ORAL ARGUMENT NOT YET SCHEDULED

08-5078

United States Court of Appeals

for the

District of Columbia Circuit

Roger C.S. Lin, *et al.*,

Appellants,

v.

United States of America,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY OF APPELLANT

Charles H. Camp
Law Offices of Charles H. Camp
1319 18TH Street, N.W.
Washington, D.C. 20036
(202) 457-7786
Counsel for Appellants

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SUMMARY OF ARGUMENT

The Government's December 3, 2008, brief ("Govt. Brief") is astonishing in several respects. The Government never addresses the central question at issue in this appeal. It fails to recognize that Appellants are seeking multiple declarations, not just one pertaining to noncitizen national status. It fails to understand that the San Francisco Peace Treaty ("SFPT") was not modified by any Executive Order of the President or the Taiwan Relations Act of 1979 ("TRA"), and remains in full force and effect today. It cites cases whose principles support Appellants' case.

The Government also erroneously re-frames the issue on appeal and then discusses matters totally irrelevant to this appeal, and misconstrues language in the Mutual Defense Treaty between the United States and the Republic of China (the "MDT") to suggest that MDT established the Republic of China as the sovereign over Taiwan.

Finally, without having filed a cross-appeal on the District Court's *sub silentio* denial of the Government's 30(b)(6) motion to dismiss for failure to state a claim on which relief can be granted, it oddly moves this Court of Appeals to "dismiss" Appellants' Amended Complaint on that same ground.

ARGUMENT

A. The Government Fundamentally Misunderstands This Case, As Well As The Relevant Facts And Laws, And Seeks To Create A Political Question Where None Exists.

The Government never addresses the central question at issue in this appeal: whether the political question doctrine bars the District Court from determining Appellants' legal rights under United States statutes and the Constitution as a result of the undisputable fact that under Article 23(a) of the Treaty of Peace with Japan (known as the "San Francisco Peace Treaty" or "SFPT"), the United States is "the principal occupying Power" over "Formosa and the Pescadores" (now called Taiwan) over which Japan renounced "all right, title and claim" in SFPT Article 2(b). J.A. at A-43 and 51.

The Government's entire discussion of the SFPT in its Brief (at 3) is as follows, "In 1952, Japan and the Allied Powers, including the United States, signed a peace treaty which provided that 'Japan renounces all right, title and claim to Formosa and the Pescadores,' but did not otherwise address Taiwan's status." [1]

[1]Amazingly, without even mentioning the SFPT, the Government's Brief at 22 states that, "The current relationship between the United States and Taiwan derives **solely and exclusively** from Executive Order No. 13014 of August 15, 1996, 61 Fed. Reg. 42963, and the Taiwan Relations Act of 1979, 22 U.S.C. 3301, et seq. . ."—neither of which state it is intended to withdraw the United States from the SFPT or change the fact that under the SFPT, the United States is the "principal occupying Power" over Taiwan. (Emphasis added.) The Government also apparently has forgotten that under the Constitution, "**treaties are the 'supreme Law of the Land**,' U.S. Const. art. VI, cl. 2." *McKesson v. Islamic Republic of Iran*, 271 F.3d 1101, 1107 (D.C.Cir. 2001), *cert. denied, motion gr.* (2002) 537 US 941, 154 L Ed 2d 248, 123 S Ct 341 and *cert.*

How the Government can totally ignore the SFPT in this treaty interpretation case—or to mention any of the fundamental Constitutional rights on which Appellants seek declarations—is a telling admission and, perhaps, even a waiver by the Government.

Similarly, other than merely listing the six political question factors set forth in *Baker v. Carr*, 369 U.S. 186 (1962) (*see* Govt. Brief, p. 11-12), all of which were fully addressed in Appellants' opening brief, the Government entirely failed to specifically address *any* of the *Baker* factors—another potential waiver by the Government.

