spokesperson and member of the Taiwan Nation Party, Chien-Ming Huang, Chou Chang, Ching-Yao Hou, Chen-Hua Liu, Chen-Ni Wu, Yang-Lung Yang, Yao-Jhih Ye, Ching-Wen Yen, A-Chu YuChiang, and The Taiwan Nation Party on behalf of its more than 1,000 of members, are all native inhabitants of Taiwan.

Petitioners' Complaint (at 18-19) seeks the following:

> Considering that this case does not present a nonjusticiable political question and instead requires treaty, statutory, and constitutional interpretation; and considering that this Court has the constitutional power and duty

to interpret treaties, statutes, and the Constitution, Plaintiffs respectfully pray that this Court enter an Order declaring that:

(a) By refusing to accept and process individual Plaintiffs' passport applications, the American Institute in Taiwan ("AIT") wrongfully denied individual Plaintiffs' United States nationality status and wrongfully denied their rights and privileges as United States nationals.

(b) Individual Plaintiffs are United States nationals and have rights and privileges as United States nationals, including those set forth below.

(c) Plaintiffs have the Fifth Amendment right against deprivation of life, liberty, or property, without due process of law.

(d) Plaintiffs have the Fourteenth Amendment right against deprivation of life, liberty, or property, without due process of law.

(e) Plaintiffs may not be deprived of the Fifth Amendment right to travel, without due process of law, which requires a notice and a hearing.

> (f) Plaintiffs have the Eighth Amendment right against cruel and unusual punishment in the form of deprivation of a recognized nationality.
>
> (g) Plaintiffs have the Fourteenth Amendment right of equal protection of the laws.
>
> (h) Plaintiffs have the First Amendment right to petition the government for a redress of grievances.

A. *The SFPT, Signed On September 8, 1951, Established The United States As "Principal Occupying Power" Over Taiwan—A Legal Status Unchanged By Any Subsequent Law.*

On April 28, 1952, the SFPT, signed on September 8, 1951, entered into force for the United States,[1] *and remains in force today*. The treaty specifically required United States' ratification to enter into force,[2] and is the United States' "supreme Law of the Land." U.S. CONST., and art. VI, para. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*." Emphasis added.)

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1. San Francisco Peace Treaty, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45. *See also* Marjorie M. Whiteman, Digest of International Law (hereinafter "Whiteman"), Vol. III, 560 (1963) (providing President Truman's proclamation).

2. SFPT, Art. 23(a). App. 33a-34a.

Under Article 2(b) of the SFPT (App. 33a), Japan renounced all "right, title and claim" to Taiwan, and Article 23(a) simultaneously established the United States as Taiwan's "Principal occupying Power." App. 33a-34a. The United States' status as the "Principal occupying Power" (and sovereign *de jure* over Taiwan) is further supported by SFPT Article 4(b) (App. 33a) confirming the validity of United States Military Government directives pertaining to Taiwan.[3]

Subsequent agreements and treaties have not abrogated the SFPT. In 1955, the United States entered into the Mutual Defense Treaty with the Republic of China ("ROC") (then in exile in Taiwan). The U.S. Senate Committee on Foreign Relations issued a "Report on Mutual Defense Treaty with the Republic of China" (Feb. 8, 1955)" recognizing that:

> It is the view of the committee that the coming into force of the present [Mutual Defense]

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3. In *Madsen v. Kinsella*, 343 U.S. 341, 348, n. 13 (1952), the Supreme Court on the nature of military government, stated

> [m]ilitary government . . . is an exercise of sovereignty, and as such dominates the country which is its theatre in all the branches of administration. Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, it is the government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except in so far as the same may be permitted by him to subsist.

(quoting Colonel William Winthrop, "in his authoritative work on Military Law and Precedents", *id.* at 346, American Articles of War of 1806, *Winthrop's Military Law and Precedents* 800 (2d. ed. 1920 reprint)).

> treaty will not modify or affect the existing legal status of Formosa and the Pescadores. The treaty appears to be wholly consistent with all actions taken by the United States in this matter since the end of World War II, and does not introduce any basically new element in our relations with the territories in question. Both by act and by implication we have accepted the Nationalist Government as the lawful authority on Formosa.
>
> To avoid any possibility of misunderstanding on this aspect of the treaty, the committee decided it would be useful to include in this report the following statement:
>
> > It is the understanding of the Senate that nothing in the treaty shall be construed as affecting or modifying the legal status or *sovereignty* of the territories to which it applies.

Likewise, in 1979, the United States enacted the Taiwan Relations Act ("TRA"), clarifying that the "absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way *any rights or obligations . . . under the laws of the United States heretofore or hereafter acquired* by or with respect to Taiwan"[4]—including the SFPT. (Emphasis added.)

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4. Taiwan Relations Act of 1979, 22 U.S.C. §§ 3301-3316 (2006), § 3303(b)(3)(A).

Section 2(b) of the TRA indicates the United States' interest in Taiwan and Taiwan's continued status, stating that (1) diplomatic relations with the People's Republic of China ("PRC") would depend on a peaceful determination of Taiwan's future; (2) any coercion would threaten the Western Pacific's peace and security and thus be of "grave concern" to the United States; (3) the United States would continue to provide Taiwan with defensive arms; and (4) the United States would remain able to resist any coercion that jeopardized the "security, or the social or economic system, of the people on Taiwan." [5] Section 4(a) provided that United States law would continue to apply "with respect to Taiwan" as it existed "prior to January 1, 1979." [6]

B. *Petitioners' Complaint Seeks A Declaration of Limited, Yet Basic Rights Under The United States Constitution And Particular Applicable United States' Laws*.

Petitioners seek certain declarations of limited, yet basic rights under the Constitution.

The Supreme Court recognized over a century ago, and has recently affirmed, that the "Constitution has independent force in [occupied island] territories, a force not contingent upon acts of legislative grace." *Boumediene*, 128 S. Ct. at 2255 (referring to the "Insular Cases").

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5. TRA, "Policy", 22 U.S.C. § 3301(b) (2006).

6. TRA, Sect. 4(a), 22 U.S.C. § 3303(a) (2006).

In one of the "Insular Cases" of the early 20th century, Justice White "disclaim[ed] any intention to hold that . . . Congress [may] deal with [the inhabitants] upon the theory that they have *no rights which it is bound to respect.*" *Downes v. Bidwell*, 182 U.S. 244, 283 (1901) (J. White, concurring) (emphasis added).

C. *History Of United States' Practice Regarding Taiwan.*

From the conclusion of World War II to the present day, the United States has had a special relationship with Taiwan, best understood by reference to official treaties, public statements by the U.S. government, and U.S. economic support of Taiwan. While these sources have not always been facially consistent with each other, they form the basis of a nuanced and specific approach to Taiwan that is clearly discernible and consistent with the legal relationship established by the SFPT.

Taiwan was annexed by the Qing Dynasty of China in 1683, became a separate province in 1887[7], and was ceded to Japan in 1895 at the end of the Sino-Japanese War.[8] In 1943, during World War II, the Cairo Declaration signed by the United States, the United Kingdom and the ROC headed by Generalissimo Chiang Kai-shek, declared it the intention of these States that Taiwan would be restored to China (*i.e.* the ROC).[9]

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7. Rudolf Bernhardt, Encyclopedia of International Law, Vol. IV 753 (2000).

8. Whiteman, Vol. III 565-66 (Treaty of Peace Between China and Japan, art. II, April 17, 1895, 181 Consol. T.S. 217 (entry into force May 8, 1895). 181 Consol.

9. Whiteman, Vol. I 272 (Cairo Declaration, U.S.-ROC-UK, Nov. 27, 1943.)

At the end of World War II, General Douglas MacArthur issued a directive that required Japanese forces on Formosa to surrender to Generalissimo Chiang, acting as the "representative of the Allied Powers empowered to accept surrender"[10] and on October 25, 1945, Japan complied.

Even prior to the signing of the SFPT in 1951, the United States provided indispensable assistance to the ROC in conducting the military occupation of Taiwan (while it was still *de jure* Japanese territory). In early 1950, the United States *publicly* expressed a position of neutrality. In the days just prior to and after the start of the Korean War,[11] President Truman stated that: (1) his ordering of the 7th Fleet to Taiwan was an "impartial neutralizing action addressed" to both the ROC and PRC in order to "keep the peace";[12] (2) the United States had "no designs on Formosa, and our action was not inspired by any desire to acquire a special position for the United States";[13] (3) Taiwan's "legal

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10. Whiteman, Vol. III, 592. *See also* Letter from President Truman to Ambassador Warren Austin (August 27, 1950) ("Truman Letter").

11. Statement of President Truman (January 5, 1950, prior to the Korean War); Whiteman, Vol. V, 1120.

12. Truman Letter; Memorandum on change in 7th Fleet directive, (January 26, 1953); Whiteman, Vol. V, 1115 (providing text of President Truman's announcement); Remark by Assistant Secretary of State Rusk, XXIII Department of State Bulletin (November 15, 1950), No. 596, at 889, 892; Whiteman, Vol. V, 1115 (stating that Taiwan was an "important flank position" in the Korean War).

13. Truman Letter.

status cannot be fixed until there is international action to determine its future;"[14] and (4) the United States had not "encroached on the territory of China."[15] Nevertheless, on October 20, 1950, Mr. Dulles noted that if the United States "already regarded Taiwan as purely Chinese territory," it "would lose her grounds for dispatching [*sic*] the Seventh Fleet to protect Taiwan."[16]

In fact, the United States' actions and role in Taiwan belied all public expressions of neutrality. In reality, the United States was providing direct and large-scale military aid to the exiled ROC behind the scenes, had done so since 1948,[17] and considered the 7th Fleet's deployment around Taiwan to be indefinite.[18]

The United States in 1950-51 took several actions evidencing dominance over Taiwan, including: (1) making

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14. *Id.*

15. *Id.*

16. James Crawford, *The Creation of States in International Law* (7th Edition, 2006) 211, n.63 (citing conversation between Mr. Dulles and ROC Ambassador Koo (Oct. 20, 1950)).

