

ORAL ARGUMENT NOT YET SCHEDULED

**08-5078**

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UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA

NOV - 3 2008

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**United States Court of Appeals**

*for the*

**District of Columbia Circuit**

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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**

---

**BRIEF FOR APPELLANTS**

---

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*Counsel for Appellants*

November 3, 2008

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November 3, 2008

## **CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES**

Pursuant to Circuit Rules 12(c) and 28(a)(1)(A), undersigned counsel for Appellants hereby certifies the following:

### **I. PARTIES AND AMICI**

#### **Plaintiffs In District Court Action:**

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  
The Taiwan Nation Party

#### **Defendant In The District Court Action:**

United States of America

#### **Appellants In Court Of Appeals:**

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  
The Taiwan Nation Party

**Appellee In Court Of Appeals:**

United States of America

**II. RULINGS UNDER REVIEW**

March 18, 2008, Memorandum Opinion and Order by United States District Court for the District of Columbia Judge Rosemary M. Collyer. [District Court docket numbers 24 and 25.] The March 18, 2008, Memorandum Opinion and Order may be found at 2008 U.S. Dist. LEXIS 20444, but otherwise are unpublished.

**III. Related Cases**

The decision on review has not previously been before this Court or any other court. There are no related cases.

Respectfully submitted,

Date: November 3, 2008



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## STATEMENT OF JURISDICTION

The United States District Court for the District of Columbia (the “District Court”) had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331. The District Court also had jurisdiction pursuant to the Administrative Procedure Act (“APA”) §§ 702 and 704, 5 U.S.C. §§ 702 and 704, and jurisdiction as to the individual Appellants pursuant to the Immigration and Nationality Act (“INA”) § 360, 8 U.S.C. § 1503. The District Court was authorized to award declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

According to the INA § 360, 8 U.S.C. § 1503, “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 not a national of the United States,” has a cause of action for declaration of nationality. Between October 2005 and April 2006, Appellants made a number of attempts to apply for United States passports through the American Institute in Taiwan (“AIT,” the United States’ *de facto* embassy on Taiwan).<sup>1</sup> The AIT never responded to Appellants, and denied them physical entry to its premises.<sup>2</sup>

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<sup>1</sup> See Taiwan Relations Act (“TRA”), 22 U.S.C. § 3305; and *Wood ex rel. United States v. Am. Inst. in Taiwan*, 286 F.3d 526, 531-34 (D.C. Cir. 2002).

<sup>2</sup> See Amended Complaint filed March 20, 2007 (“Amended Complaint”), paras. 74-80. (J.A. at A-18.)

On March 18, 2008, the District Court issued an Order and Memorandum Opinion (Joint Appendix “J.A.” at A-23-37) granting the Defendant’s Motion to Dismiss the Amended Complaint. On March 31, 2008, Appellants timely filed a notice of appeal in the District Court. (J.A. at A-39-40.)

This Court of Appeals has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

### **STATEMENT OF THE ISSUES**

1. Whether the District Court erred when it erroneously determined that the political question doctrine barred consideration of Appellants’ Amended Complaint seeking a declaratory judgment specifically authorized by the APA, the INA, and the Declaratory Judgment Act?

2. Whether the District Court erred when it erroneously determined that the political question doctrine barred it from determining whether Appellants have specific rights under United States statutes and the Constitution?

3. Whether the District Court erred when it erroneously determined that the political question doctrine barred it from interpreting the San Francisco Peace Treaty (“SFPT”) *to determine its legal impact upon Appellants?*

4. Whether the District Court erred when it refused, on the basis of the political question doctrine, to determine the *specific legal consequences to Appellants* of the SFPT’s designation of the United States as “the principal

occupying Power” of Formosa (now known as Taiwan)—a legal status that has never been modified by any Treaty?

5. Whether the District Court erred when it refused, on the basis of the political question doctrine, to determine *the specific legal consequences to Appellants* (not to Taiwan) of the fact that neither the Taiwan Relations Act of 1979 (“TRA”), nor any other legal instrument has affected the legal status of Taiwan for the purposes of the legal role and functions of the United States vis-à-vis Taiwan as set forth in the SFPT?

6. Whether the District Court erred when it failed to determine, on the basis of the political question doctrine, that the specific declarations sought by Appellants could be issued pursuant to the plain wording of United States statutes, the Constitution, and the SFPT and other relevant treaties ratified by the United States and in force, as well as pursuant to express United States policy statements and settled jurisprudence—none of which require a political or policy determination appropriately left to the non-Judicial branches of Government?

## STATEMENT OF THE CASE

This case upon appeal concerns the District Court's erroneous dismissal of Appellants' Amended Complaint on the basis of the political question doctrine.

Appellants requested the District Court to declare that Appellants enjoy basic rights under the United States' laws, including the Constitution. Specifically, Appellants' Amended Complaint (at J.A. at A-19-20) seeks the following declarations:

- (a) By refusing to accept and process individual Plaintiffs' passport applications, the AIT wrongfully denied individual Plaintiffs' United States [non-citizen] nationality status and wrongfully denied their rights and privileges as United States [non-citizen] nationals.
- (b) Individual Plaintiffs are United States [non-citizen] nationals and have rights and privileges as such 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.

The District Court wrongly determined that it had been asked by Appellants to make a “policy choice on the sovereignty of Taiwan.”<sup>3</sup> As the above quotation from the Amended Complaint makes clear, Appellants did not ask for such a policy determination, nor did their claims require such. Indeed, Appellants’ case is an effort to determine *their personal legal rights* under the *status quo* existing under the current framework of United States law, not to settle Taiwan’s ultimate political status.

Ironically, in dismissing Appellant’s Amended Complaint, the District Court recognized that the Taiwanese, including the individual Appellants, have “essentially been persons without a state for almost 60 years”—a correct conclusion reached by the District Court upon an examination of Taiwan’s indisputable legal and political situation.<sup>4</sup> Appellants’ Amended Complaint merely seeks declarations from the District Court of this same ilk based upon that same indisputable situation.