The substantive question of whether or not Appellants are non-U.S. citizen nationals entitled to non-U.S. citizen passports is just one of the declarations sought from the District Court[2]—and not a political question, given legions of cases, many cited by the Government, where a court determined whether or not a person was a U.S. national. The Government's Brief omits to mention, much less discuss the fact that Appellants also seek declarations of their fundamental rights under the First, Fifth, Fourteenth, and Eighth Amendments to the Constitution—a

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denied, motion gr. (2002) 537 US 941, 154 L Ed 2d 248, 123 S Ct 341 and vacated, remanded (2003, App DC) 355 US App DC 152, 320 F3d 280 (emphasis added).

[2] United States nationals have the right to apply for passports. *See* 8 U.S.C. § 1101(a)(22) (2007) (a "national of the United States" is a "a citizen of the United States, or . . . a person who, though not a citizen of the United States, owes permanent allegiance to the United States"); 22 U.S.C. § 212 (2007) ("Persons entitled to passport. No passport shall be granted or issued to or verified for any other persons that those owing allegiance, whether citizens or not, to the United States.").

significant omission by the Government in light of the recent holding of the Supreme Court *Boumediene v. Bush*, 128 S.Ct. 2229, 2262 (2008) that "noncitizens" within a *de jure* sovereign, occupied area outside the regular borders of the United States (*i.e.*, Guantanamo Bay) have "rights under our Constitution."

The Government's Brief (pp. 3-7) fails to contest the fact that none of the Government and Executive documents it briefly mentions (Govt. Brief, pp. 3-7), in addition to those detailed in Appellants' opening Brief, changed or modified the SFPT in any manner.

The Government cites a number of cases, some of which it "chiefly" relies upon, whose principles actually *support* Appellants' case that the District Court is not barred by the political question doctrine from issuing declarations on the "status resulting from" [3] the fact that, as a matter of law, the United States remains "the principal occupying Power" over Taiwan.

The Government erroneously re-frames the issue on appeal to suggest that Appellants are seeking a declaration of U.S. noncitizen national status simply "by virtue of their residence in Taiwan" (Govt. Brief, p. 2 citing to J.A. at A-19[4]). This

[3] *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) ("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). Ironically, *Vermilya-Brown Co. v. Connell* is a case upon which the Government "chiefly rel[ies]" in its Brief at 13 and 18.

[4] Nowhere in Appellants' Amended Complaint, including the eighteenth (18th) page of the Complaint to which the Government's Brief cites for its erroneous assertion that "Plaintiffs

is a vast, inaccurate oversimplification that is misleading, to say the least.[5] Likewise, contrary to the Government's Brief (at 10), Appellants' case does NOT rest upon General Douglas MacArthur's General Order No. 1, and they do NOT "seek a judicial declaration of United States' sovereignty over Taiwan."

What the Government fails to comprehend is that Appellants do seek declarations of their rights under U.S. statutes and the Constitution resulting from the fact that under the SFPT, the United States is "the principal occupying Power" over Taiwan (resulting from the United States defeat of Japan in World War II, including the United States' conquest of Taiwan, and subsequent United States military government jurisdiction over Taiwan, and other facts established in the SFPT). Such requested declarations are NOT political questions, but rather declarations requiring an examination and determination of Appellants' "status resulting from prior action"—namely, the United States' status as "the principal occupying Power" under the SFPT. Most importantly, neither the District Court nor the Government have disputed (1) that under the SFPT, the United States, in fact, is "the principal occupying Power" over Taiwan, or (2) that no United States

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allege that they are 'United States nationals' **by virtue of their residence in Taiwan**" (Govt. Brief, p. 2), do Appellants allege that they are noncitizen nations simply because their residence is in Taiwan.

[5] Perhaps this oversimplification explains why the Government's Brief fails to even discuss the SFPT, the fact that the United States remains the "principal occupying Power" under the Treaty, or Appellants' "status resulting from" such *de jure* occupation of Taiwan by the United States.

statute or Executive Order could change, or has changed the United States' status as "the principal occupying Power" over Taiwan.

Without detailing all of the Government's errors contained in its re-telling of history relating to Taiwan, the Government makes misleading statements on pages 3, 14 and 21 of its Brief concerning the Mutual Defense Treaty Between the United States and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433 ("MDT") to falsely suggest that the ROC has sovereignty over Taiwan.