17. *See* Memorandum on Program Analysis: MSA ["Mutual Security Agency"] Formosa (Aug. 22, 1952). Such aid had been going on since at least 1948. *See* Memorandum of conversation, Messrs. Deane and Clubb (Feb. 9, 1951).

18. Memorandum on Policy Assumptions and Questions for Meeting with ECA Regarding Economic Aid Program for Formosa: Fiscal 1952 (Mar. 2, 1951).

unannounced military overflights[19] (2) denying ROC requests for permission to conduct air bombardments from, and independent high sea ship searches around, Taiwan;[20] and (3) undertaking extensive military training, reorganizing and propaganda assistance to the ROC.[21]

In September 1951, at the end of peace negotiations between the Allies and Japan, the United States publicly stated that Taiwan's ultimate disposition required a "fundamental reconsideration" and "a greater degree of unanimity" as to which "government properly represents China."[22] The United States stated that "if it is agreed that the question of the time when Formosa should be returned to China should be left open, this equally makes it appropriate that the whole matter be left unresolved by the treaty, save for the elimination of Japan's interest. *No one can say that at some future unpredictable date a return to China would necessarily serve the best interests of the inhabitants*, *whose welfare*,

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19. Memorandum of conversation, ROC Ambassador Koo and Messrs. Merchant and Freeman, (June 29, 1950).

20. Memorandum of conversation, Secretary of State Dean Rusk, Mr. Freeman and ROC Ambassador Koo (July 25, 1950), p. 2.

21. Memorandum on Mr. Rankin's [Chargé d'Affaires, Taipei] Views Regarding Military Aid to Formosa and Use of Nationalist Troops in the Far East (February 28, 1951), p. 3. *See also* American Embassy, Taipei, Taiwan, "Taiwan" (Country Report), p. 14 (May 10, 1955).

22. Note from Delegation of the United States of America to the Conference for Conclusion and Signature of Treaty of Peace with Japan (San Francisco, California), US POS/4 (September 1951).

under the Charter of the United Nations, is paramount (Article 73)" (emphasis added).[23] This was the context in which the United States formalized its role as "Principal occupying Power" of Taiwan under the SFPT—a role still in effect today.

D. *The District Court Judgment.*

On March 18, 2008, Judge Rosemary M. Collyer granted the government's motion to dismiss Petitioners' case on the basis of the political question doctrine. App. 30a. The court believed that the suit presented a non-justiciable political question and that the court lacked subject matter jurisdiction. *Id.* 20a-30a. The court stated that the Petitioners' request for a determination of non-citizen national status under the Immigration and Nationality Act (INA), the Administrative Procedure Act (APA) and the United States Constitution (*id.* 14a) was impossible to resolve "without expressing a lack of respect due to [the court's] coequal Branches of government." *Id.* 30a.

The court acknowledged that the SFPT, which entered force in April 28, 1952, contains Japan's renunciation of all right, title and claim to Taiwan

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23. *Id. See also* Statement of United States Delegate to SFPT Conference (Mr. Dulles) to the New York Times (September 3, 1951), Whiteman, Vol. III, 538. Article 73 falls under the heading "Declaration Regarding Non-Self-Governing Territories," and imposes obligations on "Members of the United Nations which *have or assume responsibilities for the administration of territories* whose peoples have not yet attained a full measure of self-government." *Id.* (Emphasis added.)

(App. 18a), designates the United States as principal occupying Power (*id.*17a) and remains a binding treaty today. *Id.* 15a-19a. The court recognized that this places the Petitioners in a place of international limbo. *Id*. 29a. However, the court said that to address plaintiffs' claims, it would need to address a "quintessential political question" (*id*. 23a), namely to determine who is sovereign over Taiwan. *Id.* The court said that "sovereignty, whether de jure or de facto, of a territory is a political question," citing *Jones v. United States*, 137 U.S. at 212 and *Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir. 2007), *now vacated* ("the determination of sovereignty over an area, the Supreme Court has held, is for the legislative and executive departments.") *Id.* 23a.

The district court applied the six factors established in *Baker v. Carr*, 369 U.S. 186 to determine whether the political question doctrine applied, concluding that plaintiffs' suit met four of the six *Baker* factors that would establish non-justiciability. App. 25a-30a.

Within two months of this opinion, the U.S. Supreme Court issued their opinion in *Boumediene*, 128 S.Ct. 2229, in which the Court considered the issue of sovereignty in determining whether or not the United States had sovereignty over Guantanamo Bay in order to assess whether the detainees had Constitutional rights. The majority of the Court found that the United States exercised *de facto* sovereignty over Guantanamo Bay and held that detainees were entitled to habeas corpus rights under the U.S. Constitution.

E. ***The Court of Appeals Judgment.***

On April 7, 2009, the court of appeals affirmed Judge Collyer's finding and dismissed Petitioners' case on the basis of political question doctrine. App. 2a, 6a, 13a. The court acknowledged that the SFPT does generally identify the United States as the principal occupying Power but believed the SFPT failed to indicate exactly what the United States is occupying power over. *Id.* 3a.

In response to Petitioners' request that the court interpret the treaty provisions in the SFPT, the court acknowledged that it *could* resolve the case through treaty analysis and statutory construction (App. 7a, emphasis in the original), citing to *Japan Whaling Ass'n.*, 478 U.S. at 230, "the courts have the authority to construe treaties and executive agreements." *Id.* But the court declined to do so, stating that the political question stripped the court of jurisdiction (*id.* 7a) and that Taiwan's sovereignty is an antecedent question to Petitioners' claims. *Id.* 8a.

The court acknowledged Petitioners' argument that the Court went beyond its historically limited role with respect to national security and foreign policy in *Boumediene*, 128 S.Ct. 2229, in considering sovereignty. App. 10a. However, the court construed this Court's decision in *Boumediene* narrowly, stating the Court's authority only applies to situations where *de facto* sovereignty is uncontested (*id.* 11a) and not to situations of *de jure* sovereignty, as in Petitioners' case. *Id.* 11a.

The court rejected Petitioners' comparison of their status as non-national citizens to the status of Filipino

non-national citizens in 1898. App. 11a-13a. The court interpreted 8 U.S.C. § 1408 (App. 35a-36a) as according non-citizen national status exclusively to persons born in American Samoa and Swains Island as per 8 U.S.C. § 1101(a)(29) (App. 35a) and excluding persons born in Taiwan. *Id.* 13a.

REASONS FOR GRANTING THE PETITION

I. *The political question doctrine cannot validly bar a federal court from interpreting the SFPT to determine if the United States' designation as "the Principal occupying Power" over Taiwan means the United States has de jure sovereignty over Taiwan, and consequently, Petitioners have fundamental rights under the Constitution.*

In *Boumediene*, 128 S. Ct. 2229, this Court, without any hesitancy under the political question doctrine, interpreted the treaty and lease agreement between the United States and Cuba to *examine*, but not decide United States *de facto* sovereignty over Guantanamo Bay, to determine petitioners' fundamental Constitutional rights flowing from such sovereignty.

As noted above, such an examination of our Government's "prior actions" is required by long-standing Supreme Court precedents. *Vermilya-Brown*, 335 U.S. at 380 ("Recognizing that the determination of sovereignty over an area is for the legislative and executive departments, *Jones v. United States*, 137 U.S. 202 [(1890)], *does not debar courts from examining the status resulting from prior action. De Lima v. Bidwell*, 182 U.S. 1 [(1901)]; *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 [(1945)]."). (Emphasis added).

In examining our Government's "prior actions" this Court held that,

> Under the terms of the lease between the United States and Cuba, Cuba retains "ultimate sovereignty" over the territory [Guantanamo Bay] while the United States exercises "complete jurisdiction and control." . . . Under the terms of the 1934 Treaty [Defining Relations with Cuba, May 29, 1934, 48 Stat. 1683], however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base [at Guantanamo Bay].

This Court further held in *Boumediene*, 128 S.Ct. 2252-55, that,

> When we have stated that sovereignty is a political question, we have referred not to sovereignty in the general, colloquial sense, meaning the exercise of dominion or power . . . but sovereignty in the narrow, legal sense of the term, meaning a claim of right. . . . *Indeed, it is not altogether uncommon for a territory to be under the de jure sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. This condition can occur when the territory is seized during war, as Guantanamo was during the Spanish-American War.*
>
> . . . .

> In a series of opinions later known as the *Insular Cases*, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. (internal citations omitted) . . .
>
> The Court held that the Constitution has independent force in these territories, a force not contingent upon actions of legislative grace. . . .
>
> . . . .
>
> *Downes* [182 U.S. 244 at 293 (White, J., concurring)] ("[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States"). As the Court later made clear, "the real issue in the Insular Cases was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable . . . ." *Balzac v. Porto Rico*, 258 U.S. 298, 312, 42 S.Ct. 343, 66 L.Ed. 627 (1922). . . . *Torres v. Puerto Rico*, 442 U.S. 465, 475-476, 99 S. Ct. 2425, 61 L.Ed. 2d 1 (1979) (Brennan, J., concurring in judgment) ("Whatever the validity of the [*Insular Cases*] in the particular historical contest in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the

> Bill of Rights—to the Commonwealth of Puerto Rico in the 1970s"). But, *as early as Balzac in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants "guaranties of certain fundamental personal rights declared in the Constitution."* 258 U.S. at 312. . . . [T]he Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. *This century-old doctrine informs our analysis in the present matter.*

(Emphasis added.)