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<sup>3</sup> Memorandum Opinion by United States District Judge Rosemary M. Collyer, entered March 18, 2008 (“Memorandum Opinion”) at 12. (J.A. at A-34.)

<sup>4</sup> Memorandum Opinion at 11. (J.A. at A-33.)

## SUMMARY OF ARGUMENT

The political question doctrine is not intended to exclude “political cases” from judicial attention, but instead excludes only “political questions” that require the court to move beyond the application of law and to engage in policy choices appropriately left to the non-judicial branches of the Government. The doctrine is narrowly tailored, requiring a “discriminating analysis” of the “particular question” at issue. The District Court erred by failing to conduct such a stringent analysis, ignoring the particular declarations sought by the Amended Complaint, and incorrectly making a blanket determination that the political question doctrine precluded the Court from making any declaration of the legal rights sought.

The District Court glossed over Appellants’ Amended Complaint and sought to avoid having to make any of the specific declarations—all specifically authorized by the APA §§ 702 and 704, 5 U.S.C. §§ 702 and 704, the INA § 360, 8 U.S.C. § 1503, 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 “quintessential political question.”<sup>5</sup> In doing so, the District Court 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.

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<sup>5</sup> *Id.*, p. 7. (J.A. at A-29.)

Most importantly, the District Court totally ignored the indisputable fact that under the SFPT,<sup>6</sup> the United States is the “principal occupying Power” over Taiwan—a status, as a matter of law, still true today—and refused to determine *the legal effects of that indisputable legal fact* and declare whether the SFPT gives Appellants the specific legal rights sought to be declared in the Amended Complaint.

In sum, the declarations sought by Appellants are based upon the indisputable fact that the United States is, as a matter of law under the SFPT, the “principal occupying Power” over Taiwan. The District Court erroneously believed that it was required to ignore this legal fact and to determine the ultimate sovereignty of Taiwan before it could consider making or denying the declarations sought in the Amended Complaint.

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<sup>6</sup> The San Francisco Peace Treaty (“SFPT”), 3 UST 3169, TIAS 2490, 136 UNTS 45, 1951 U.S.T. Lexis 516 (signed September 8, 1951, advice by Senate on April 15, 1952, ratified, proclaimed and entry into force on April 28, 1952). (J.A. at A-42-89.)

## STATEMENT OF FACTS

**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 Laws, Including The TRA.**

On April 28, 1952, the SFPT, signed on September 8, 1951, entered into force for the United States.<sup>7</sup> The treaty specifically required United States’ ratification to enter into force,<sup>8</sup> and is the United States’ “supreme Law of the Land.” U.S. CONST., art. II, sect. 2, and at art. VI. The SFPT remains in force today.

Under Article 2(b) of the SFPT, Japan renounced all “right, title and claim” to Taiwan, and Article 23(a) simultaneously established the United States as Taiwan’s “principal occupying Power.”

In 1979, following the United States’ recognition of the People’s Republic of China (“PRC”) as the “sole legal Government of China,”<sup>9</sup> the United States enacted the TRA, clarifying that the “absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or

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<sup>7</sup> *Id. See also* MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW (hereinafter “WHITEMAN”), VOL. III, p. 560 (providing President Truman’s proclamation).

<sup>8</sup> SFPT, Art. 23(a). (J.A. at A-51.)

<sup>9</sup> *See* Joint Communiqué by United States and PRC, issued on December 15, 1978, accompanied by President Carter’s Address of December 15, 1978, 79 Department of State Bulletin 25 (1979) (noting that the “Government of the United States of America *acknowledges* the Chinese position that there is but one China and Taiwan is part of China”) (emphasis added) (J.A. at A-362). *See also* the similar language of the Joint Communiqué by United States and PRC, issued at Shanghai on February 27, 1972, 66 Department of State Bulletin 435, 437-38 (1972) (J.A. at A-357-360).

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” (emphasis added).<sup>10</sup>

Section 2(b) of the TRA established that: (1) diplomatic relations with the 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.”<sup>11</sup> Section 4(a) provided that United States law would continue to apply “with respect to Taiwan” as it existed “prior to January 1, 1979.”<sup>12</sup> This United States law included “any statute, rule, regulation, ordinance, order, or judicial rule or decision of the United States or any political subdivision thereof.”<sup>13</sup> Section 4(b)(6) of the TRA stated that a national-quota system “may” be applied to Taiwan under the INA.<sup>14</sup>

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<sup>10</sup> Taiwan Relations Act of 1979 (“TRA”), 22 U.S.C. §§ 3301-3316 (2006), § 3303(b)(3)(A).

<sup>11</sup> TRA, Sect. 2(b) (“Policy”), 22 U.S.C. § 3301(b).

<sup>12</sup> TRA, Sect. 4(a), 22 U.S.C. § 3303(a).

<sup>13</sup> TRA, Sect. 15(1), 22 U.S.C. § 3314(1). *See also Dupont Circle Citizens Assoc. v. D.C. Board of Zoning Adjustment*, 530 A.2d 1163, 1170 (D.C. Cir. 1987).

<sup>14</sup> TRA, Sect. 4(b)(6), 22 U.S.C. § 3303(b)(6).

Section 2(c) of the TRA also reaffirmed that “[n]othing contained in this [Act] shall contravene” the United States’ interest in preserving and enhancing the human rights of “all the . . . inhabitants of Taiwan.”<sup>15</sup> In this regard, the International Covenant on Civil and Political Rights,<sup>16</sup> ratified by the United States in 1992,<sup>17</sup> established at Article 24(3) that “[e]very child has the right to acquire a nationality,” and at Article 12(2) that “[e]veryone shall be free to leave any country, including his own.”<sup>18</sup>

**B. The SFPT Established The United States As The “Principal Occupying Power” Over Taiwan—In Essence Determining The United States’ Present *De Jure* Sovereignty Over Taiwan For The Purposes Of United States Law.**

While not an issue on which a declaration is sought by Appellants—it is notable that in the SFPT, Taiwan was not abandoned and rendered *terra nullius* (“no man’s land”) available to any State for annexation.<sup>19</sup> Instead, the SFPT named

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<sup>15</sup> TRA, Sect. 2(c), § 3301(c).