Specifically, in its Brief at page 3, the Government states, "In 1954, the United States and the Republic of China ("ROC") signed a mutual defense treaty wherein the United States . . . recognized Taiwan to be among its [the ROC's] territories." On page 14 of its Brief, the Government states, "Over fifty years ago, the United States . . . recognized Taiwan to be among China's territories." On page 21 of its Brief, the Government states, "The United States has repeatedly made clear that Taiwan is not within its legal control. See Mutual Defense Treaty Between the United States and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433, Article VI ('the terms "territorial" and "territories" shall mean in respect of the Republic of China, Taiwan and the Pescadores')."

In quoting Article 6 of the MDT, the Government omitted the following, underlined limiting language in Article 6: "For the purposes of Articles 2 and 5,

the terms 'territorial' and 'territories' shall mean in respect of the Republic of China, Taiwan and the Pescadores. . . ."

Article 2, in relevant part, states, "In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack and communist subversive activities directed from without against their territorial integrity and political stability."

Article 5, in relevant part, states, "Each party recognizes that an armed attack in the West Pacific Area directed against the territories of either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes."

Contrary to the Government's repeated assertions, Govt. Brief, pp. 3 and 14, nothing in either MDT Article 2 or 5 "recognized Taiwan to be among its [the ROC's] territories" <u>for purposes of deciding who has sovereignty over Taiwan</u>—a widely known open question resulting from the continuing fact that the SFPT has never been modified or followed by another treaty determining who has "ultimate sovereignty" over Taiwan. Needless to add, if, as the Government erroneously suggests, the MDT was intended to settle the question of Taiwan's sovereignty—a question left open by the SFPT—the MDT surely would have made *some* reference to the SFPT and *expressly* stated that the ROC has sovereignty over Taiwan. For

the Government to suggest otherwise ignores the universally known fact that the question of Taiwan's sovereignty is a question not yet answered—and, needless to add, a question not at issue in this lawsuit.[6]

In the February 8, 1955, "Report on Mutual Defense Treaty with the Republic of China, U.S. Senate, Committee on Foreign Relations (1955)" the Committee stated as follows concerning the "Status of Formosa and the Pescadores":

> China ceded Formosa and the Pescadores to Japan by the 1895 Treaty of Shimonoseki after the Sino-Japanese War. At the Cairo Conference in 1943, President Roosevelt, Prime Minister Churchill, and Generalissimo Chiang Kai-shek agreed that Formosa and the Pescadores "shall be restored to the Republic of China." At the Potsdam Conference this decision was confirmed in the proclamation defining the terms for Japanese surrender, July 26, 1945. **Administrative control** of the island **[BUT NOT SOVEREIGNTY]** was turned over to the Republic of China subsequent to the Japanese surrender in September 1945.
>
> Formosa became the seat of the National Government of the Republic of China in December 1949. By the peace treaty of September 8, 1951, signed with the United States and other powers, Japan renounced "all right, title, and claim to Formosa and the Pescadores." The treaty did not specify the nation to which such right, title, and claim passed. Although the Republic of China was not a signatory to the treaty it and the parties at the conference expressly recognized that it did not dispose finally of

[6] The issue in this lawsuit involves rights arising as a result of the fact that under the SFPT the United States is the "principal occupying Power" over Taiwan.

> Formosa and the Pescadores. The Republic of China concluded a separate peace treaty with Japan on April 28, 1952, "on the same or substantially the same terms" as specified in article 26 of the Japanese treaty.
>
> * * * *
>
> **It is the view of the committee that the coming into force of the present [Mutual Defense] 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.***

(Emphasis added.)

In short, the Government is simply wrong is asserting that the MDT "recognized Taiwan to be among its [the ROC's] territories" for sovereignty purposes. Govt. Brief, pp. 3 and 14. To the contrary, the MDT is **not** to "be construed as affecting or modifying the legal status or sovereignty of the territories to which is applies," including Taiwan—which status remains established by the

still-in-force SFPT, under which the United States remains "the principal occupying Power."

