Nos. 03-334; 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF DIEGO C. ASENCIO, A. PETER BURLEIGH, LINCOLN GORDON, ALLEN HOLMES, ROBERT V. KEELEY, L. BRUCE LAINGEN, ANTHONY LAKE, SAMUEL W. LEWIS, STEPHEN LOW, ROBERT A. MARTIN, ARTHUR MUDGE, DAVID NEWSOM, R. H. NOLTE, HERBERT S. OKUN, THOMAS R. PICKERING, ANTHONY QUAINTON, WILLIAM D. ROGERS, MONTEAGLE STEARNS, VIRON P. VAKY, RICHARD N. VIETS, ALEXANDER F. WATSON, WILLIAM WATTS, AND ROBERT J. WOZNIAK AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Each of the *amici curiae* has been in the diplomatic service of the United States government, for the most part as a presidential appointee.

The names and diplomatic posts of the *amici curiae* are as follows:

Diego C. Asencio served as Ambassador to Colombia from 1977 to 1980, Assistant Secretary of State for Consular Affairs from 1980 to 1983, Ambassador to Brazil from 1983 to 1986, and Chairman of the Commission for the Study of International Migration and Cooperative Economic Development from 1987 to 1989.

A. Peter Burleigh served as Ambassador and Coordinator for Counter-Terrorism from 1991 to 1992, Ambassador to Sri Lanka and the Maldives from 1995 to 1997, and Ambassador and Deputy Permanent Representative to the United Nations from 1997 to 1999.

Lincoln Gordon served as Ambassador to Brazil from 1961 to 1966 and Assistant Secretary of State for Inter-American Affairs from 1966 to 1967.

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1. The parties in the petitions have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that the law firm of Arnold & Porter represents the twelve Kuwaiti detainees who are petitioners, but that firm is not counsel of record for any party in this proceeding. William D. Rogers, a retired partner of Arnold & Porter and one of the former United States diplomats on whose behalf this *amici* brief is filed, contributed to its drafting with the assistance of other Arnold & Porter attorneys. No person or entity other than the *amici curiae* or their counsel of record has made a monetary contribution to the preparation or submission of this brief.

Allen Holmes served as Ambassador to Portugal from 1982 to 1985, Assistant Secretary of State for Political-Military Affairs from 1985 to 1989, and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict from 1993 to 1999.

Robert V. Keeley served as Ambassador to Mauritius from 1976 to 1978, Deputy Assistant Secretary of State for African Affairs from 1978 to 1980, Ambassador to Zimbabwe 1980 to 1984, and Ambassador to Greece from 1985 to 1989.

L. Bruce Laingen served as Ambassador to Malta from 1977 to 1979 and Charges D'Affaires in Tehran from 1979 to 1981.

Anthony Lake is a Professor at Georgetown University's School of Foreign Service, and served as Assistant to the President for National Security Affairs from 1993 to 1997.

Samuel W. Lewis served as Assistant Secretary of State for International Organization Affairs from 1975 to 1977, Ambassador to Israel from 1977 to 1985, and Director of the State Department Policy Planning Staff from 1993 to 1994.

Stephen Low served as a senior member of the National Security Council Staff from 1974 to 1976, Ambassador to Zambia from 1976 to 1979, Ambassador to Nigeria from 1979 to 1981, and Director of the Foreign Service Institute from 1982 to 1987.

Robert A. Martin served as a Foreign Service Officer from 1961 to 1994.

Arthur Mudge served as USAID Assistant General Counsel from 1967 to 1969, USAID Mission Director in Guyana from 1974 to 1976, USAID Mission Director in Nicaragua from 1976 to 1978, and USAID Mission Director in Sudan from 1980 to 1983.

David Newsom served as Ambassador to Libya from 1965 to 1969, Ambassador to Indonesia from 1973 to 1977, Ambassador to the Philippines from 1977 to 1978, and Undersecretary for Political Affairs from 1978 to 1981.

R.H. Nolte served as Ambassador to Egypt in 1967.