<sup>16</sup> International Covenant on Civil and Political Rights (“ICCPR”), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. *See also* PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW (7<sup>TH</sup> ED., 1997) (hereinafter “AKEHURST”), p. 136, quoting the *Genocide Case*, International Court of Justice Advisory Opinion, ICJ Reports 1951, 15 at 29 (establishing that a State Party to a treaty may enter reservations that are compatible with the “object and purpose” of the treaty, despite objections thereto).

<sup>17</sup> United States reservations, declarations and understandings, ICCPR, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

<sup>18</sup> *See also* the United States Army Manual, FM 27-10 (“Army Manual”), §§ 274, 381 (incorporating Geneva Convention articles allowing civilians to leave occupied territory).

<sup>19</sup> *See* AKEHURST, p. 148 (defining *terra nullius*). *See also* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2D ED., 2006) (hereinafter “CRAWFORD”), p. 209 (finding Taiwan not to be *terra nullius* on the basis of the island’s “effective, organized government”).

the United States the “principal occupying Power.” The issue of Taiwan’s *de jure* sovereignty for Appellants’ purposes under United States law is thus straightforward – which state today (as opposed to tomorrow and permanently) has “the better right to possess familiar in the common law”?<sup>20</sup>

In this regard, the United States has (1) invoked United Nations (“U.N.”) Charter Article 73 concerning non-self-governing territories when it was the sole nation prepared to act as governor of Taiwan (as discussed further below); (2) accepted “principal occupying Power” status under a treaty of peace, which can transfer title;<sup>21</sup> (3) envisaged in its 1951 Note to the SFPT Convention Delegates (discussed below) that its role could last until some “future, unpredictable date”; (4) invoked the right to individual self-defense and taken on the role of direct counterpart to the PRC with respect to Taiwan;<sup>22</sup> (5) demonstrated untrammelled military use and domination of Taiwan (as discussed below); (6) gone to the brink

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<sup>20</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (6<sup>TH</sup> ED., 2003) (hereinafter “BROWNLIE”), p. 119 (internal citations omitted). *See also* AKEHURST, p. 149, quoting the *Eastern Greenland Case* (Denmark v. Norway, 1933), Permanent Court of International Justice, series A/B, no. 53, at 46 (observing that in many territorial disputes, “the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other State could not make out a superior claim”).

<sup>21</sup> *See* the Army Manual, § 353 (defining “subjugation or conquest” as “impl[ying] a transfer of sovereignty, which generally takes the form of annexation and is *normally effected by a treaty of peace*”) (emphasis added).

<sup>22</sup> Statement of President Eisenhower, H. Doc. 76, 84<sup>th</sup> Cong., 1<sup>st</sup> sess., XXXII Dep’t St. Bull., No. 815 (February 7, 1955), pp. 211-13, and S. Rep. 13, 84<sup>th</sup> Cong., 1<sup>st</sup> sess. (January 26, 1955), WHITEMAN, VOL. V, pp. 1123-27; Department of State announcement (January 21, 1956), XXXIV Dep’t St. Bull., No. 866 (January 30, 1956), pp. 164-67, and Public statement of the PRC (January 18, 1956), WHITEMAN, VOL. V, pp. 1129-30.

of war to protect its rights with respect to Taiwan;<sup>23</sup> (7) provided enormous, full-spectrum support to an economically dependent Taiwan and militarily and politically dependent Republic of China (“ROC”),<sup>24</sup> which recognized that Taiwan did not legally form part of its sovereign territory;<sup>25</sup> and (8) dictated the terms of the island’s disposition.

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<sup>23</sup> Joint Resolution of Congress (January 29, 1955), WHITEMAN, VOL. V, p. 1119. The contested positions included the islands of Quemoy and Matsu; H. Rept. 4, 84<sup>th</sup> Cong., 1<sup>st</sup> sess. (January 24, 1955), p. 4, WHITEMAN, VOL. V, p. 1124.

<sup>24</sup> See Budget Comparisons (All Governments on Taiwan): 1950-1952 (February 18, 1952) (J.A. at A-209); Letter from ROC Prime Minister (and Concurrently Chairman of the Council for United States Aid) Chen Cheng to Dr. Hubert G. Schenck, Chief of Mission, Mutual Security Agency (MSA), Mission to China, Taipei, Taiwan (November 30, 1952) (J.A. at A-216-217); Four-Year Plan for Attainment of Economic Independence by the Government of the Republic of China (November 1952) (J.A. at A-219-278); “CA” Section, U.S. Department of State, Memorandum on Call of General Yu Ta-wei November 25: Probable Subject of Conversation (November 25, 1953) (J.A. at A-280-281); “FE” Section, U.S. Department of State, Memorandum on FOA Proposal for Economic Advisory Group for Formosa (February 4, 1954) (J.A. at A-283-284); Letter from ROC Ambassador Koo to Secretary of State Dulles (November 12, 1954) (J.A. at A-286-291); “FE” Section, U.S. Department of State, Tables on Mutual Security Programs for Formosa: FY 1950 through FY 1955 (April 20, 1955) (J.A. at A-296-297); Memorandum from Commander in Chief Pacific to Secretary of Defense (ISA) on FY 1956 Direct Forces Support Refined Program, Formosa (October 14, 1955) (J.A. at A-322-355).

<sup>25</sup> “FE” Section, U.S. Department of State, Memorandum on the Juridical Status of Formosa and the Pescadores (January 27, 1955). (J.A. at A-293-294.)

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

Appellants seek the declarations set forth in the Amended Complaint because they correctly believe they enjoy certain limited, yet basic rights under the Constitution, rights which United States government bodies are required to respect. These rights include life, liberty, property (*see Downes v. Bidwell*, 182 U.S. 244 at 283 (1901); *Boumediene v. Bush*, 128 S. Ct. 2229, 2254-2258 (2008) (internal citations omitted)) and due process.