B. This Lawsuit Seeking Declarations Requiring Examination of Appellants' "Status Resulting From Prior Action," Does Not Involve The Political Question Doctrine.

In the recent Supreme Court case of *Boumediene v. Bush*, 128 S.Ct. 2229, 2251-2252 (2008), which reversed *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007)[7], on which the District Court, in part, based its March 18, 2008, Memorandum Opinion (J.A. A-29), the Supreme Court, without any hesitancy under the political question doctrine, interpreted the treaty and lease agreement between the United States and Cuba to held that,

> Guantanamo Bay is not formally part of the United States. . . . And 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, T.S. No. 866], 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].

Similarly, under the SFPT, as a matter of law, the United States is "the principal occupying Power" over Taiwan (as it *de facto* is over Guantanamo Bay)

[7] Both *Boumediene* decisions are cited in the Government's Brief at 18-19.

unless and until it is determined in a later treaty who has "ultimate sovereignty" over Taiwan.

This Court, like the Supreme Court in *Boumediene*, should not hesitate to determine that the political question doctrine does not prohibit the District Court from interpreting the SFPT in order to declare what rights Appellants have under certain United States statutes and the Constitution.

Indeed, in *Rogers v. Sheng*, 280 F.2d 663, 664-665 (D.C. Cir. 1960), this Court held that Taiwan is a "country" for purposes of § 243(a) of the Immigration and Nationality Act of 1952 (dealing with deportation), and, most importantly, that because the "word 'country' as used in § 243(a) is not limited to national sovereignties in the traditional diplomatic sense . . . the possibilities of foreign affairs embarrassment which the District Court feared do not arise. Nor does this construction involve judicial intervention into political matters entrusted to the Executive and Legislative Branches." Consequently, this Court in *Rogers* did nothing more than interpret a United States statute, and determine for Mr. Sheng a "status resulting from prior action"—something the Court held did not "involve judicial intervention into political matters."

The Supreme Court *Boumediene v. Bush*, 128 S.Ct. 2252-2255, further held 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. See *De Lima* v. *Bidwell*, 182 U.S. 1, 21 S. Ct. 743, 45 L. Ed. 1041 (1901); *Dooley* v. *United States*, 182 U.S. 222, 21 S. Ct. 762, 45 L. Ed. 1074 (1901); *Armstrong* v. *United States*, 182 U.S. 243, 21 S. Ct. 827, 45 L. Ed. 1086 (1901); *Downes* v. *Bidwell*, 182 U.S. 244, 21 S. Ct. 770, 45 L. Ed. 1088 (1901); *Hawaii* v. *Mankichi*, 190 U.S. 197, 23 S. Ct. 787, 47 L. Ed. 1016 (1903); *Dorr* v. *United States*, 195 U.S. 138, 24 S. Ct. 808, 49 L. Ed. 128 (1904). The Court held that the Constitution has independent force in these territories, a force not contingent upon actions of legislative grace. . . .

Downes [v. Bidwell, 182 U.S. 244, 21 S.Ct. 770 (1901)] 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.

Just as Japan did following the close of World War II when it entered into the SFPT and ceded Taiwan to the Allied Forces and, importantly, recognized that the United States was "the principal occupying Power" over Taiwan,

> 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.'. . . . 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.[8] And although it recognized, by entering into

[8] Likewise, as alleged in paragraph 4 of the Amended 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**, according to General Order No. 1 issued by General Douglas MacArthur, Supreme Commander for the Allied Powers. [Original Footnote in Amended 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); Lung-chu Chen and W. M. Reisman, *Who Owns Taiwan: A Search for International Title*, 81 Yale L.J. 599, 611, 639 (1972).] **Neither the SFPT nor or any other subsequent legal instrument altered the agency relationship between the principal, the**

> 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. Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.
>
> 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 v. Bush, 128 S.Ct. at 2258-2259 (emphasis added).

Allied Powers led by the United States, and the agent, the ROC, for the purpose of Taiwan's occupation." (Emphasis added.)