In stark contrast to the Supreme Court's thoughtful examination of all relevant facts pertaining to the United States' *de facto* sovereignty over Guantanamo Bay, the Court of Appeals refused to undertake a detailed analysis of Petitioners' claims, even while acknowledging that "careful analysis of the SFPT might lead us to conclude the United States has temporary sovereignty. But we will never know, because the political question doctrine forbids us from commencing that analysis." App.9a.

Surely the political question doctrine does not trump the Constitutionally mandated obligation of courts to interpret treaties and determine the existence of Constitutional rights. If so, then the political question doctrine has become the "supreme Law of the Land" (U.S. Const. art. VI) and the courts take a backseat to the political branches of our Government.

Ironically, only two weeks after the Court of Appeals ruled in this case, it noted in *Rasul v. Myers*, 563 F.3d 527, 530 n.3 (D.C. Cir. 2009), in partial reliance upon its own decision in *Lin v. United States*, that, "*[B]efore Boumediene*, it was clearly established that "[w]ho is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges . . . of that government." (Internal citations omitted; emphasis provided.)

In *Rasul*, the Court of Appeals failed to appreciate, however, that in *Boumediene*, this Court was not establishing United States *de facto sovereignty* over Guantanamo Bay but was rather *examining* sovereignty in order to determine Constitutional rights.

In this declaratory judgment case, Petitioners ask the Court to *examine* United States' sovereignty over Taiwan by interpreting the SFPT to determine whether the United States' designation as "the principal occupying Power" (App. 33a) over Taiwan means that the United States has current *de jure* sovereignty over Taiwan and, if so, whether Petitioners have certain fundamental rights. Petitioners are *not* asking the court to *determine* who has or will have ultimate sovereignty over Taiwan. Rather, Petitioners ask the Court to *examine and interpret* the SFPT and, based upon that examination and interpretation, determine Petitioners' legal and Constitutional rights.

In *Boumediene v. Bush*, this Court further found that,

> At the close of the Spanish-American War, Spain ceded control over the entire island of Cuba to the United States and specifically "relinquishe[d] all claim[s] of sovereignty . . . and title." (internal citations omitted). From the date the treaty with Spain was signed until the Cuban Republic was established on May 20, 1902, the United States governed the territory "in trust" for the benefit of the Cuban people. And although it recognized, by entering into the 1903 Lease Agreement, that Cuba retained "ultimate sovereignty" over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898.

Boumediene, 128 S.Ct. at 2258-2259

The Court questioned the government's position that the Constitution had no effect because the United States had disclaimed sovereignty in the formal sense of the word, stating that this would allow the political branches to govern without legal constraint, and concluding that:

> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its

> borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." *Murphy v. Ramsey*, 114 U.S. 15, 44, 5 S.Ct. 747, 29 L. Ed. 47 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. *To hold the political branches have the power to switch the Constitution on or off at will is quite another*. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.' *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).

Boumediene, 128 S.Ct. at 2258-2259 (emphasis added).

Likewise, nothing has altered the legal relationship between the United States and Taiwan that was established in the SFPT. As stated in paragraph 4 of the Complaint,

> The Allied Powers led by the United States entrusted the Republic of China ("ROC") with authority to accept the surrender of the Japanese troops and to occupy Taiwan on behalf of the Allied Powers. [Original Footnote in Complaint paragraph 4: Supreme Commander for the Allied Powers General

> Order No. 1, Sept. 2, 1945, J.C.S. 1467/2; *see also* Dep't of St. Bull., Feb. 1955, at 329; *see also* Y. Frank Chiang, *One-China Policy and Taiwan*, 28 Fordham Int'l L.J. 1, 35, n.158 (2004.] Neither the SFPT nor or any other subsequent legal instrument has altered the agency relationship between the principal, the Allied Powers led by the United States, and the agent, the ROC, for the purpose of Taiwan's occupation.

The political question doctrine is a narrowly tailored doctrine that restrains the courts from deciding "political questions," as opposed to "political cases." *Baker*, 369 U.S. 186. Petitioners seek to vindicate their personal rights, not to influence United States foreign policy. *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) (finding reliance on political question doctrine misplaced with respect to claims for personal rights). The political question doctrine is relied on "only occasionally" by the Supreme Court, and requires a "discriminating analysis of the particular question posed." *Harbury v. Hayden*, 522 F.3d 413, 418-19 (internal citations omitted).

The modern test to be applied in determining non-justiciability is set forth in *Baker v. Carr*:

> Prominent on the surface of any case held to involve a political question is found
>
> [(1)] a textually demonstrable Constitutional commitment of the issue to a coordinate political department; or

> [(2)] a lack of judicially discoverable and manageable standards for resolving it; or
>
> [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
>
> [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
>
> [(5)] an unusual need for unquestioning adherence to a political decision already made; or
>
> [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

Courts have made numerous rulings interpreting and determining the legal effects of previously established United States sovereignty over held lands. *See*, *e.g.*, *Rabang v. Boyd*, 353 U.S. 427, 432 (1957) (noting that Filipinos were not "foreigners" during the United States' legal control of the islands), citing *Downes v. Bidwell*, 182 U.S. at 279 (establishing that "the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their *status* shall be").

Thus, because the United States formally undertook through the SFPT, and subsequent affirmations, to serve as Taiwan's protecting "Power," the United States "is, for all practical purposes, answerable to no other sovereign for its acts" on Taiwan. *See Boumediene*, 128 S. Ct. at 2252-53, 2257-59, 2260-62 (finding the habeas writ to extend to Guantanamo Bay on this basis, despite the United States' mere *de facto* sovereignty there and Cuba's "ultimate sovereignty" over the area).

A. *Petitioners' claims are justiciable and do not fall within the scope of the political question doctrine*.

1. *The "particular questions" presented by Petitioners' claims are not committed to the political branches in a "textually demonstrable constitutional" manner or otherwise, and do not require a policy determination by the Court* (*Baker* Factors 1 & 3)

Petitioners' claims for basic Constitutional rights and a declaration of their United States non-citizen nationality[24] fall within the "Judicial Power[, which] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." U.S. CONST., art. III, § 2. Any person who is denied a "right or privilege as a national of the United States ….by any department or independent agency, or official thereof, upon the ground that he is

24. Complaint, Sect. VII(a)-(h).

not a national of the United States," has a cause of action for declaration of nationality. INA, § 360, 8 U.S.C. § 1503 (2006). *See also* the mirror provision in the Nationality Act of 1940, § 503, referenced in *Cabebe v. Acheson*, 183 F.2d 795, 796-97 (9th Cir. 1950) (further noting that as of the Act of 1902, passports were to be granted to United States non-citizen nationals).

Likewise, as discussed below, the determination of nationality claims is properly one for courts. *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 966 (9th Cir. 2003), *citing Hughes v. Ashcroft*, 255 F.3d 752, 758 (9th Cir. 2001), relying on 8 U.S.C. § 1252(b)(5).

2. *The standards applicable to Petitioners' claims are discoverable and manageable, and are susceptible to judicial application of law within the proper realm of judicial expertise*. (*Baker* Factor 2)

The Constitution, United States statutes, international legal principles and federal precedents provide sufficient, judicially discoverable and manageable standards to adjudicate Petitioners' statutory claims. *See Wang v. Masaitis*, 416 F.3d 992, 996 (9th Cir. 2005) (finding that "[r]esolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provision at issue"); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d. Cir. 1995) (stating that "universally recognized norms of international law provide judicially discoverable and manageable standards").

There is no legitimate need to go beyond the law and engage in foreign affairs in order to consider issuing the requested declarations. *Harbury*, 522 F.3d at 419, citing *Baker*, 369 U.S. at 211.

3. *The resolution of Petitioners' claims would not express any lack of respect due the coordinate branches of government, lead to differing pronouncements by various departments, or violate an unusual need for unquestioning adherence to a political decision already made.* (*Baker* Factors 4-6)

Petitioners do not seek to contradict any political decisions relating to Taiwan. They request the courts simply *to interpret and declare the domestic legal effects of these political decisions under United States law.* While the Congress and President may "acquire, dispose of, and govern territory," they lack the "power to decide when and where [the Constitution's] terms apply" or "what the law is." *Boumediene*, 128 S. Ct. at 2259, citing *Murphy*, 114 U.S. at 44, *Marbury*, 1 Cranch at 137.

Petitioners ask the courts simply to examine Taiwan's "resulting status" under United States law, *Vermilya-Brown Co.*, 335 U.S. at 380 (political question doctrine "does not debar courts from examining the status resulting from prior action. *De Lima v. Bidwell*, 182 U.S. 1 [(1901)]; *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 [(1945)]."), and on this basis "decide independently whether a statute applies to that area" at the present time, *without prejudice* to Taiwan's future disposition. *Baker*, 369 U.S. at 212.

Nowhere in the Court's *Boumediene* decision is the question of non-justiciability raised, although few would characterize that case as being free of political implications. If this Court can, during open hostilities, consider and rule on issues involving Congress, the Executive Branch and the United States Constitution in respect of the handling of alleged terrorists, surely the interpretation of the SFPT and its legal effects upon Petitioners under U.S. laws are properly within the Courts' purview.