The Supreme Court recognized over a century ago, and has very recently again acknowledged, 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”); *id.*, p. 2259 (holding that the Constitution cannot be “contracted away” even where *de jure* sovereignty has been disclaimed, if *de facto* sovereignty remains).

In one of the “Insular Cases” of the early 20<sup>th</sup> 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*, 182 U.S. at 283 (J. White, concurring) (emphasis added). This wording contrasts strongly with that of the *Dred Scott* case, which observed that Africans were deemed by “every European nation” to be “so far inferior that they had *no*

*rights which the white man was bound to respect.” Scott v. Sanford, 60 U.S. 393, 407 (1856).(Emphasis added.)*

**D. 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 which is 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. This underlying consistency is based upon and reinforces the fundamental legal relationship established by the SFPT.

Taiwan was annexed by the Qing Dynasty of China in 1683, then became a separate province in 1887<sup>26</sup> and was ceded to Japan in 1895 at the end of the Sino-Japanese War.<sup>27</sup> 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 purpose of these States that Taiwan would be restored to China (*i.e.* the ROC).<sup>28</sup>

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<sup>26</sup> RUDOLF BERNHARDT, ENCYCLOPEDIA OF INTERNATIONAL LAW, VOL. IV (2000), p. 753.

<sup>27</sup> Treaty of Peace Between China and Japan, 181 Consol. T.S. 217 (signed April 17, 1895, entry into force May 8, 1895), Art. II, WHITEMAN, VOL. III, pp. 565-66.

<sup>28</sup> Cairo Declaration (United States, ROC, United Kingdom) (1943), WHITEMAN, VOL. I, p. 272.

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”<sup>29</sup> and on September 2, 1945, Japan complied.

Prior to the signing of the SFPT, the United States provided indispensable assistance to the ROC in occupying Taiwan (which was still *de jure* Japanese territory). In early 1950, after the ROC’s retreat to the island, the United States publicly expressed a position of neutrality on Formosa/Taiwan. During these days just prior to and after the start of the Korean War,<sup>30</sup> President Truman said that: (1) his ordering of the 7<sup>th</sup> Fleet to Taiwan was an “impartial neutralizing action addressed” to both the ROC and PRC in order to “keep the peace”;<sup>31</sup> (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”;<sup>32</sup> (3) Taiwan’s “legal status cannot be fixed until there is international action to determine its future;”<sup>33</sup> and (4)

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<sup>29</sup> WHITEMAN, VOL. III, p. 592. *See also* Letter from President Truman to Ambassador Warren Austin (August 27, 1950) (“Truman Letter”). (J.A. at A-133.)

<sup>30</sup> Statement of President Truman, (January 5, 1950, prior to the Korean War); WHITEMAN, VOL. V, p. 1120.

<sup>31</sup> Truman Letter (J.A. at A-133); Memorandum on change in 7th Fleet directive, (January 26, 1953); WHITEMAN, VOL. V, p. 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, pp. 889, 892, WHITEMAN, VOL. V, p. 1115 (stating that Taiwan was an “important flank position” in the Korean War).

<sup>32</sup> Truman Letter (J.A. at A-133).

<sup>33</sup> *Id.*

the United States had not “encroached on the territory of China.”<sup>34</sup> Nevertheless, on October 20, 1950, Mr. Dulles noted that if the United States had “already regarded Taiwan as purely Chinese territory,” it “would lose her grounds for dispatching [*sic*] the Seventh Fleet to protect Taiwan.”<sup>35</sup>

In fact, these public expressions of neutrality did not accurately reflect the extent of the United States’ role on Taiwan. In reality, the United States was providing direct and large-scale military aid to the ROC behind the scenes, and had done so since 1948.<sup>36</sup> The United States also considered the 7<sup>th</sup> Fleet’s deployment around Taiwan to be indefinite.<sup>37</sup>

Despite public and private statements of neutrality to its allies and the rest of the world, the United States saw Taiwan as critical to its interests in the Pacific and deeply feared the strategic implications of a Communist takeover of Taiwan.<sup>38</sup> The United States also feared that if its aid to Taiwan were discovered, the ROC would

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<sup>34</sup> *Id.*

<sup>35</sup> CRAWFORD, p. 211, fn. 63, citing conversation between Mr. Dulles and ROC Ambassador Koo (October 20, 1950).

<sup>36</sup> See Memorandum on Program Analysis: MSA [“Mutual Security Agency”] Formosa (August 22, 1952) (J.A. at A-211-214). Such aid had been going on since at least 1948. See Memorandum of conversation, Messrs. Deane and Clubb (February 9, 1951). (J.A. at A-136-139.)

<sup>37</sup> Memorandum on Policy Assumptions and Questions for Meeting with ECA Regarding Economic Aid Program for Formosa: Fiscal 1952 (March 2, 1951). (J.A. at A-163-164.)

<sup>38</sup> Memorandum of conversation, General MacArthur and Messrs. Sebald and Bishop (February 16, 1949). (J.A. at A-112-115.)

be perceived as a “puppet” regime.<sup>39</sup> A February 1951 internal policy paper stated that “[t]here has ... emerged a contradiction between what we are doing, on one hand, and what we are permitting our friends and allies to think we are willing to do [to keep Taiwan from the PRC], on the other. This apparent contradiction, which holds evident potential dangers to us, appears to arise from not having yet made a clear-cut decision respecting our basic policy towards Formosa.”<sup>40</sup>

The United States in 1950-51 continued with actions that asserted dominance over Taiwan, including: (1) making unannounced military overflights which led to an ROC request for a liaison group;<sup>41</sup> (2) denying ROC requests for permission to conduct air bombardments from, and independent high sea ship searches around, Taiwan;<sup>42</sup> and (3) undertaking extensive military training, reorganizing and propaganda assistance to the ROC.<sup>43</sup>

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<sup>39</sup> Memorandum on letter from Dr. Frank Meleney respecting China (March 23, 1950). (J.A., A-117-118.)