As the Court knows, the Supreme Court concluded by holding for the first time that "noncitizens detained by our Government in territory over which another country maintains ***de jure*** sovereignty" have "rights under our Constitution." *Boumediene v. Bush*, 128 S.Ct. at 2262 (emphasis added).

Appellants seek declarations that they too have "rights under our Constitution" resulting from the United States' undisputed status under the SFPT as "the principal occupying Power" over Taiwan, a status set forth in SFPT Article 23(a) (and further confirmed by SFPT Article 4(b) confirming the validity of United States Military Government directives pertaining to Taiwan).[9] The fact that Appellants seek their declarations in a declaratory judgment act—specifically authorized by the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the Administrative Procedure Act §§ 702 and 704, 5 U.S.C. §§ 702 and 704, and the Immigration and Nationality Act § 360, 8 U.S.C. § 1503—and that the noncitizen prisoners at Guantanamo Bay sought a declaration of their Constitutional rights

[9] In *Madsen v. Kinsella*, 343 U.S. 341, 348, n. 13 (1952), the Supreme Court on the nature of military government, stated (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*, p. 800 (2d ed. 1920 reprint)), "Military 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 . . . . "

through a *habeas corpus* action—does not justify a dismissal of the Amended Complaint on the basis of the political question doctrine.

Importantly, in *Boumediene v. Bush, id*., the Supreme Court quoted *Hamdan v. Rumsfeld*, 548 U.S. [557] at 585, n. 16, 126 S. Ct. 2749, 165 L. Ed. 2d 723 ("'**[A]bstention is not appropriate in cases . . . in which the legal challenge turn[s] on the status of persons as to whom the military asserted its power'**" (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975)))" (emphasis added)—a case describing precisely the case at bar in which Appellants' seek a declaration of their rights resulting from the fact that the United States is "the principal occupying Power" over Taiwan.

As previously stated, the Supreme Court held in *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) (cited in Govt. Brief, pp. 13, 18), that "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 *Japan Whaling Assoc. v. American Cetacean Soc*., 478 U.S. 221, 230 (1986) (cited in Govt. Brief, p. 17), the Supreme Court noted, "As *Baker* [*v. Carr*, 369 U.S. 186 (1969)] 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.)

This is precisely what the Ninth Circuit did in *Wang v. Masaitis*, 416 F.3d 992 (9th Cir. 2005). In *Wang*, the issue was whether the extradition treaty with Hong Kong was Constitutional considering that Hong Kong was a non-sovereign. *Wang*, 416 F.3d 992. Just as in this case, in *Wang*, the United States argued that the Constitutionality of the extradition treaty was a nonjusticiable political question because it arguably required the court to decide the status of Hong Kong. The Ninth Circuit disagreed and found that it "need not decide the status of Hong Kong's sovereignty." *Id*. at 994. "Rather, the constitutional issue that Wang has raised is whether the term 'treaty' in the Treaty Clause encompasses agreements with non-sovereigns, such as Hong-Kong -- and that question is clearly justiciable under *Baker v. Carr . . . .* " *Id.* Having considered the history of the transfer of sovereignty over Hong Kong from the United Kingdom to China in 1997, the legal instruments implementing this transfer, and the policy declarations regarding this transfer, the Ninth Circuit concluded, "China's sovereignty over Hong Kong (and

the corollary Hong Kong's subsovereign status) has been resolved by the executive branch, and we do not question that judgment." *Id*. at 995. "However, this court may examine the resulting status of Hong Kong, and decide whether the Treaty Clause applies to Hong Kong as a constitutionally recognizable treaty party." *Id*.