II. ***The INA, which defines non-citizen nationals as persons "born in an outlying possession of the United States on or after the date of formal acquisition of such possession," 8 U.S.C. § 1408, with "outlying possessions of the United States," 8 U.S.C. § 1101(a)(29), defined only to include American Samoa and Swains Island, does not deprive Petitioners of their non-citizen national status for purposes of determining their eligibility for non-citizen passports under 22 U.S.C. § 212.***

Despite the fact that nothing in the INA indicates that it is the exclusive path to non-citizen nationality, and nothing in the law requires Petitioners to be non-citizen nationals under the INA in order to qualify for United States non-citizen passports under 22 U.S.C. § 212 (App. 37a) ("No passport shall be granted or issued or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."), the Court of Appeals ruled (App. 12a-13a) against Petitioners and held that,

> "[T]he road to U.S. nationality runs through provisions detailed elsewhere in the Code, see

> 8 U.S.C. §§ 1401-58, and those provisions indicate that the only 'non-citizen nationals' currently recognized by our law are persons deemed to be so under 8 U.S.C. § 1408." [*See Marquez-Almanzar v. INS*, 418 F.3d 210, 218-19 (2d. Cir. 2005)] . . . . Moreover, Congress precisely defined a non-citizen national as, inter alia, a person "born in an outlying possession of the United States on or after the date of formal acquisition of such possession." 8 U.S.C. § 1408. The term "outlying possessions of the United States" means American Samoa and Swains Island. *Id.* § 1101(a)(29). The definition does not include Taiwan. *Id.*

A. *The INA is silent as to the conditions or means by which one comes to "owe permanent allegiance." 8 U.S.C. §1101(a)22.*

The fact that the INA does not provide any guidance as to the meaning of "permanent allegiance" was recognized in *Fernandez v. Keisler*, 502 F.3d 337, 348 (4th Cir. 2007) and *Dragenice v. Gonzalez*, 470 F.3d 183, 187 (4th Cir. 2006) (per curium) ("Congress provided no explicit guidance . . . as to the circumstances under which a person 'owes permanent allegiance to the United States.'").

What is clear, however, is that courts agree that "the term 'permanent allegiance' merely describes the nature of the relationship between non-citizen nationals and the United States. . . ." *See*, *e.g.*, *Marquez-Almanzar*, 418 F.3d at 217. Allegiance does arise in conquered

territory. And the relationship between Petitioners and the United States is set forth in the SFPT; the United States is the "Principal occupying Power" over Taiwan and its native inhabitants, including Petitioners. Importantly, nothing in the SFPT, to which the ROC was not even a party, or any other treaty mandates native Taiwanese persons' allegiance to the ROC.

Likewise, nothing in the INA or its legislative history suggests that Congress intended in the INA to change the basic meaning of "nationals" or the courts' rulings on its fundamental significance.

> "The term nationals came into use in this country when the United States acquired territories outside its continental limits whose inhabitants were not at first given full political equality with citizens. Yet they were deemed to owe permanent allegiance to the United States and were entitled to our country's protection. The term national was used to include these noncitizens in the larger group of persons who belonged to the national community and were not regarded as aliens."

Oliver v. United States Dep't of Justice, 517 F.2d, 426, 428, n.3 (2d Cir. 1975).

> The term [national] . . . was originally intended to account for the inhabitants of certain territories- territories said to 'belong to the United States,' including the territories acquired from Spain during the Spanish-American War, namely the Philippines, Guam,

> and Puerto Rico - in the early twentieth century, who were not granted U.S. citizenship, yet were deemed to owe 'permanent allegiance' to the United States and recognized as members of the national community in a way that distinguished them from aliens.

Marquez-Almanzar, 418 F.3d at 218 (internal citation omitted).

Even the Department of State' Foreign Affairs Manual states that "[t]he United States exercises sovereignty over a few territories besides . . . [American Samoa and Swains Island] . . . . Under international law and Supreme Court dicta, inhabitants of those territories (Midway, Wake, Johnston, and other islands) would be considered non-citizen, U.S. nationals . . . ." 7 FAM 1120 § 1121.4-3. (Oct. 10, 1996). *See, e.g.*, *Farrell v. United States*, 313 F.3d 1214, 1216 (9th Cir. 2002) ("Johnston Island is not a foreign country. It is a United States insular possession."); and *United States v. Paquet*, 131 F. Supp. 32, 34 (D. Haw. 1955) (Indeed Wake [Island] is so far from being 'foreign. . . .'").

The question of whether Petitioners "owe permanent allegiance to the United States," for the purpose of determining whether or not they qualify as nationals is one to be decided by federal courts—not the political branches of Government. 8 U.S.C. § 1101(a)(22) (App. 34a-35a); 8 U.S.C. § 1522(b)(5)(A) (App. 37a).

B. *Supreme Court Precedents, Never Overruled By Congress, Establish Petitioners' Status As Non-Citizen Nationals.*

The notion of citizenship and its nexus with individual rights emerged in the *Dred Scott Case*, *Scott v. Sanford*, 60 U.S. 393 (1857), which "for the first time in our history [made] . . . a judicial declaration that there might be subjects who were not citizens." Frederic R. Coudert, Jr., *Our New Peoples: Citizens*, *Subjects*, *Nationals or Aliens*, 3 Colum. L. Rev. 13, 17 (1903).

Subsequently, when Spain ceded its former colonies in the Treaty of Peace Between the United States and the Kingdom of Spain, Dec. 10, 1898, 30 Stat. 1754, TS 343 ("Treaty of Paris"), the status of the inhabitants of the former Spanish colonies became an issue, as these inhabitants were not aliens and owed allegiance to the United States, but were not citizens of the United States. Frederic R. Coudert, Jr., *Our New Peoples: Citizens*, *Subjects*, *Nationals or Aliens*, 3 Colum. L. Rev. at 19. ("The Treaty [Treaty of Paris] transfer[d] the sovereignty of Spain over the islands and their peoples to the United States and with such sovereignty necessarily the allegiance of the people.").

Importantly, persons residing in the former Spanish colony of Puerto Rico were considered "nationals" of the United States in the period from *1898* (when the Treaty of Paris was concluded) to *1917* (when Congress granted citizenship). *De La Rosa v. United States*, 229 F.3d 80, 86 (1st Cir. 2000) (Torruella, J., concurring).

Similarly, under the treaty concluded on December 2, 1899, in which Germany and Great Britain renounced in favor of the United States all their rights and claims over the Samoan Islands (American Samoa),[25] the inhabitants of these territories were considered nationals long before any Congressional action on the status of the inhabitants of Tutuila: "[t]he subjects of these islands [American Samoa] who acquired American nationality when they passed under the jurisdiction of the United States . . . [were considered] non-citizen nationals." Dudley O. McGovney, *Our Non-Citizen Nationals, Who Are They?*, 22 Cal. L. Rev. 593, 629 (1934). It took Congress another twenty-five years to confer non-citizen national status upon the Island's inhabitants, which was simply continued under INA, 8 U.S.C. §§1101(a)(21), (22) & (29) and §1408. App. 34a-36a.

All military attacks against Taiwan in WWII were conducted by US military forces. This Court, which has always vigorously guarded the very principles upon which this Nation was founded, has ruled that the responsibility of the United States over a conquered territory commences from the moment of formal

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25. *See* Convention to Adjust the Question between the United States, Germany, and Great Britain in Respect to the Samoan Islands, art. 2, Dec. 2, 1899, 31 Stat. 1878 (1899) ("Samoan Islands Treaty"). The Samoan high chiefs on two islands formally ceded their lands to the United States by Articles of Cession three months later. On July 16, 1904, the village chiefs of Manu'a [Swains Island] did the same. Stanley K. Laughlin, *The Law of United States Territories And The Affiliated Jurisdictions*, 32-34 (Lawyers Cooperative Publishing, 1995).

acquisition of the territory (e.g., at the conclusion of a peace treaty): "[t]he guaranties of certain fundamental personal rights declared in the Constitution . . . had from the beginning full application in the Philippines and Porto Rico. . . ." *Balzac*, 258 U.S. at 312-313 (emphasis added).

Consequently, when Japan gave up all "right, title and claim" to Taiwan in the SFPT, Chapter II, Article 2(b) (App. 33a), and the United States was legally recognized in the SFPT as the "Principal occupying Power" over all lands renounced by Japan, including Taiwan, all native inhabitants of Taiwan, including Petitioners now, were similarly given the rights of United States nationality *nolens volens* (*i.e.* whether unwilling or willing).

In sum, Petitioners are entitled to all fundamental rights of non-citizen nationality, including non-citizen passports as a result of their allegiance to the United States.[26]

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26. Currently, Petitioners carry passports of the Republic of China, which is not recognized as a "state" by either the United States or the United Nations. Without travel documents issued by a sovereign state, Petitioners' fundamental right to travel is enormously limited, and they are often made subject to under-the-table payments for visas, landing permits, customs clearances, and exit permits.

III. *The Issues Presented In This Case Are Of Supreme National And International Importance.*

It would be a grave injustice if this Court were to determine that the political question doctrine allows courts to *examine* sovereignty in order to determine what Constitutional rights alleged terrorists held at Guantanamo Bay have, but bars courts from interpreting the SFPT to determine whether Petitioners, who inhabit US conquered territory over which the United States is designated as the "Principal occupying Power" and were determined by the District Court to "have essentially been persons without a state for almost 60 years," (App. 28a) have certain fundamental Constitutional and legal rights. But that is precisely what the Court of Appeals did when it erroneously affirmed the District Court's dismissal of Petitioners' Complaint on the basis of the political question doctrine.