<sup>40</sup> “CA” Section, U.S. Department of State, General Comments on Draft of Far Eastern Policy Paper (February 19, 1951), p. 1. (J.A. at A-141.)

<sup>41</sup> Memorandum of conversation, ROC Ambassador Koo and Messrs. Merchant and Freeman, (June 29, 1950). (J.A. at A-121-124.)

<sup>42</sup> Memorandum of conversation, Secretary of State Dean Rusk, Mr. Freeman and ROC Ambassador Koo (July 25, 1950), p. 2. (J.A. at A-126-131.)

<sup>43</sup> 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. (J.A. at A-147-161). *See also* American Embassy, Taipei, Taiwan, “Taiwan” (Country Report), p. 14 (May 10, 1955) (J.A. at A-299-320).

In the spring of 1951, as the Korean War raged, the United States Government internally revisited its stance toward Taiwan.<sup>44</sup> One official saw the denial of Taiwan to the PRC as the “*sine qua non* for developing it as a military and political asset” since “[n]either an independent Formosa nor Formosa under a [U.N.] trusteeship could successfully defend itself against mainland China.”<sup>45</sup> The same official asserted that “[i]f we *hold* Formosa simply with a view to supporting indefinitely a refugee government there, we shall from a political standpoint have saddled ourselves with a liability; if we *hold* Formosa with a clear view to using it as a means toward accomplishing our purposes with respect to mainland China, we may make of it a major asset” (emphasis added).<sup>46</sup> Another official stated that “the U.S. should give careful consideration to ways and means for developing fully the maximum military strength of Chinese forces on Formosa, for rehabilitating the Formosan economy and for progressively changing the character of the top Chinese political and military leadership in order that that leadership be less identified with the [ROC authorities].”<sup>47</sup>

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<sup>44</sup> Letter from F. J. Lawton, Director of Bureau of the Budget, Executive Office of the President, to James E. Webb, Under Secretary of Department of State (March 23, 1951) (requesting immediate and long-term objectives for Taiwan). (J.A. at A-166-167.)

<sup>45</sup> Memorandum on Formosa [No. 2], Top Secret Policy Paper (April 4, 1951), p. 20. (J.A. at A-190, A-202.)

<sup>46</sup> *Id.*, p. 6. (J.A. at A-189.)

<sup>47</sup> Memorandum on Formosa [No. 1], (attributed to FE:CA:W.W.Stuart) (April 4, 1951), pp. 7-8, item 11. (J.A. at A-175-76.)

In September 1951, at the end of peace negotiations between the Allies and Japan, the United States publicly took the position that Taiwan's ultimate disposition required a "fundamental reconsideration" and "a greater degree of unanimity" as to which "government properly represents China."<sup>48</sup> The United States took the position 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, under the Charter of the United Nations, is paramount (Article 73)*" (emphasis added).<sup>49</sup> It was in this specific context that the United States assumed the role of "principal occupying Power" of Taiwan under the SFPT.

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<sup>48</sup> 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) (J.A. at A-207.)

<sup>49</sup> *Id.* See also Statement of United States Delegate to SFPT Conference (Mr. Dulles) to the New York Times (September 3, 1951), WHITEMAN, VOL. III, p. 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." (Emphasis added.)

## STANDARD OF REVIEW

The District Court's dismissal of the Amended Complaint on the basis of the political question doctrine is subject to *de novo* review. *Harbury v. Hayden*, 522 F.3d 413, 416 (D.C. Cir. 2008) (political question review is *de novo*); *Rasul v. Myers*, 512 F.3d 644, 654 (D.C. Cir. 2008), citing *Cummings v. Dept. of the Navy*, 350 U.S. App. D.C. 68, 279 F.3d 1051, 1053 (D.C. Cir. 2002).

## ARGUMENT

### **A. Appellants' Rights To The Declarations Sought In The Amended Complaint Are Founded In United States Statutes And The Constitution.**

Consistent with Article III, Sect. 2, of the United States Constitution, this Court's jurisdiction is authorized by the following statutes: 28 U.S.C. § 1331; the INA § 360, 8 U.S.C. § 1503, with respect to the action brought by individual Appellants; and the APA §§ 702 and 704, 5 U.S.C. §§ 702 and 704.

This Court has Federal Question jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," pursuant to 28 U.S.C. § 1331.

This action arises under the INA so far as it involves the Court's determination of the individual Appellants' nationality status under the INA § 360, 8 U.S.C. § 1503. This statutory provision authorizes the Court's jurisdiction over declaratory judgment actions for declaration of United States nationality.

This action also arises under the APA so far as it involves the Court’s review of an agency action pursuant to 5 U.S.C. §§ 702 and 704. This statutory provision authorizes the Court to review any “agency action” which resulted in a “legal wrong” or “adversely affected or aggrieved” a “person.”

This action also arises under the SFPT so far as it requires the Court to decide which benefits it confers upon Appellants.

Finally, this action arises under the Constitution of the United States because it involves this Court’s declaration of Appellants’ constitutional rights as United States non-citizen nationals.

**B. This Case Does Not Present A Nonjusticiable Political Question.**

**1. The “political question” doctrine is narrowly tailored.**

The political question doctrine is a narrowly tailored doctrine that restrains the courts from deciding “political questions,” as opposed to “political cases.” *Baker v. Carr*, 369 U.S. 186 (1962). Appellants 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*, 522 F.3d at 418-19 (internal citations omitted).