Likewise, in *Ungar v. PLO*, 402 F.3d 274 (1st Cir. 2005), the First Circuit examined whether or not the Palestinian Liberation Organization ("PLO") was a sovereign state immune from suit under the Anti-Terrorist Act ("ATA") and the Foreign Sovereign Immunity Act ("FSIA"). *Ungar*, 402 F.3d at 279. The defendant PLO argued that the First Circuit was precluded from adjudicating the case because it presented a nonjusticiable political question. The First Circuit found "this argument unconvincing," that the plaintiffs "easily clear the six Baker hurdles," and turned to the merits of the case. *Id*. at 279, 280, 282. The First Circuit then considered the relevant historical background and the PLO's "status resulting from prior action" (*Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948)): the United Kingdom's mandate over Palestine following World War I; the United Nation's plan to create two independent states (one Jewish, the other Arab) within the mandate territory; the withdrawal of the British; the ensuing Arab-Israeli conflicts; the United Nations' resolutions concerning Palestine's self-determination and sovereignty and granting the PLO observer status at the United Nations; the PLO's declaration of independence of Palestine in 1988; the 1994

agreement between Israel and PLO; and the United Nations' enhancement of the PLO's observer status. *Id*. at 284-289. Applying the international law definitions of statehood codified in the Restatement (Third) of Foreign Relations and the Montevideo Convention of 1933, the First Circuit held that the PLO failed to meet the burden of demonstrating "statehood" and was not entitled to foreign sovereign immunity. *Id*. at 292, 294.

In *United States v. Shiroma*, 123 F. Supp. 145, 148 (D. Hi. 1954) (cited in Govt. Brief, p. 18), the District Court was faced with the question of, "whether the United States acquired traditional '*de jure* sovereignty' over Okinawa under the Treaty of Peace [with Japan—the SFPT]." In that case, the Court determined that defendant Shiroma was "not a national of the United States" because Japan had "de jure sovereignty," *id*. at 149, over Okinawa under the SFPT—again, clearly determining the "status resulting from prior action," (*Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948)).

C. Appellants' Declaratory Judgment Is Justiciable Because They Are Entitled To A Declaratory Judgment Under Both The Declaratory Judgment Act And The Administrative Procedures Act.

The Government erroneously argues (Govt. Brief, p. 16-17) that Appellants' declaratory judgment action is not "justiciable under the Immigration and Nationality Act" because, the Government asserts, the Act (8 U.S.C. § 1503) limits

"declarations of nationality 'to any person who is within the United States.'" However, persons outside the United States[10] who have been denied rights and privileges as nationals are not confined by the procedures described in 8 U.S.C. § 1503(b) (applicable to "any person who is not within the United States"). *Rusk v. Cort*, 369 U.S. 367, 379, 82 S. Ct. 787, 7 L. Ed. 2d 809 (1962) (**A person outside the United States who has been denied a right of citizenship is not confined to the procedures prescribed by INA § 360(b) and (c) [8 U.S.C. § 1503(b) and (c)] and may seek relief under both the Administrative Procedure Act and the Declaratory Judgment Act**). *See also Cort v. Herter*, 187 F. Supp. 683, 685 (D.D.C. 1960), *aff'd by Rusk v. Cort*, 369 U.S. 367 (1962) ("Section 360 [8 U.S.C. § 1503] may well be thought to provide an exclusive remedy for a person outside of the United States who has sought and obtained a certificate of identity and who has applied for admission to the United States at a port of entry. But we need not determine that question. The language of the section shows no intention to provide an exclusive remedy, or any remedy, for persons outside the United States who have not adopted the procedures outlined in subsections (b) and (c). Neither does the section indicate that such persons are to be denied existing remedies. The

[10] For the purpose of 8 U.S.C. § 1503, the "United States" "means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. § 1101(a)(38).

legislative history of the section does not require such a construction. *Cf. Frank v. Rogers*, 102 U.S. App.D.C. 367, 252 F.2d 889 [(2d Cir. 1958)]; *Tom Mung Ngow v. Dulles*, 122 F.Supp. 709 [(D.D.C. 1954)]. Subsections (b) and (c) were designed to regulate, not to require, the use of certificates of identity.")