Herbert S. Okun served as Ambassador to the German Democratic Republic from 1980 to 1983, Ambassador and Deputy Permanent Representative to the United Nations from 1985 to 1989, and United States Member of the Group of International Advisors to the International Commission of the Red Cross from 1996 to 2000.

Thomas R. Pickering served as Ambassador to Jordan from 1974 to 1978, Assistant Secretary of State for Oceans, Environment and Science from 1978 to 1981, Ambassador to Nigeria from 1981 to 1983, Ambassador to El Salvador from 1983 to 1985, Ambassador to Israel from 1985 to 1988, Ambassador and Representative to the United Nations from 1989 to 1992, Ambassador to India from 1992 to 1993, Ambassador to the Russian Federation from 1993 to 1996, and Under Secretary of State for Political Affairs from 1997 to 2001. He currently serves as Senior Vice President of International Affairs at the Boeing Company.

Anthony Quainton served as Ambassador to Central African Republic from 1976 to 1978, Ambassador to

Nicaragua from 1982 to 1984, Ambassador to Kuwait from 1984 to 1987, and Ambassador to Peru from 1989 to 1992.

William D. Rogers served as Assistant Secretary of State for Inter-American Affairs, U.S. Coordinator, Alliance for Progress, from 1974 to 1976, and Under Secretary of State for Economic Affairs from 1976 to 1977.

Monteagle Stearns served as Ambassador to Ivory Coast from 1976 to 1979, Vice President of the National Defense University from 1979 to 1981, and Ambassador to Greece from 1981 to 1985.

Viron P. Vaky served as Ambassador to Costa Rica from 1972 to 1974, Ambassador to Colombia from 1974 to 1976, Ambassador to Venezuela from 1976 to 1978, and Assistant Secretary of State for Inter-American Affairs from 1978 to 1980.

Richard N. Viets served as Ambassador to Jordan from 1981 to 1984.

Alexander F. Watson served as Ambassador to Peru from 1986 to 1989, Ambassador and Deputy Permanent Representative to the United Nations from 1989 to 1993, and Assistant Secretary of State for Western Hemisphere Affairs from 1993 to 1996.

William Watts served as a Foreign Service Officer from 1956 to 1965 and Staff Secretary and Senior Staff Member of the National Security Council in the White House from 1969 to 1970.

Robert J. Wozniak served as Counselor for Public Affairs at the U.S. embassies in Greece and Morocco and at the U.S. mission to NATO headquarters in Brussels, and as Public Affairs Officer at the U.S. embassies in Cyprus and Syria from 1970 to 1992.

Each is persuaded, as will appear below, that these cases present issues of profound importance to the future role and influence of the United States in the world. Accordingly, *amici curiae* submit this brief in support of the petitioners, Shafiq Rasul, *et al.* and Fawzi Khalid Abdullah Fahad Al Odah, *et al.*

SUMMARY OF **ARGUMENT**

The courts below denied review of the Executive Branch's incarceration of the petitioners, effectively holding that if it does so on foreign soil its action is beyond judicial review.

The rulings have not gone unnoticed abroad. Governments and international organizations have criticized them. Other nations have seen a license to incarcerate their own citizens and others with impunity.

This undermines what has long been one of our proudest diplomatic advantages – the nation's Constitutional guaranty, enforced by an independent judiciary, against arbitrary government.

ARGUMENT

We, the *amici curiae* lending our names in support of this brief, have all been in the diplomatic service of the United States. Some have been ambassadors or foreign service officers, others have had appointments at senior levels in the Department of State or in the other agencies of the United States Government dealing with "that vast external realm." All are retired from public service.

It is not our purpose to add to what the parties will offer on the merits. We hope rather to enlarge on their presentation by setting before the Court our collective professional experience as to the significance for American diplomacy and international relations of the holdings of the court below.