Federal courts have often adjudicated matters touching on highly sensitive foreign relations, for example:

(1) the status of non-state territories abroad, *Cheng Fu Sheng v. Rogers*, 177 F. Supp. 281 (D.D.C. 1959) (deciding the issue whether Taiwan is a “country” for the purpose of the deportation statute), *rev’d on other grounds, Rogers v. Cheng Fu Sheng*, 108 U.S. App. D.C. 115 (D.C. Cir. 1960); *United States v. Shiroma*, 123 F. Supp. 145 (D. Haw. 1954) (deciding status of Okinawa and Ryukyu Islands and their inhabitants under the SFPT);

(2) the requirement that a war declaration justify United States military action, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990);

(3) the status of the ROC and its property in Washington, D.C., *Strategic Technologies PTE, Ltd. v. Republic of China (Taiwan)*, 2007 U.S. Dist. LEXIS 34258, No. 05-2311 (RMC) (D.D.C. May 10, 2007) (Collyer, J., who rendered judgment now under appeal) (recognizing the ROC’s sovereign immunity in enforcement dispute) (J.A. at A-371-375); *Dupont Circle Citizens Assoc. v. D.C. Board of Zoning Adjustment*, 530 A.2d 1163, 1170-71 (D.C. Cir. 1987) (relying on the “sweeping language” of the TRA to find that the ROC mission in Washington, D.C. was a “chancery” for zoning purposes, despite a contrary finding by the Department of State); and

(4) statutory claims raised despite a contrary United States treaty promise, *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (rejecting political question challenge to statute-based claim against United States decision not to certify Japan pursuant to executive agreement).

The modern test to be applied in the “discriminating analysis” as to whether a “particular question” poses a nonjusticiable political question 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* at 217. See also *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (distilling the *Baker* test into three inquiries: (i) Does the issue involve the resolution of questions committed by the text of the Constitution to a coordinate branch of

Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? and (iii) Do prudential considerations counsel against judicial intervention?).

This Court has recognized that the first two *Baker* factors are the “most important.” *Harbury*, 522 F.3d at 419. Nonjusticiability can result when one of the *Baker* conditions is fulfilled. *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005).

**2. Appellants’ claims are justiciable and do not fall within the scope of the political question doctrine.**

**a. The “particular questions” presented by Appellants’ 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.**

Appellants’ claims for basic constitutional rights and a declaration of their United States non-citizen nationality<sup>50</sup> 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, sect. 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 not a national of the United

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<sup>50</sup> See Amended Complaint, Sect. VII(a)-(h). (J.A. at A-19-20.)

States,” has a cause of action for declaration of nationality. INA, § 360, 8 U.S.C. § 1503. *See also* the mirror provision in the Nationality Act of 1940, § 503, referenced in *Cabebe v. Acheson*, 183 F.2d 795, 796-97 (9<sup>th</sup> Cir. 1950) (further noting that as of the Act of 1902, passports were to be granted to United States non-citizen nationals).

The determination of nationality claims is properly one for courts of appeals (on legal points) and district courts (on factual points). *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 966 (9<sup>th</sup> Cir. 2003), citing *Hughes v. Ashcroft*, 255 F.3d 752, 758 (9<sup>th</sup> Cir. 2001), relying on 8 U.S.C. § 1252(b)(5).

- b. **The standards applicable to Appellants’ claims are discoverable and manageable, and are susceptible to judicial application of law within the proper realm of judicial expertise.**

The Constitution, United States statutes, international legal principles and federal precedents provide sufficient, judicially discoverable and manageable standards to adjudicate Appellants’ statutory claims. *See Wang v. Masaitis*, 416 F.3d 992, 996 (9<sup>th</sup> 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 (2<sup>d</sup> Cir. 1995) (stating that “universally recognized norms of international law provide judicially discoverable and manageable standards”); *Nguyen Thang Loi v. Dow*

*Chem. Co. (In re Agent Orange Prod.)*, 373 F. Supp. 2d 7, 169 (E.D.N.Y. 2005) (finding that international legal questions “are ascertainable and manageable”).

In sum, there is no legitimate need for the District Court 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 v. Carr*, 369 U.S. at 211.

- c. **The resolution of Appellants’ 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.**

This Circuit has assigned the fourth through sixth *Baker* factors, which Justice Powell in *Goldwater v. Carter* grouped together as “prudential considerations,” a lesser degree of importance. *Harbury*, 522 F.3d at 419. The Second Circuit found them to be “relevant *only* if judicial resolution of a question would contradict prior decisions taken by a political branch *in those limited contexts* where such contradiction would seriously interfere with important governmental interests.” *Kadic*, 70 F.3d at 249 (emphasis added).

Appellants 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 v. Bush*, 128 S. Ct. at 2259, citing *Murphy v. Ramsay*, 114 U.S. 15, 44 (1885), *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

Appellants ask the courts simply to examine Taiwan's "resulting status" under United States law 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.

Any "unhappiness" of the Executive at having to try this case would be "understandable, but legally irrelevant." *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 281 (1st Cir. 2005). This case may "engender strong feelings," but its mere "capacity to stir emotions is not enough to render an issue nonjusticiable." *Id.* The United States has in any event expressly recognized the right of Taiwanese persons to sue in United States courts. *Chang v. N.W. Meml. Hosp.*, 506 F. Supp. 975, 978 (N.D. Ill. 1980) (quoting letter from Assistant Legal Adviser for Treaty Affairs observing that the ROC's de-recognition "was not intended in any way to abrogate, infringe, or otherwise modify the right" of Taiwanese persons to sue in United States courts).

Importantly, the District Court's reliance on *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) to support its finding that the matter at hand is non-justiciable, is unfounded since this very case was overturned by the United States

Supreme Court's very considered opinion in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), which thoroughly addressed separation of power issues relating to actions taken by Congress and the Executive in the War on Terror, and which strongly affirmed the role of the courts in overseeing the constitutionality of such actions.

Nowhere in the Supreme Court's *Boumediene* opinion, or in the concurring and dissenting opinions attached thereto, is the question of non-justiciability raised, although few would characterize that case as being free of political implications. 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.

Thus, as demonstrated above, United States courts (including both this one and the District Court) have previously considered and ruled on the merits of cases involving Taiwan. They have also routinely considered cases involving treaties as well as the interpretation of passport-eligibility rules relative to those with non-citizen nationality status. That this case involves such elements does not render the case non-justiciable.