With regard to the APA, APA § 702, 5 U.S.C. § 702 confers a right of action on persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" and entitles such persons to "judicial review thereof." The AIT is an "agency" of the United States. *See Wood v. American Institute of Taiwan*, 351 U.S. App. D.C. 14, 286 F.3d 526 (D.C. Cir. 2002) (holding that the AIT is an agency or instrumentality of the United States government and enjoys sovereign immunity for the purpose of the False Claims Act). The AIT's refusal to accept Plaintiffs passport applications constituted an "agency action," which is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551 (13) (2006). Plaintiffs suffered a "legal wrong" and were "adversely affected or aggrieved" by the AIT's refusal to accept their passport applications, as alleged in the Amended Complaint at paragraph 77.[11]

[11] Amended Complaint paragraph 77, "The AIT refused to accept and process the passport applications, without providing an explanation setting forth the reasons for the refusal." *See also* Amended Complaint paragraphs 71-76, and 78-81.

In sum, the Government's argument that Appellants' declaratory judgment lawsuit is nonjusticiable fails as the Declaratory Judgment Act and the Administrative Procedures Act specifically provide jurisdiction for Appellants' lawsuit—and INA § 360(b) and (c) [8 U.S.C. § 1503(b) and (c)] do not exclude seeking a declaratory judgment under either such previously available Acts.

D. The Government's Request To "Dismiss" Appellants' Complaint In This Appeal Is Erroneous. Moreover, Determining Appellants' Status As Noncitizen Nationals Is Not A Political Question.

In the event the Court correctly determines that the political question doctrine is inapplicable to this case, the Government seeks "*dismissal*. . . because plaintiffs have failed to state a claim on which relief can be granted. Plaintiffs claim to be non-citizen nationals by virtue of their birth in Taiwan. United States law, however, specifically provides only persons born in American Samoa or Swains Island are deemed non-citizen nationals based on the location of their birth." Govt. Brief, p. 10.

The Government's request to dismiss the Amended Complaint for "failure to state a claim on which relief can be granted" (obviously pursuant to Federal Rule of Civil Procedure 12(b)(6)) is totally inappropriate at this stage because the District Court *sub silentio* denied the Government's 12(b)(6) motion, and the Government did not file a cross-appeal seeking reversal of the District Court's

denial of its 12(b)(6) motion to dismiss. *See, e.g., Haddon v. Walters*, 43 F.3d 1488, 1491 (D.C. Cir. 1995) (cited in Govt. Brief, p. 19) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)) ("'Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. . . . Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.'").

The Government's Brief (at p. 10) seeking "dismissal" (an odd request given that this is the Court of Appeals) goes to the substance of just one of the eight declarations sought in Appellants' Amended Complaint (J.A. at A-19-20), and never addresses the adequacy of what was alleged by Appellants in their Amended Complaint. As the Supreme Court made abundantly clear in *Boumediene v. Bush*, noncitizens can "have rights under our Constitution." 128 S.Ct. at 2262 (emphasis added).

Moreover, courts are charged with making determinations of nationality and, as mentioned above, persons outside the United States[12] who have been denied rights and privileges as nationals are not confined by the procedures described in 8 U.S.C. § 1503(b) (applicable to "any person who is not within the United States"). *Rusk v. Cort*, 369 U.S. 367, 379, 82 S. Ct. 787, 7 L. Ed. 2d 809 (1962).[13]

Needless to add, discussed below are cases cited in the Government's Brief, the principals of which, in light of the Supreme Court's decision in *Boumediene v. Bush*, lend support for the substantive declarations sought by Appellants.

In *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 968 (9th Cir. 2003) (cited in Govt. Brief, p. 20), the Ninth Circuit noted that, "Other courts of appeals have also characterized non-citizen nationals as those born in territories of the United States. The Second Circuit has explained:

> **The terms 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

[12] For the purpose of 8 U.S.C. § 1503, the "United States" "means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. § 1101(a)(38).

[13] *See also, supra, Cort v. Herter*, 187 F. Supp. 683, 685 (D.D.C. 1960), *aff'd by Rusk v. Cort*, 369 U.S. 367 (1962).

> to the national community and were not regarded as aliens.

Oliver v. INS, 517 F.2d 426, 428 n.3 (2d Cir. 1975) (per curiam) [emphasis added].