We understand that the D.C. Circuit Court of Appeals held that the detention by the Executive Branch of the Government of the United States of twelve Kuwaiti nationals, two British nationals, and two Australian nationals is beyond review by the Judicial Branch of that same Government. This Court agreed to review whether U.S. courts have jurisdiction to "consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." Under the D.C. Circuit's reading of *Johnson v. Eisentrager*,[2] the resolution of this issue turned on its determination of the technical legal status of the Guantanamo Bay enclave.

But critical to the holding in *Johnson* was the fact that the prisoners actually had been tried and that they were

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2. 339 U.S. 763, 785-88 (1950).

challenging not the utter lack of process but rather the authority of the military tribunal that tried them. Here, there have been no trials and no independent judicial process of any kind. There is reason to fear that the international community, like at least one United States court, will understand the Executive Branch to be saying that it might imprison these detainees "as it will, when it pleases, without any compliance with any rule of law of any kind . . . and without acknowledging any judicial forum in which its actions may be challenged."[3] Because the prisoners in *Johnson* had been afforded a modicum of due process, the Court in *Johnson* had no occasion to contemplate, and cannot be read as addressing, a position so grave, startling and extreme as that presented by the Executive here. It is the impact of such an assertion on our nation's diplomacy, its relations with other countries, and its image in the world that invoke our concern.

These sixteen Guantanamo prisoners undeniably are imprisoned by authority of the United States. They have not been charged with a criminal offense. They have no counsel. Their detention for all that is known is indefinite. They are kept in small cells. Their every activity is controlled by officers of the Executive Branch. They may, for all that appears, be held in Guantanamo forever, with no tribunal, military or civilian, having found that they committed a crime. Nor, for so long as the lower court's determination stands, can a court inquire into their custody. That these sixteen have been deprived of their liberty is beyond debate.

This is, from our foreign policy experience, a case of vast public import. Indeed, it has already become notorious

3. *Gherebi v. Bush*, No. 03-55785, 2003 WL 22971053, at *14 (9th Cir., Dec. 18, 2003).

abroad. The world has taken due note of the fact that the United States has incarcerated these petitioners in Guantanamo and that there has been no effort to charge, try or judge them under law. This has generated international concern. The Inter-American Commission on Human Rights has undertaken precautionary measures.[4] The UN High Commissioner for Human Rights has spoken out.[5] The International Committee of the Red Cross has gone on record.[6] The British Court of Appeal in the *Abbasi* case has expressed its displeasure.[7] The Human Rights Chamber of

4. Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), Inter-Am. C.H.R. (March 12, 2002) *reprinted in* 41 I.L.M. 532 (2002) (requesting that prisoners be granted hearings on their status before a "competent tribunal").

5. Press Release, Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba, (Jan. 16, 2002), *available at* www.unhchr.ch under "news room, statements/messages" (last visited Sept. 30, 2003) (recalling that legal status of detainees, if disputed, must be determined by a "competent tribunal"); *see also* Press Release, U.S. Court Decision on Guantanamo Detainees Has Serious Implications for Rule of Law, says UN Rights Expert, (March 12, 2003), *available at* www.unhchr.ch under "news room, press releases" (last visited Sept. 30, 2003) (ruling below "offends the first principle of the rule of law" and "can set a dangerous precedent").

6. Operational Update, *Guantanamo Bay: Overview of the ICRC's work for detainees*, Int'l Comm. of the Red Cross (Aug. 25, 2003), *available at* www.icrc.org (last visited Sept. 30, 2003) ("The ICRC's main concern today is that the US authorities have placed the internees in Guantanamo beyond the law . . . .").

7. *Abbasi v. Secretary of State*, 2002 EWCA Civ 1598, 2002 All ER (D) (Nov) (U.K. Ct. App. 2002), par. 107 ("We have made

(Cont'd)

Bosnia-Herzegovina, a court that the United States helped create, has issued its own protest.[8] And Shirin Ebadi, the recipient of the most recent Nobel Peace Prize, referred specifically to Guantanamo in her acceptance remarks as an affront to universal human rights.[9]

The world understands that this country must address how our criminal justice system is to be altered to take account of the contemporary realities of terrorism. That is a domestic matter. The Guantanamo prisoners case has become

(Cont'd)
clear our deep concern that, in apparent contravention of fundamental principles of law, Mr. Abbasi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.").