Indeed, the Court of Appeals and the District Court totally glossed over Petitioners' Complaint and avoided making any declarations—all specifically authorized by the APA §§ 702 and 704, 5 U.S.C. §§ 702 and 704, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202—by erroneously concluding that all of the declarations sought would require the Court to determine a political question. In doing so, the lower courts ignored settled federal jurisprudence allowing judicial determinations of the legal effects of United States laws, policies and actions upon persons in territories and lands abroad, and instead erroneously concluded that a determination of Taiwan's ultimate sovereignty was necessary before considering the declarations Petitioners seek.

Given the fact that Petitioners are stateless (in violation of International Law) and that Taiwan as a non-state is ineligible to seek a declaration of its rights under the SFPT from the International Court of Justice, this Court is the only court in the world competent—and Constitutionally mandated—to interpret the SFPT to determine whether Petitioners have fundamental Constitutional rights.

This case has been widely characterized as being *the* most important case in the history of Taiwan—and, needless to add, the most important case in the lives of Petitioners and all native inhabitants living in Taiwan *de jure* occupied by the United States.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED APRIL 7, 2009

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 08-5078.

Argued Feb. 5, 2009.

Decided April 7, 2009.

Roger C.S. LIN, et al.,

Appellants

v.

UNITED STATES of America,

Appellee.

Before: HENDERSON, BROWN, and GRIFFITH, Circuit Judges.

Opinion for the Court filed by Circuit Judge BROWN.

BROWN, Circuit Judge:

America and China's tumultuous relationship over the past sixty years has trapped the inhabitants of Taiwan in political purgatory. During this time the people on Taiwan have lived without any uniformly

recognized government. In practical terms, this means they have uncertain status in the world community which infects the population's day-to-day lives. This pervasive ambiguity has driven Appellants to try to concretely define their national identity and personal rights.

Initially, the individual Appellants sought modest relief: they wanted passports. More specifically, they wanted internationally recognized passports. Now, however, Appellants seek much more. They want to be U.S. nationals with all related rights and privileges, including U.S. passports. Determining Appellants' nationality would require us to trespass into a controversial area of U.S. foreign policy in order to resolve a question the Executive Branch intentionally left unanswered for over sixty years: who exercises sovereignty over Taiwan. This we cannot do. Because the political question doctrine bars consideration of Appellants' claims, the district court had no choice but to dismiss Appellants' complaint for lack of subject matter jurisdiction. Accordingly, we affirm.

I

At the end of the Sino-Japanese War, in 1895, China relinquished the island of Taiwan (then Formosa) to Japan. Treaty of Shimonoseki, China-Japan, art. 2(b), April 17, 1895, 181 Consol. TS 217. After its defeat in World War II, Japan surrendered sovereignty over Taiwan to the Allied forces in 1945. *See* 91 CONG. REC. S8348-49 (1945) (Text of Japanese Order). Specifically, General Douglas MacArthur ordered the Japanese

commanders within China and Taiwan to surrender to Generalissimo Chiang Kai-shek, *id.*, leader of the Chinese Nationalist Party, *The Chinese Revolution of 1949*, http:// www. state. gov/r/pa/ho/time/cwr/ 88312.htm (last visited March 4, 2009). In 1949, China's civil war—a battle between Chinese nationalists and communists—ended; mainland China fell to the communists and became the People's Republic of China ("P.R.C."), forcing Chiang Kai-shek to flee to Taiwan and re-establish the Republic of China ("R.O.C.") in exile. *Id.*

On September 8, 1951, Japan signed the San Francisco Peace Treaty ("SFPT") and officially renounced "all right, title and claim to Formosa and the Pescadores." Treaty of Peace with Japan, art. 2(b), Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45. The SFPT does not declare which government exercises sovereignty over Taiwan. It does generally identify the United States as "the principal occupying Power," but does not indicate over what. *Id.* at art. 23(a).

In 1954, the United States recognized the R.O.C. as the government of China, acknowledged its control over Taiwan, and promised support in the event of a large-scale conflict with the P.R.C. Mutual Defense Treaty Between the United States of America and the Republic of China, U.S.—R.O.C., Dec. 2, 1954, 6 U.S.T. 433; *The Taiwan Strait Crises: 1954-55 and 1958*, http://www. state.gov/r/pa/ho/time/lw/88751.htm (last visited March 4, 2009). The ensuing decades, however, brought improved diplomatic relations with the P.R.C. and the

United States' posture on Taiwan's sovereign changed. Starting in 1972, the United States recognized that the P.R.C. considered Taiwan a part of China and specifically declined to challenge that position. *See*DEP'T ST. BULL., Mar. 20, 1972, at 435, 437-38 (setting forth the text of Joint Communiqué by U.S. and P.R.C., the "Shanghai Communiqué," issued on February 27, 1972). In 1979, President Carter recognized the P.R.C. as the sole government of China and simultaneously withdrew recognition from the R.O.C. *See*DEP'T ST. BULL., January 1, 1979 (setting forth the text of Joint Communiqué on the Establishment of Diplomatic Relations Between the U.S. and P.R.C., issued on December 15, 1978); *see also Goldwater v. Carter,* 617 F.2d 697, 700 (D.C.Cir.), *vacated,* 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979).

This change in policy prompted Congress to pass the Taiwan Relations Act of 1979 ("TRA"), 22 U.S.C. § 3301 *et seq.,* in order to spell out the United States' new, unofficial relationship with "the people on Taiwan." *See id.* § 3301 ("[T]he Congress finds that the enactment of this Act is necessary to help maintain peace, security, and stability in the Western Pacific; and . . . authoriz[e] the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan."). The TRA established the American Institute in Taiwan ("AIT") as the unofficial U.S. representative for relations with Taiwan. *Id.* § 3305. The AIT, *inter alia,*"processes visa applications from foreign nationals and provides travel-related services for Americans." *United States ex rel. Wood v. Am. Inst.*

in Taiwan, 286 F.3d 526, 529 (D.C.Cir.2002). There is no indication the Congress or the Executive gave the AIT any responsibility for processing passport applications for the people on Taiwan.

The TRA also outlined the United States' "expectation that the future of Taiwan will be determined by peaceful means" and its intention "to provide Taiwan with arms of a defensive character." *Id.* § 3301(b); *see also id.* § 3302 (describing the provision of defense articles and services to Taiwan). Despite the executive renunciation of ties with the R.O.C., Congress pledged to maintain relations with the people on Taiwan and supply the government with weapons. *Id.* Thus began decades of "strategic ambiguity" with respect to sovereignty over Taiwan. CRS Issue Brief IB98034, *Taiwan: Recent Developments and U.S. Policy Choices,* by Kerry B. Dumbaugh, Foreign Affairs, Defense, and Trade Division, January 24, 2006.

In 2006, Appellants, residents of Taiwan and members of the Taiwan Nation Party, attempted multiple times to submit applications for U.S. passports to the AIT for processing. The AIT refused to accept the applications and, ultimately, prevented Appellants from delivering further submissions. Appellants filed a complaint in the district court seeking essentially two declarations: (1) the AIT's refusal to process the individual Appellants' passport applications wrongfully deprived them of their status as U.S. nationals and attendant rights; and (2) Appellants are U.S. nationals entitled to all associated rights, particularly those

flowing from the First, Fifth, Eighth, and Fourteenth Amendments. Am. Compl. 18-19. The district court dismissed the case for lack of subject matter jurisdiction under the political question doctrine. On appeal, Appellants admit Taiwan does not currently have a recognized sovereign, but argue that until it does, the SFPT established the United States as Taiwan's "principal occupying power," effectively giving the United States temporary *de jure* sovereignty. According to Appellants, no subsequent treaty or law abrogates this aspect of the SFPT. When permanent sovereignty is ultimately decided, they concede the United States' supposed *de jure* sovereignty will cease; but, in the meantime, Appellants consider themselves non-citizen U.S. nationals.

II

We review the district court's dismissal of Appellants' claims *de novo*. *Piersall v. Winter,* 435 F.3d 319, 321 (D.C.Cir.2006). Under the political question doctrine, a court must decline jurisdiction if there exists "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). "[D]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider v. Kissinger,* 412 F.3d 190, 194 (D.C.Cir.2005). Because deciding sovereignty is a political task, Appellants' case is nonjusticiable. *Jones v. United States,* 137 U.S. 202, 212, 11 S.Ct. 80, 34 L.Ed. 691 (1890) ("Who is the

sovereign, *de jure* or *de facto,* of a territory, is not a judicial, but a political [ ] question. . . ."); *Baker,* 369 U.S. at 212, 82 S.Ct. 691 ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing. . . .").

Appellants argue this is a straightforward question of treaty and statutory interpretation and well within the Article III powers of the court. It is and it isn't. The political question doctrine deprives federal courts of jurisdiction, based on prudential concerns, over cases which would normally fall within their purview. *National Treasury Employees Union v. United States,* 101 F.3d 1423, 1427 (D.C.Cir.1996). We do not disagree with Appellants' assertion that we *could* resolve this case through treaty analysis and statutory construction, *see Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) ("[T]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts."); we merely decline to do so as this case presents a political question which strips us of jurisdiction to undertake that otherwise familiar task. *See Gonzalez-Vera v. Kissinger,* 449 F.3d 1260, 1264 (D.C.Cir.2006) ("We need not quarrel with the plaintiffs' assertion that certain claims for torture may be adjudicated in the federal courts as provided in the TVPA. We simply observe that such a claim, like any other, may not be heard if it presents a political question.").