**C. United States Courts Previously Have Determined The Legal Effects Of A Special Relationship Between The United States And An Island Territory Falling Legally Under Its Control.**

Regardless of the fact that the District Court was not asked in the Amended Complaint to determine ultimate sovereignty over Taiwan, United States courts have made numerous rulings interpreting and determining the legal effects of previously established United States sovereignty over held islands, including in the strikingly similar situation (discussed in detail below) involving the Philippines.

When the SFPT entered into force in April 1952, the relevant United States immigration law was the Nationality Act of 1940 (“Nationality Act”).<sup>51</sup> See *Rabang v. Boyd*, 353 U.S. 427 (1957) at 432 (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”).

Section 101(e) of the Nationality Act defined an “outlying possession” as “all territory, other than [the continental United States, Hawaii, Puerto Rico and the Virgin Islands] over which the United States exercises rights of sovereignty, except the Canal Zone.” The Nationality Act did not define “sovereign rights,” dictate

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<sup>51</sup> Nationality Act of 1940, 76 P.L. 853; 76 Cong. Ch. 876; 54 Stat. 1147 (October 14, 1940).

specific means of acquiring such rights, or require permanent or even complete sovereignty over a territory.

The INA broadened the Nationality Act's definition of United States non-citizen nationality by dropping the exclusion of aliens (at 8 U.S.C. § 1101(a)(22)(B)), with the result that the Fourth Circuit has even found a Mexican national and United States permanent resident to qualify upon applying for United States citizenship. *United States v. Morin*, 80 F.3d 124, 126 (4<sup>th</sup> Cir. 1996). Contrast *Marquez-Almanzar v. INS*, 418 F.3d 210, 218-19 (2<sup>d</sup> Cir. 2005) (holding enrollment in the United States army insufficient, whereas birth on a territory subject to the United States' *de jure* sovereignty suffices for non-citizen nationality); *Hughes v. Ashcroft*, 255 F.3d 752 (finding only United States citizenship indicates "permanent allegiance" for citizens of other sovereign States), citing *Rabang*; accord *Salim v. Ashcroft*, 350 F.3d 307 (3<sup>d</sup> Cir. 2003).

United States courts have considered the rights and status of Filipinos as non-citizen nationals under United States law and practice. *Cabebe v. Acheson*, 183 F.2d at 801 (observing that the Filipinos' status was the "direct result of the United States' assumption of sovereignty over the Islands"). This finding was issued (and earlier assumed in practice) despite the United States' having: (1) disclaimed any intent of conquest but having used military force to assert and protect its treaty rights over the territory, *id.* at 801 (recognizing the United States'

“undeviating non-imperialistic policy” with respect to the Philippines); (2) consistently expressed its desire to depart;<sup>52</sup> (3) laid down conditions for the Philippines’ future disposition and having allowed its inhabitants to choose the territory’s final status;<sup>53</sup> (4) fostered local political institutions; and (5) recognized local citizenship.<sup>54</sup> *Id.* at 801; Jones Act, § 2.

Throughout the United States’ presence, Filipinos were deemed United States non-citizen nationals because they were “entitled to the protection of the United States” and consequently owed “permanent allegiance” to the United States. *Rabang*, 353 U.S. at 429. The Taiwanese in 1952 were similarly given the rights and duties of United States non-citizen nationality *nolens volens* (*i.e.* whether unwilling or willing). *See id.* at 798 (with respect to the Filipinos). Like the Filipinos, the Taiwanese (and more specifically Appellants) fit within the terms of the Nationality Act.

Taiwan is also similarly situated to the Philippines in that quotas have been imposed on their inhabitants’ mainland immigration while their status was deemed transitional (*i.e.* after passage of the TRA and after the Philippine Independence

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<sup>52</sup> *See, e.g.*, An Act to declare the purpose of the people of the United States as to the future political status of the Philippine Islands, and to provide a more autonomous government for those islands (“Jones Act”), 39 Stat. 545 (1916), preamble.

<sup>53</sup> *See Cabebe*, 183 F.2d at 799.

<sup>54</sup> *See, e.g.*, “United States non citizen nationality,” Interpretation, 308.1, U.S. Citizenship and Immigration Services (referring to the Philippine legislature’s law of March 26, 1920 allowing naturalization to Philippine citizenship). *See also Cabebe*, 183 F.2d at 798.

Act of 1934,<sup>55</sup> respectively). This restriction did not affect Filipinos' United States non-citizen nationality for other purposes.

In short, Appellants are entitled to rights and access akin to those historically enjoyed by the Filipinos. They are Taiwanese who remain “essentially ... persons without a state”<sup>56</sup> and who (like the Filipinos of yesteryear) remain entitled to the United States' protection and bound by the duty of “permanent allegiance.”

1. **The Philippines, whose inhabitants were for a time United States non-citizen nationals, had during that period a relationship to the United States which closely parallels that which has existed between Taiwan and the United States since 1952.**

In the Philippines, there was nearly a half-century during which the United States accorded the islands' inhabitants the status of non-citizen nationals. *Rabang*, 353 U.S. 427. Article IX of the Paris Treaty of 1898,<sup>57</sup> which ended the Spanish-American War, provided that “[t]he civil rights and political status of the native inhabitants [of the Philippines] ... shall be determined by the [United States] Congress.” Congress subsequently established that all former Spanish subjects resident in the Philippines on April 11, 1899, and their children, would “be *citizens of the Philippine Islands* and as such *entitled to the protection of the United*

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<sup>55</sup> Philippine Independence Act of 1934, 48 Stat. 462, 48 U.S.C. (1934 Ed.).

<sup>56</sup> Memorandum Opinion at 11. (J.A. at A-33.)

<sup>57</sup> Treaty of Peace Between the United States and Spain (“Paris Treaty”), TS 343 (December 10, 1898).

*States.*” *Rabang* at 429-30 (emphasis added) (citing Congress’ Act of July 1, 1902, 32 Stat. 691, 692).