8. *Boudellaa et al. v. Bosnia and Herzegovina et al.*, Decision on Admissibility and Merits, Cases nos. CH/02/8679 *et seq.*, Human Rights Chamber for Bosnia and Herzegovina (Oct. 11, 2002), *available at* www.hrc.ba (visited Sept. 30, 2003), pars. 233 (hand-over of prisoners to U.S., before their transfer to Guantanamo, violated "obligations to protect the applicants against arbitrary detention by foreign forces") & 333 (Bosnia and Herzegovina must retain lawyers "to take all necessary action in order to protect the applicants' rights while in US custody . . . .").

9. Shirin Ebadi, Nobel Peace Prize Address before the Norwegian Nobel Committee (Dec. 10, 2003), *available at* http://www.iranmania.com/News/ArticleView/Default.asp?NewsCode=20500&NewsKin ("The concerns of human rights' advocates increase when they observe that international human rights laws are breached not only by their recognized opponents[,] . . . but . . . also violated in Western democracies, . . . countries which were themselves among the initial codifiers of the United Nations Charter and the Universal Declaration of Human Rights.").

an issue of unusual concern abroad because it is a vivid reminder how America's undoubted military power may be applied elsewhere. Citizens of foreign countries cannot assume that what happened to the Guantanamo prisoners cannot happen to them. It will not be evident why, if the Executive Branch can detain prisoners in Guantanamo free of judicial inquiry, it cannot expand the practice to establish a global criminal justice system with other prison camps like Guantanamo, similarly subject to no legal oversight and in which any foreigner deemed a danger by some official might be detained indefinitely. Nor will it be evident why such a practice could not reach out to persons within the United States or even to American citizens.

This is because the lower court's decision turned on the fact that the prisoners are in Guantanamo Bay, Cuba. The nice distinction in the Court of Appeals' opinion – that the executive branch of the United States government can act as it will in Cuba, but the hand of the judiciary cannot reach that conduct – is lost on others.

This use by the American military of its base in Cuba has a particular resonance abroad. As this Court well knows, Guantanamo is an artifact of America's imperial age in this Hemisphere. There is, in the view of others, a heavy irony that these prisoners should be claimed to be beyond the reach of the law simply because they are being held in an enclave in Cuba – a nation whose authoritarian pretensions this country has opposed for forty years.

It has been the experience of each of us that our most important diplomatic asset has been this nation's values. Power counts. But this nation's respect for the rule of law – and in particular our reverence for the fundamental

constitutional guarantee of individual freedom from arbitrary government authority – have gone far to earn us the respect and trust which lie at the heart of all cordial relations between nations. Thus the perception of this case abroad – that the power of the United States can be exercised outside the law and even, it is presumed, in conflict with the law – will diminish our stature and repute in the wider world.

We have come to believe, in our representation of this country to other nations, that those nations are more willing to accept American leadership and counsel to the extent that they see us as true to the principle of freedom under the law. Indeed, the matter has rarely been better put than by President Bush in signing the Torture Victims Protection Act on March 12, 1992:

> In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that they are respected everywhere.[10]

The teaching of the courts below, however, is that those "democratic institutions and the rule of law," as far as the Judicial Branch is concerned, need not be respected in Guantanamo or indeed anywhere other than in the United States. This puts United States citizens abroad – as well as those of other nations – at risk because it can be invoked in support of other countries' practices of arbitrary detention. When the second Gulf War began, many predicted that Guantanamo Bay signaled a "double standard" that Iraq and others would use to justify mistreatment of American and

10. Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 465 (March 12, 1992).

coalition POWs.[11] Unfortunately, that message appears to have been received. Other states have already used the United States' example to justify their own abuses. For example, explaining the detention of militants without trial, Malaysia's law minister said that the practice was "just like the process in Guantanamo Bay." He emphasized that he "put the equation with Guantanamo just to make it graphic to you that this is not simply a Malaysian style of doing things."[12]