Once the Executive determines Taiwan's sovereign, we can decide Appellants' resulting status and concomitant rights expeditiously. *Baker,* 369 U.S. at 212, 82 S.Ct. 691 ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area."). But for many years—indeed, as Appellants admit, since the signing of the SFPT itself—the Executive has gone out of its way to avoid making that determination, creating an information deficit for determining the status of the people on Taiwan. Appellants insist they do not ask the court to determine Taiwan's sovereign; however, without knowing Appellants' status, we cannot delineate Appellants' resultant rights.

Identifying Taiwan's sovereign is an antecedent question to Appellants' claims. This leaves the Court with few options. We could jettison the United States' long-standing foreign policy regarding Taiwan—that of strategic ambiguity—in favor of declaring a sovereign. But that seems imprudent. Since no war powers have been delegated to the judiciary, judicial modesty as well as doctrine cautions us to abjure so provocative a course.

Appellants attempt to side-step this fatal hurdle by asserting that, for the limited purpose of determining their status and rights under U.S. law, the issue of sovereignty is already decided under the SFPT. According to them, as the "principal occupying power"

under the treaty, the United States retains temporary *de jure* sovereignty over Taiwan. Consequently, Appellants urge us to remember recognizing that the determination of sovereignty over an area is a political question "does not debar courts from examining the status resulting from prior action." *Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 380, 69 S.Ct. 140, 93 L.Ed. 76 (1948). True enough. However, under the interpretation of the political departments to whom we must defer in such matters, *Pearcy v. Stranahan,* 205 U.S. 257, 265, 27 S.Ct. 545, 51 L.Ed. 793 (1907) (deferring to "the interpretation which the political departments have put upon [a] treaty" when resolving a question of sovereignty), it remains unknown whether, by failing to designate a sovereign but listing the United States as the "principal occupying power," the SFPT created any kind of sovereignty in the first place. Therefore, the "prior action" on which Appellants rely is not only an open question, but is in fact the same question Appellants insist they do not require this Court to answer: who is Taiwan's sovereign? Appellants may even be correct; careful analysis of the SFPT might lead us to conclude the United States has temporary sovereignty. But we will never know, because the political question doctrine forbids us from commencing that analysis. We do not dictate to the Executive what governments serve as the supreme political authorities of foreign lands, *Jones,* 137 U.S. at 212, 11 S.Ct. 80; this rule applies *a fortiori* to determinations of U.S. sovereignty.

Appellants query how the political question doctrine can bar their claims in light of the Supreme Court's recent decision in *Boumediene v. Bush*, __U.S. __, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008). They observe:

> If the United States Supreme Court can, during open hostilities, consider and rule on issues involving Congress, the Executive Branch and the United States Constitution in respect of the handling of alleged enemy aliens directly threatening the United States mainland, surely the interpretation of the SFPT and its legal effects upon Appellants under U.S. laws are properly within the courts' purview.

Appellants' Br. 28. At first blush, it is difficult to challenge Appellants' reasoning. In truth, one can understand the perception that the Court in *Boumediene* went far beyond its historically limited role with respect to national security and foreign policy. *See Schneider*, 412 F.3d at 195 (Article III "provides no authority for policymaking in the realm of foreign relations or provision of national security. . . . [D]ecision-making in the areas of foreign policy and national security is textually committed to the political branches."). Under precedent both *de jure* and *de facto* sovereignty are political questions—indeed, archetypal political questions. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1918). Still, to read *Boumediene* as Appellants suggest would call into question the continuing viability of the entire political

question doctrine. We do not read *Boumediene* so broadly, particularly as the majority merely held it had authority to review enemy detentions under the Suspension Clause in those cases where *de facto* sovereignty is "uncontested." *Boumediene,* 128 S.Ct. at 2247, 2252-53, 2262.

Even if we concluded (which we do not) that *Boumediene* abrogated *sub silentio* the political question doctrine as it relates to *de facto* sovereignty, no valid argument can be made that it did so in relation to determining *de jure* sovereignty, which is at issue here. The majority in *Boumediene* explained, "to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction," and then rejected that premise as "unfounded." *Boumediene,* 128 S.Ct. at 2253. As counsel for the Government aptly put it at oral argument, the gravamen of the Court's decision centered not on the *de jure* reach of the Constitution, but on the limitations that adhere to the United States' actual exercise of power over non-citizens detained in a foreign territory. Appellants do not assert, nor could they, that the United States exercises actual control over the people on Taiwan. Thus, to the extent relevant in this case, *Boumediene* left the political question doctrine intact.

Finally, Appellants attempt to analogize the United States' former relationship with the Philippines, after Spain ceded the Philippine Islands to the United States

in 1898, to its current relationship with Taiwan. The comparison is inapposite. Congress, not a court, declared the Filipino population was "entitled to the protection of the United States" based on the United States' sovereignty over the Philippines. *See Rabang v. Boyd,* 353 U.S. 427, 429, 77 S.Ct. 985, 1 L.Ed.2d 956 (1957). Later, Congress acknowledged "the final and complete withdrawal of American sovereignty over the Philippine Islands" and stripped the Filipino people of their non-citizen national status. *Id.* at 429-30. Therefore, unlike here, courts confronting claims involving the rights enjoyed by Filipinos had no need to determine sovereignty over the Philippine Islands.

Appellants argue that, as in the Philippines, the people on Taiwan owe the United States "permanent allegiance" and, consequently, meet the definition of U.S. nationals. *See* 8 U.S.C. § 1101(a)(22) ("The term 'national of the United States' means . . . a person who, though not a citizen of the United States, owes permanent allegiance to the United States."). We join the majority of our colleagues and conclude manifestations of "permanent allegiance" do not, by themselves, render a person a U.S. national. *See Marquez-Almanzar v. INS,* 418 F.3d 210, 218-19 (2d Cir.2005) (holding "one cannot qualify as a U.S. national under 8 U.S.C. § 1101(a)(22)(B) by a manifestation of 'permanent allegiance' to the United States. . . . [T]he road to U.S. nationality runs through provisions detailed elsewhere in the Code, see 8 U.S.C. §§ 1401-58, and those provisions indicate that the only 'non-citizen nationals' currently recognized by our law are persons deemed to be so under 8 U.S.C.

§ 1408."); *see also Abou-Haidar v. Gonzales,* 437 F.3d 206, 207 (1st Cir.2006) ("The overwhelming majority of circuit courts to consider the question have concluded that one can become a 'national' of the United States only by birth or by naturalization under the process set by Congress."); *Sebastian-Soler v. U.S. Att'y Gen.,* 409 F.3d 1280, 1285-87 (11th Cir.2005); *Salim v. Ashcroft,* 350 F.3d 307, 309-10 (3d Cir.2003); *Perdomo-Padilla v. Ashcroft,* 333 F.3d 964, 972 (9th Cir.2003). Moreover, Congress precisely defined a non-citizen national as, inter alia, a person "born in an outlying possession of the United States on or after the date of formal acquisition of such possession." 8 U.S.C. § 1408. The term "outlying possessions of the United States" means American Samoa and Swains Island. *Id.* § 1101(a)(29). The definition does not include Taiwan. *Id.* Thus, attitudes of permanent allegiance do not help Appellants.

III

Addressing Appellants' claims would require identification of Taiwan's sovereign. The Executive Branch has deliberately remained silent on this issue and we cannot intrude on its decision. Therefore, as the district court correctly concluded, consideration of Appellants' claims is barred by the political question doctrine. Accordingly, we affirm.

So ordered.

APPENDIX B —MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED MARCH 18, 2008

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 06-1825(RMC).

Dr. Roger C.S. LIN, et al.,

Plaintiffs,

v.

UNITED STATES of America,

Defendant.

MEMORANDUM OPINION

ROSEMARY M. COLLYER, District Judge.

In this case, the Plaintiffs, residents of Taiwan and the Taiwan Nation Party, ask the Court to interpret treaties, statutes, and other legislative and executive pronouncements to determine to what extent the Immigration and Nationality Act ("INA"),[1] the Administrative Procedure Act ("APA"),[2] and the United

1. 8 U.S.C. §§ 1101-1777 (2007).

2. 5 U.S.C. §§ 701-706 (2007).

States Constitution apply to them. The United States moves to dismiss, arguing that the suit presents a non-justiciable political question and that the Court lacks subject matter jurisdiction. *See* Def.'s Mot. to Dismiss ("Def.'s Mem.") [Dkt. # 17].

I. BACKGROUND FACTS

A short history lesson is provided by the Complaint. *See* Am. Compl. [Dkt. # 16]. In 1894, Japan and China engaged in the Sino-Japanese War in which Japan defeated China. Am. Compl. ¶ 26. Both governments signed the Treaty of Shimonoseki on April 17, 1895. *Id.* ¶ 27. Pursuant to the Treaty, China ceded Taiwan (then known as Formosa) to Japan in perpetuity and full sovereignty. *Id.* ¶ 28.

On December 7, 1941, Japan attacked the United States naval base at Pearl Harbor, Hawaii, and as a result the United States Congress issued a Declaration of War on December 8. *Id.* ¶¶ 29-30. After an intense war, Japan surrendered on September 2, 1945. Japanese representatives signed the Instrument of Surrender aboard the battleship USS Missouri, anchored in Tokyo Bay. *Id.* ¶ 31. On that same day, General Douglas MacArthur, Supreme Commander for the Allied Powers,[3]

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3. The Allied Powers included Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. *See* Am. Compl. ¶ 40.

issued General Order No. 1, ordering the "senior Japanese commanders and all ground, sea, air and auxiliary forces within . . . Formosa" to "surrender to Generalissimo Chiang Kai-shek." *Id.* ¶ 32; *see also* Supreme Commander for the Allied Powers General Order No. 1, Sept. 2, 1945, J.C.S. 1467/2. According to the Complaint, "[p]ursuant to the General Order No. 1, Chiang Kai-shek, a military and political leader of the [Republic of China ("ROC")], was a 'representative of the Allied Powers empowered to accept surrender[ ]' " of the Japanese forces. Am. Compl. ¶ 32. On October 25, 1945, Chiang Kai-shek's representative in Taiwan accepted the surrender of the Japanese forces there, although "[t]he surrender and repatriation of the Japanese forces in Taiwan (Formosa) was carried out with substantial assistance of the United States armed forces." *Id.* ¶¶ 33-34.