The Ninth Circuit in 1950 observed that by virtue of this entitlement to protection, “a hybrid status appeared, the so-called ‘non-citizen national,’” and that “[n]ationality’ is a term denoting a relationship between an individual and a nation ‘involving the duty of obedience (or “allegiance”) on the part of the subject and protection on the part of the state.’ And, it is domestic rather than international law which in most circumstances determines acquisition or loss of nationality.” *Cabebe v. Acheson*, 183 F.3d at 797-98 (internal citation omitted). In 1925, the United States Supreme Court in *Toyota* recognized that “Filipinos are not aliens, and owe allegiance to the United States.” *Toyota v. United States*, 268 U.S. 402, 412 (1925); *Rabang*, 353 U.S. at fn. 7 (citing § 101 of the Nationality Act). In 1957, the Supreme Court confirmed this non-citizen national designation, observing that pursuant to Congress’ Act of 1902, “Filipinos, as [United States non-citizen] nationals, *owed* [until 1946] an obligation of permanent allegiance to this country.” *Rabang*, 353 U.S. at 429.

The Jones Act of 1916 declared in its preamble that the Spanish-American War had not been one of conquest, and that “it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable

government can be established therein.”<sup>58</sup> The Act also authorized the Philippine Legislature to allow qualifying United States citizens also to obtain Philippines citizenship.<sup>59</sup> Significantly, the United States separately recognized between 1920 and 1943 that the granting of Philippine citizenship would automatically confer United States non-citizen nationality as well. *Cabebe*, 183 F.2d at 798. Filipinos were nevertheless often barred from naturalization to United States citizenship on racial grounds. *Id.* at 800; *Toyota*, 268 U.S. at 409-11. *See also* Nationality Act at § 303.

Upon the Philippines’ acceptance of the terms of the United States’ Philippine Independence Act of 1934 (*i.e.* a United States-supervised constitutional convention and 10 years of Commonwealth government), *Cabebe*, 183 F.2d at 799, mainland immigration of Filipinos began to be tracked,<sup>60</sup> and Filipinos were restricted to a mainland immigration quota of 50 persons per year and considered “aliens” for all purposes of “immigration, exclusion, or expulsion,” despite their United States non-citizen nationality. *Rabang*, 353 U.S. at 433 (citing the Philippine Independence Act of 1934, § 1238).

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<sup>58</sup>Jones Act, Preamble.

<sup>59</sup> *Id.*, Sect. 2.

<sup>60</sup> *See* Census Table, Persons Obtaining Legal Permanent Resident Status by Region and Selected Country of Last Residence, Fiscal Years 1820 to 2006, Department of Homeland Security. (J.A. at A-367-369.)

On July 4, 1946, the United States gave up all “possession, supervision, jurisdiction, control or sovereignty” over the Philippines, *Cabebe*, 183 F.2d at 799, and at that time Filipinos were simultaneously divested of their United States non-citizen nationality. *Rabang*, 353 U.S. at 430-31.

Similarly, Taiwan is presently held directly by the United States under a treaty of renunciation (the SFPT) that gives the United States an exclusive, supreme, unsupervised and unlimited role as the “principal occupying Power” of Taiwan. The United States is in no way legally prevented from exercising on Taiwan “full powers of administration, legislation and jurisdiction,” including by applying United States law “as it may deem appropriate to local conditions and requirements.”<sup>61</sup>

Its delegation of these powers (at least facially) to the ROC merely: (1) continued practices existing during the ROC’s belligerent occupation from 1945 to

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<sup>61</sup> Compare Trusteeship Agreement for the Trust Territory of the Pacific Islands (“TTPI”), Art. 3, WHITEMAN, VOL. I, p. 777. See also WHITEMAN, VOL. I, pp. 779-84, 796-97 (discussing the United States’ application of law to the TTPI); Trusteeship Agreement, Art. 12, WHITEMAN, VOL. I, p. 822; *Boumediene*, 129 S. Ct. at 2252, citing 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 206, Comment *b*, at 94 (observing that sovereignty “implies ... authority to apply law there”); 7 Foreign Affairs Manual (“FAM”) 1116.2-1 and 7 FAM 1121.2-1 (defining a “territory” that is “subject to the jurisdiction” of the United States as one over which the United States exercises sovereignty, and which is “[s]imply stated, ... subject to the laws of the United States”). Compare, however, 7 FAM 1121.2-1 (observing that “[a]n ‘unincorporated territory’ or ‘outlying possession’” is one where the Constitution “has not been expressly and fully extended by the Congress”), quoting UNITED STATES CONST., art. IV, sect. 3 (establishing that Congress shall have the “power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”).

1952 (which depended on United States aid and which did not confer title);<sup>62</sup> (2) maintained the ROC's dignity as mainland China's recognized government-in-exile and U.N. representative;<sup>63</sup> and (3) served as a convenient means to govern a far-flung territory under constant threat, and to develop the island's self-government pursuant to the U.N. Charter's Article 73. *See Boumediene v. Bush*, 128 S. Ct. at 2254 (noting that the United States has long recognized that replacing occupied territories' laws with United States law might be "not only disruptive but also unnecessary").

Thus, because the United States formally undertook through the SFPT, and on innumerable occasions since 1952 has acted affirmatively, 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 2252-2253, 2257-2259, 2260-2262 (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); *Callas v. United States*, 253 F.2d 838, 843-44 (2d Cir. 1958).

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<sup>62</sup> *See* Army Manual, § 353.

<sup>63</sup> *See* BROWNIE, p. 360 (observing that the competence, privileges and immunities of exiled governments hosted by the United Kingdom during WWII could have been based only on the "invitation and consent of the territorial sovereign"). The ROC's need for public legitimacy explains the non-extension of United States treaties over Taiwan.

## CONCLUSION

For the foregoing reasons, Appellants pray that this Court of Appeals reverse the District Court's March 18, 2008, Memorandum Opinion and Order erroneously granting the Defendant's Motion to Dismiss the Amended Complaint.

Respectfully submitted,



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November 3, 2008

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**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing Brief of Appellant and accompanying Joint Appendix were served upon the following counsel for Appellee via First Class pre-paid U.S. Mail this 3<sup>rd</sup> day of November 2008:

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