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11. *See, e.g.*, Jamie Fellner, *Prisoners of War in Iraq and at Guantanamo; Double Standards*, INT'L HERALD TRIB., March 31, 2003 ("At risk are not only the rights of the individuals who are detained today: by ignoring the clear mandates of international law, the United States invites every other country, including Iraq, to do the same."); Ivan Roman, *Critics: Guantanamo Example May Hurt POWs*, ORLANDO SENTINEL, March 30, 2003 ("Months before the first bomb was dropped on Baghdad on March 19, concerns arose about the Pentagon's position regarding the Guantanamo detainees and the implications it could have on its own troops heading to the Middle East."); Praful Bidwai, *Iraq: Doubts Grow on Quick Coalition Victory*, INT'L PRESS SERV., March 24, 2003 (noting that U.S. "double standards" on POWs are "starkly revealed" by detention of suspects in Guantanamo Bay, "often in chains and inside cages. . . . Equally deplorable is the U.S. threat to treat Iraq's army officers as 'war criminals' merely because they are defending their country, while insisting that the U.S. prisoner-invaders be treated as POWs.").

12. Sean Yoong, *Malaysia slams criticism of security law allowing detention without trial*, Assoc. Press, Sept. 17, 2003. Egypt has also moved to detain human rights campaigners as threats to national security, as have Ivory Coast, Cameroon, and Burkina Faso. "The insistence by the Bush administration on keeping Taliban and Al Qaeda captives in indefinite detention in Guantanamo Bay, Cuba, instead of jails in the United States – and the White House's preference for military tribunals over regular courts – helps create a free license for tyranny in Africa." Shehu Sani, *U.S. actions send a bad signal to Africa: Inspiring intolerance*, INT'L HERALD TRIB., Sept. 15, 2003.

The present Administration summed up two centuries of foreign policy in the *National Security Strategy of the United States of America*, issued in September 2002. That document said that the essence of American foreign policy was a "distinctly American internationalism that reflects the union of our values and our national interests." It added that "[i]n pursuit of our goals, our first imperative is to clarify what we stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere." It promised: "We will speak out honestly about violations of the nonnegotiable demands of human dignity." And it defined these "nonnegotiable demands of human dignity" as including "the rule of law," "equal justice," and "limits on the absolute power of the state."[13]

In our professional experience we have found these principles to be the strongest assets of American diplomacy. The admiration and respect for this nation abroad is a function of our own commitment to liberty under law. In this, we have led the world. The success of our interests in the wider arena turns importantly on the extent to which this nation is perceived as continuing to abide by these principles. Any hint that America is not all that it claims, or that it is prepared to ignore a "nonnegotiable demand of human dignity," that it can accept that the Executive Branch may imprison whom it will and do so beyond the reach of the due process of law, demeans and weakens this nation's voice abroad.

We have taken it as our duty to so state to this Court. Power counts, and there is no doubting America's power at

13. National Security Strategy of the United States of America (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nss.html.

this juncture. But values count too. And, for this nation, there is no benefit in the exercise of our undoubted power unless it is deployed in the service of fundamental values: democracy, the rule of law, human rights, and due process. To the extent that we are perceived as compromising those values, to that extent will our efforts to promote our interests in the wider world be prejudiced. Such at least is our collective experience.

George Kennan's Long Telegram from the American Embassy in Moscow to the State Department in 1946 defined the authoritarian bestiality of the Soviet system and its aim to break "the international authority of our state."[14] It was perhaps the most important American diplomatic communication of the last Century. In closing, Kennan spoke for us all and for all time:

> [T]he greatest danger that can befall us in coping with this problem of Soviet communism, is that we shall allow ourselves to become like those with whom we are coping.[15]

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14. George Kennan, *"The Long Telegram" from Moscow, Feb. 22, 1946*, *in* FOREIGN RELATIONS OF THE UNITED STATES 706 VOL. VI (Government Printing Office, 1969).

15. *Id*. at 709.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted,

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