On September 8, 1951, the Allied Powers and Japan signed the San Francisco Peace Treaty ("SFPT"), which entered into force on April 28, 1952. *Id.* ¶ 37. Article 2(b) of the SFPT provided, "Japan renounces all right, title and claim to Formosa and the Pescadores." *Id.* ¶ 38; *see also* Treaty of Peace with Japan, art. 2(b), Sept. 8, 1951, 136 U.N.T.S. 46 (entered into force Apr. 28, 1952). However, the SFPT did not indicate to whom sovereignty over Taiwan was to be transferred. *See* Am. Compl. ¶ 39. The Complaint alleges that "[n]either the ROC government, which occupied the island of Taiwan (Formosa) as agent for the 'principal

occupying Power,'[4] nor the government of the Peoples' Republic of China ("PRC"), which controlled mainland China, signed, ratified, or adhered to the SFPT." *Id.* ¶ 41. "The parties to the SFPT chose not to give "any right, title [or] claim to Formosa and the Pescadores" to China. *Id.* ¶ 44.

According to the Plaintiffs, the decision not to cede Formosa to China was a considered judgment.

> Prior drafts of Article 2(b) show that the Allied Powers originally intended to give China sovereignty over Taiwan (Formosa), but later affirmatively changed their intention. The drafts dated August 5, 1947, and January 8, 1948, provided: "Japan hereby cedes to China in full sovereignty the island of Taiwan (Formosa) and adjacent minor islands[.]" By contrast, the final draft of the SFPT did not transfer "full sovereignty" in Taiwan and the Pescadores Islands from Japan to China.

Id. ¶ 45. Instead, Article 23 designated the United States as "the principal occupying Power," with the government of the ROC as its agent. *Id.* ¶¶ 46-47.

A separate Treaty of Peace between the ROC and Japan, signed on April 28, 1952 and entered into force on August 5, 1952 (the "Treaty of Taipei"), also did not

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4. *See* SFPT, art. 23(a) ("the United States is 'the principal occupying Power' "). Am. Compl. at 9, n. 20.

transfer sovereignty over Taiwan from Japan to China. *Id.* ¶ 48. It merely recognized that "Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores)." *Id.*; *see also* Treaty of Peace with Japan, Apr. 28, 1952, R.O.C.-Japan, 163 U.N.T.S. 38 (entered into force Aug. 5, 1952).

> In the aftermath of the SFPT, the governments of the leading allies interpreted the SFPT to mean that no state acquired sovereignty over Taiwan (Formosa) and title to its territory. For example, United States Secretary of State John Foster Dulles told the Senate in December 1954, "[the][sic] technical sovereignty over Formosa and the Pescadores has never been settled. That is because the Japanese peace treaty merely involves a renunciation by Japan of its right and title to these islands. But the future title is not determined by the Japanese peace treaty, nor is it determined by the peace treaty which was concluded between the [ROC] and Japan." Likewise, British Foreign Secretary Anthony Eden told the British House of Commons, "under the Peace Treaty of April, 1952, Japan formally renounced all right, title and claim to Formosa and the Pescadores; but again this did not operate as a transfer to Chinese sovereignty, whether to the [PRC] or to the [ROC]. Formosa and the Pescadores are therefore, in the view of Her Majesty's

> Government, territory the de jure sovereignty over which is uncertain or undet[er]mined." Similarly, in 1964, President Georges Pompidou (then Premier of France) stated that "Formosa (Taiwan) was detached from Japan, but it was not attached to anyone" under the SFPT.

Am. Compl. ¶ 49. Further, the Complaint alleges that "[i]n 1955, United States Secretary of State John Foster Dulles confirmed that the basis for ROC's presence in Taiwan was that 'in 1945, the [ROC] was entrusted with authority over [Formosa and the Pescadores]' and 'General Chiang [Kai-shek] was merely asked to administer [Formosa and the Pescadores] for the Allied . . . [P]owers pending a final decision as to their ownership.' " *Id.* ¶ 50.

The Plaintiffs allege that this state of affairs has never changed: the United States remains the principal occupying Power, "holding sovereignty over Taiwan and title to its territory in trust for the benefit of the Taiwanese people," *id.* ¶ 56; the Taiwanese people have never declared their own sovereignty or formed their own government, *id.* ¶ 60; no one in the international community, including the United Nations and the United States, recognizes Taiwan as an independent state, *id.* ¶¶ 61-63; under the Taiwan Relations Act ("TRA") of 1979, 22 U.S.C. §§ 3301-3316 (2006), "the people of the United States" maintain "commercial, cultural, and

other relations" with the "people of Taiwan,"[5] because "the future of Taiwan" is still not "determined,"[6] *Id.* ¶¶ 59 & 64; in July 1982, the United States gave "Six Assurances" to Taiwan, including that it "would not formally recognize Chinese sovereignty over Taiwan," *id.* ¶ 65; and as late as October 25, 2004, United States Secretary of State Colin Powell confirmed that "Taiwan is not independent. It does not enjoy sovereignty as a nation, and that remains our policy, our firm policy." *Id.* ¶ 67.

Plaintiffs claim that they have rights and privileges as United States nationals including: fundamental rights under the U.S. Constitution, including a First Amendment right to petition for redress of grievances, a Fifth Amendment right to due process of law, an Eighth Amendment right against cruel and unusual punishment in the form of deprivation of a recognized nationality, and Fourteenth Amendment rights to due process and equal protection. *See id.* § VII.

II. LEGAL STANDARDS

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Because subject matter jurisdiction is an Article

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5. TRA, 22 U.S.C. § 3301.

6. *See supra* note 5.

III as well as a statutory requirement, "no action of the parties can confer subject[ ]matter jurisdiction upon a federal court.' " *Akinseye v. District of Columbia,* 339 F.3d 970, 971 (D.C.Cir.2003). On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Evans v. B.F. Perkins Co.,* 166 F.3d 642, 647 (4th Cir.1999); *see also McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178, 182-83, 56 S.Ct. 780, 80 L.Ed. 1135 (1936).

Because subject matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States,* 334 F.3d 61, 64, 69 (D.C.Cir.2003). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States,* 782 F.2d 227, 241 (D.C.Cir.1986), *vacated on other grounds,* 482 U.S. 64, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.,* 974 F.2d 192, 197 (D.C.Cir.1992).

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face, testing whether a plaintiff has properly stated a claim. *Browning v. Clinton,* 292 F.3d 235, 242 (D.C.Cir.2002). Although a complaint "does not need detailed factual allegations, a plaintiff's obligation

to provide the 'grounds' of his 'entitle [ment]to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* __ U.S. __, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007) (internal citations omitted). The court must treat the complaint's factual allegations-including mixed questions of law and fact-as true, drawing all reasonable inferences in the plaintiff's favor. *Macharia,* 334 F.3d at 64, 67; *Holy Land Found. for Relief & Dev. v. Ashcroft,* 333 F.3d 156, 165 (D.C.Cir.2003). The facts alleged "must be enough to raise a right to relief above the speculative level." *Twombly,* 127 S.Ct. at 1965. The court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Browning,* 292 F.3d at 242. In deciding a 12(b)(6) motion, the Court "may only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao,* 226 F.Supp.2d 191, 196 (D.D.C.2002) (citation omitted).

III. ANALYSIS

The basis for Plaintiffs' claims that they are nationals of the United States is that the United States is allegedly exercising sovereignty over Taiwan. *See* Am. Compl. ¶ 69 ("[c]onsidering that the United States is holding de jure sovereignty over Taiwan, the Taiwanese people owe permanent allegiance to the United States and have the status of United States nationals (as

opposed to citizens)"). The Plaintiffs would have the Court address a quintessential political question and trespass into the extremely delicate relationship between and among the United States, Taiwan and China. This it is without jurisdiction to do.

The determination of who is sovereign over specific territory is non-justiciable. "Who is the sovereign, *de jure* or *de facto,* of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." *Jones v. United States,* 137 U.S. 202, 212, 11 S.Ct. 80, 34 L.Ed. 691 (1890) (citing cases as far back as 1818); *see also Boumediene v. Bush,* 476 F.3d 981, 992 (D.C.Cir.2007), *cert. denied,* __ U.S. __, 127 S.Ct. 1478, 167 L.Ed.2d 578 (2007), *rehearing granted, order vacated,* __ U.S. __, 127 S.Ct. 3078, 168 L.Ed.2d 755 (2007) ("[t]he determination of sovereignty over an area, the Supreme Court has held, is for the legislative and executive departments") (internal citations omitted).