In *Marquez-Almanzar v. INS*, 418 F.3d 210, 218 (2d Cir. 2005) (cited in Govt. Brief, p. 20), the Court noted that,

> **The term [national] . . . was originally intended to account for 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, Guan, 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. *See* 7 Charles Gordon *et al*., *Immigration Law and Procedure*, Section 91.01[3][b] (2005); *see also Rabang v. Boyd*, 353 U.S. 427, 429-30, 1 L. Ed. 2d 956, 77 S. Ct. 985 (1957) ('The Filipinos, as nationals, owed an obligation of permanent allegiance to this country. . . . In the [Philippines Independence Act of 1934], the Congress granted full and complete independence to [the Philippines], and necessarily severed the obligation of permanent allegiance owed by Filipinos who were nationals of the United States.'). . . .
>
> **In the early years of the twentieth century, the distinction between citizens and noncitizen nationals was an important one. Many of our insular possessions were not regarded as fully incorporated into the United States, and their inhabitants were not accorded full rights of citizenship. With the grant of independence to the Philippines, and the gradual extension of citizenship rights to the indigenous inhabitants of other insular possessions, the**

distinction between citizenship and noncitizen nationality has become less significant.

(Emphasis added.)

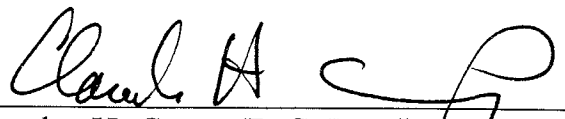
And whether Appellants "owe permanent allegiance to the United States" for purposes of determining whether or not they qualify as nationals is a question to be decided by federal courts. *Fernandez v. Keisler*, 502 F.3d 337, 348 (4th Cir. 2007) (cited in Govt. Brief, p. 20) and *Dragenice v. Gonzales*, 470 F.3d 183, 187 (4th Cir. 2006) (per curiam) ("Congress provided no explicit guidance . . . as to the circumstances under which a person 'owes permanent allegiance to the United States.'") Importantly, "The Immigration and Nationality Act explicitly directs that a 'court shall decide the nationality claim.' 8 U.S.C.A. § 1252(b)(5)(A) (West 2005)." *Fernandez v. Keisler* (Motz, J. dissenting), 502 F.3d at 353.

For Appellants who were declared by the District Court to "have essentially been persons without a state for almost 60 years," J.A. at A-33, a declaration of whether or not they are noncitizen nationals, and whether or not they have fundamental Constitutional rights—as a result of the fact that under the SFPT the United States is "the principal occupying Power" over Taiwan—is and remains "significant" to them.

CONCLUSION

For the foregoing reasons, Appellants pray that this Court of Appeals (1) reverse the District Court's March 18, 2008, Memorandum Opinion and Order erroneously granting the Defendant's Motion to Dismiss the Amended Complaint, and (2) deny the Government's erroneous request to "dismiss" Appellants' Amended Complaint for failure to state a claim on which relief can be granted.

Respectfully submitted,



Charles H. Camp (D.C. Bar # 413575)
Law Offices of Charles H. Camp
1319 18TH Street, N.W.
Washington, D.C. 20036
Telephone: (202) 457-7786
Facsimile: (202) 457-7788
Email: ccamp@charlescamplaw.com

COUNSEL FOR APPELLANTS

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1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Respectfully submitted,

Charles H. Camp (D.C. Bar # 413575)
Law Offices of Charles H. Camp
1319 18TH Street, N.W.
Washington, D.C. 20036
Telephone: (202) 457-7786
Facsimile: (202) 457-7788
Email: ccamp@charlescamplaw.com

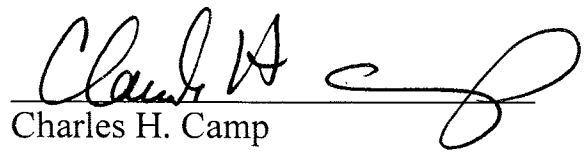
Counsel for Appellants

Date: December 17, 2008

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply of Appellant were served upon the following counsel for Appellee via First Class pre-paid U.S. Mail this 17th day of December 2008:

Melissa Nicole Patterson, Esquire
Civil Division, Appellate Staff
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530



Charles H. Camp