Neither *Ungar v. Palestine Liberation Org.,* 402 F.3d 274 (1st Cir.2005) nor *Rasul v. Bush,* 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004), on which Plaintiffs rely, grants the Court jurisdiction to determine whether the United States exercises sovereignty over Taiwan. *Ungar* involved statutory interpretation of the Antiterrorism Act which "neither signaled an official

position on behalf of the United States with respect to the political recognition of Palestine nor amounted to the usurpation of a power committed to some other branch of government." *Ungar*, 402 F.3d at 280. Similarly, *Rasul* relied on "the express terms of [U.S.] agreements with Cuba," made by the Executive Branch, to define the scope of the U.S. relationship with Guantanamo Bay Naval Base. *Rasul*, 542 U.S. at 480-81, 124 S.Ct. 2686. Plaintiffs ask the Court to interpret General Order No. 1, which was issued by General MacArthur as Supreme Commander of the Allied Powers—not by the Executive Branch of the United States Government. They acknowledge that the treaty actually negotiated and signed by the United States, the SFPT, only recognized that Japan had ceded sovereignty over Taiwan and did not address post-war sovereignty over Taiwan. "Interpreting" the SFPT, therefore, is of no assistance in this matter and the Court is without standards or boundaries to guide it in "interpreting" General Order No. 1.

In *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court enumerated six factors that may render a case nonjusticiable under the Political Question doctrine: (1) textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of

respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment of multifarious pronouncements by various departments on one question. *Baker*, 369 U.S. at 217, 82 S.Ct. 691; *see also Schneider v. Kissinger*, 412 F.3d 190 (D.C.Cir.2005). "To find a political question, [the Court] need only conclude that one factor is present, not all." *Schneider*, 412 F.3d at 194. In the instant matter, at least four of the factors counsel against the exercise of jurisdiction over Plaintiffs' claims.

A. Textually Committed to Coordinate Branches

Plaintiffs' suit raises policy questions that are textually committed to coordinate branches of government.

> As the Supreme Court suggested in *Marbury* [*v. Madison*, 5 U.S.(1 Cranch) 137, 2 L.Ed. 60 (1803)] and made clear in later cases, "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* [*v. Cent. Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1918)]. Otherwise put, "foreign policy decisions are the subject of just such a textual commitment," as contemplated in

Appendix B

Baker v. Carr. Comm. Of United States Citizens v. Reagan, 859 F.2d 929, 933-34 (D.C.Cir.1988).

Schneider, 412 F.3d at 194. Article I, Section 8 of the Constitution "is richly laden with delegation of foreign policy and national security powers" to the legislature. *Id.* "Article II likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive. . . . Indeed, the Supreme Court has described the President as possessing 'plenary and exclusive power' in the international arena and 'as the sole organ of the federal government in the field of international relations. . . .' " *Id.* at 195 (quoting *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936)).

As the sources cited by Plaintiffs make plain, at the end of World War II, the sovereignty of Taiwan was an undecided question. It remains a very delicate issue in international relations. Plaintiffs want the Court to ignore intervening events[7] and catapult over the Executive and Legislative Branches, which have obviously and intentionally *not* recognized any power as sovereign over Taiwan. That inaction is as much committed by the Constitution to those "political" branches as their actions are. "The political question

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7. *See, e.g.*, Executive Order No. 13014 of August 15, 1996, 61 Fed. Reg. 42963 (superseding Executive Order No. 12143 of June 22, 1979, 44 Fed. Reg. 37191), and the Taiwan Relations Act of 1979, 22 U.S.C. § 3301, *et seq.*

doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986). Thus, the Court is without jurisdiction to adjudicate Plaintiffs' Complaint.

B. Judicially Discoverable and Manageable Standards

The second criterion of the *Baker* six brings under the nonjusticiable umbrella of political question any case as to which there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217, 82 S.Ct. 691. Plaintiffs argue that the Court need only perform a traditional judicial task: interpret treaties, laws and the Constitution. Certainly the Plaintiffs have identified a traditional judicial task but they misapprehend the nature of their own Amended Complaint. Fundamentally, they assert that General Order No. 1 made Chiang Kai-shek an agent for the principal occupying Power, *i.e.*, the United States, and that nothing since has withdrawn that agency or substituted any other Power over Taiwan. In order to examine the bases for Plaintiffs' claims, the Court would be required to interpret the *meaning* of General Order No. 1, the *authority* for the issuance of General Order No. 1, whether it had or has any *binding nature* on the Allies' and/or the United States' foreign policy, and its *continued viability.*

Judges are not soldiers or diplomats. General Order No. 1 was entered very shortly after Japan signed the Instrument of Surrender and long before all Japanese soldiers actually laid down their arms. During the course of the 14-year Japanese invasion of China (1931-45), Chiang Kai-shek as head of the Kuomintang (KMT or "Chinese Nationalist People's Party") had continued to wage war against Mao Zedong, head of the Chinese Communist Party ("CCP"). China Page, U.S. Dept of State, http://www.state.gov/r/pa/ei/bgn/18902. htm (last visited Mar. 17, 2008) ("China Page"). It was not until 1949 that Chiang Kai-shek fled with the remnants of his KMT government and military to Taiwan, "where he proclaimed Taipei to be China's 'provisional capital' and vowed to re-conquer the Chinese mainland." *Id.* Thus, the purpose, language, and intentions behind General Order No. 1 might have been entirely blunted by later events. What is clear is that the judiciary is not equipped to interpret and apply, 50 years later, a wartime military order entered at a time of great confusion and undoubted chaos.

C. Initial Policy Determination for Nonjudicial Discretion

Plaintiffs have essentially been persons without a state for almost 60 years. The last completely clear statement of authority over Taiwan came from General MacArthur in 1945. One can understand and sympathize with Plaintiffs' desire to regularize their position in the world.

That Plaintiffs remain in an international limbo is not, however, because they have been ignored by the United States or the rest of the world. The ascendency of Mao Zedong and the CCP dramatically changed the situation in the Taiwan Straits and created a long-standing tension between mainland China and the United States. "Any remaining hope of normalizing relations ended when U.S. and Chinese communist forces fought on opposing sides in the Korean conflict." China Page at 17. Not until President Richard Nixon traveled to Beijing in February 1972 did the two nations pledge to work toward full normalization of diplomatic relations. *Id.* Finally,

> [i]n the Joint Communique on the Establishment of Diplomatic Relations dated January 1, 1979, the United States transferred diplomatic recognition from Taipei to Beijing. The United States reiterated the Shanghai Communique's acknowledgment of the Chinese position that there is only one China and that Taiwan is a part of China; Beijing acknowledged that the American people would continue to carry on commercial, cultural, and other unofficial contacts with the people of Taiwan.

Id. at 18. With passage of the Taiwan Relations Act, 22 U.S.C. § 3301, *et seq.*, and establishment of the American Institute of Taiwan, the United States has maintained unofficial relations with Taiwan.

In the face of these years and years of diplomatic negotiations and delicate agreements, it would be foolhardy for a judge to believe that she had the jurisdiction to make a policy choice on the sovereignty of Taiwan. The foreign relations of the United States are conducted by the President of the United States and the Executive and Legislative Branches will decide whether and under what circumstances the United States will recognize a sovereign government over Taiwan.

D. Respect for Coordinate Branches of Government

This Court could not decide Plaintiffs' case without addressing the intentional and careful way in which the Executive Branch has *not* pressed forward on Taiwanese sovereignty, over these many years. Any effort on the part of the judiciary to declare Plaintiffs' rights under the U.S. Constitution, if any, would be impossible "without expressing a lack of respect due to [the Court's] coequal Branches of Government." *Schneider*, 412 F.3d at 198.

IV. CONCLUSION

Finding that four of the six *Baker* factors apply here, the Court concludes that the Political Question Doctrine bars its consideration of Plaintiffs' Amended Complaint. The government's motion to dismiss will be granted. A memorializing order accompanies this Memorandum Opinion.

APPENDIX C — CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED IN THE CASE

1. United States Constitution:

A. Article III, Section 1 provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

B. Article III, Section 2, paragraphs 1 and 2 provide:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State

claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

C. Article IV, Section 4 provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

Appendix C

2. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 (advice by Senate on April 15, 1952, ratified, proclaimed and entered into force on April 28, 1952):

A. Chapter II, Article 2(b) provides:

> Japan renounces all right, title and claim to Formosa and the Pescadores.

B. Chapter II, Article 4(b):

> Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3.

C. Chapter VII, Article 23(a):

> The present Treaty shall be ratified by the States which sign it, including Japan, and will come into force for all the States which have then ratified it, when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States, namely Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and

Northern Ireland, and the United States of America. The present Treaty shall come into force of each State which subsequently ratifies it, on the date of the deposit of its instrument of ratification.

D. Chapter VII, Article 25:

For the purposes of the present Treaty the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty. Subject to the provisions of Article 21, the present Treaty shall not confer any rights, titles or benefits on any State which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favour of a State which is not an Allied Power as so defined.

3. United States Statutes:

A. 8 U.S.C. § 1101(a)(21) (2006) provides: "As used in this chapter . . . The term 'national' means a person owing permanent allegiance to a state."

B. 8 U.S.C. § 1101(a)(22) (2006) provides: "As used in this chapter . . . The term

'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."

C. 8 U.S.C. § 1101(a)(29) (2006) provides: "As used in this chapter . . . The term 'outlying possessions of the United States' means American Samoa and Swains Island."

D. 8 U.S.C. § 1408 (2006) provides:

Unless otherwise provided in section 301 of this title [8 USC § 1401], the following shall be nationals, but not citizens, of the United States at birth:

(1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;

(2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;

(3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession; and

(4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years—

> (A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and
>
> (B) at least five years of which were after attaining the age of fourteen years.

The proviso of section 301(g) [8 USC § 1401(g)] shall apply to the national parent under this paragraph in the same manner as it applies to the citizen parent under that section.

Appendix C

E. 8 U.S.C. § 1522(b)(5)(A) (2006) provides:

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

F. 22 U.S.C. § 212 (2006) provides:

No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.