	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
	)	
	)	MOTION FOR LEAVE
	)	TO FILE BRIEF AS *AMICI CURIAE*
	)	
	)	Case No. 09-001
	)	
UNITED STATES OF AMERICA	)	Tried at Guantanamo Bay, Cuba on
	)	7 May 2008
	)	15 August 2008
Appellee	)	24 September 2008
	)	27 October – 3 November 2008
	)	
	)	Before a Military Commission
v.	)	Convened by Hon. Susan Crawford
	)	
	)	Presiding Military Judge
ALI HAMZA AHMAD SULIMAN	)	Colonel Peter Brownback, USA (Ret.)
AL BAHLUL	)	Colonel Ronald Gregory, USAF
	)	
Appellant.	)	Date: **October 15, 2009**
	)	

TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSIONS REVIEW

The undersigned individuals respectfully move for leave to file the instant brief as *Amici Curiae* in the case of United States of America v. Ali Hamza Ahmad Suliman Al Bahlul.

INTEREST OF AMICUS CURIAE

Amici serve on the faculty at leading academic institutions as historians, political scientists, and constitutional law scholars. They submit this brief in support of Appellant out of their respect for principles of constitutional law and commitment to their application. The Amici have worked and written extensively in the relevant fields and seek now to offer the results of recent and highly relevant research for consideration by this court.

Christopher David Jenkins is an Assistant Professor of Law at the University of Copenhagen Faculty of Law. He is an expert in comparative law, extraterritoriality, and constitutional states of emergency, having written extensively in these areas, including *Habeas Corpus and Extra-territorial Jurisdiction after Boumediene: Towards a Doctrine of "Effective Control" in the United States*, 9 Human Rights Law Review 306-28 (2009); *Common Law Declarations of Unconstitutionality*, 7 *International Journal of Constitutional Law* 183-214 (2009); and *Constitutional Reform Goes to War: Some Lessons from the United States*, Public Law 258-79 (Summer 2007). He received a Doctor of Civil Laws and an LL.M. at McGill University Faculty of Law, Institute of Comparative Law, his M.A. in Political Science from Marshall University, his J.D. from Washington and Lee University School of Law, and his B.A. from Miami University.

Seth F. Kreimer is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School. He is an expert in Constitutional Law and Constitutional Remedies, Constitutional Litigation, Civil Liberties, and the First Amendment. He has written and litigated extensively in the all of the above areas. He was a law clerk to the Hon. Arlin M. Adams, U.S. Court of Appeals for the Third Circuit. He received both his J.D. and his B.A. from Yale University.

Jana K. Lipman is an Assistant Professor in the Department of History at Tulane University. She is an expert in U.S. foreign relations broadly construed to include diplomatic and non-state actors. She conducted the most comprehensive field research on how Guantanamo Bay Naval Base employees navigated the politics and contradictions of living in Cuba and working for the U.S. Military, culminating in the publication of GUANTANAMO: A WORKING-CLASS HISTORY BETWEEN EMPIRE AND REVOLUTION, Berkeley: University of California Press (2008).

Most recently, she has written "Guantanamo and the Case of Kid Chicle: Labor, Privatization, and the Law in the Expansion of U.S. Empire," in *Transitions and Transformations in the U.S. Imperial State*. Eds. Alfred McCoy and Francisco Scarano. Madison: University of Wisconsin Press (forthcoming 2009).

Kermit Roosevelt is a Professor of Law at the University of Pennsylvania Law School. His areas of expertise include Constitutional Law, Conflict of Laws, and Federal Jurisdiction, and he has written extensively in all three areas, including an article titled *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017 (2005). He was a law clerk to the U.S. Supreme Court Associate Justice David H. Souter (1999-2000), and prior to that was a Law Clerk to the Hon. Stephen F. Williams, U.S. Court of Appeals for the District of Columbia. received his J.D. from Yale University, and his A.B. from Harvard University.

Rogers M. Smith is the Christopher H. Browne Distinguished Professor of Political Science in the Political Science Department at the University of Pennsylvania, where he also serves as Chair of the Penn Program on Democracy, Citizenship, and Constitutionalism. His expertise and areas of research focus on constitutional law, American political thought, and modern and political theory, and he has written extensively in all of these areas. He was as an American Academy of Arts and Sciences Fellow in 2004. He previously taught at Yale University where he was the Alfred Cowles Professor of Government. He received his Ph.D. in Political Science from Harvard University, and his B.A. in Political Science from James Madison College, Michigan State University.

Bartholomew H. Sparrow is a Professor with the Department of Government, University of Texas at Austin. His areas of expertise are U.S. foreign policy, U.S. territorial policy, and political communication. He is the author of THE INSULAR CASES AND THE

EMERGENCE OF AMERICAN EMPIRE. LANDMARK LAW CASES AND AMERICAN SOCIETY. Lawrence: University Press of Kansas (2006), an in depth examination of the *Insular Cases*, and the political implications of those decisions. He received his Ph.D. from the University of Chicago, his M.A. from the University of Texas at Austin, and his B.A. from Dartmouth College.

ARGUMENT IN SUPPORT OF MOTION FOR LEAVE

The legal issues encompassed within this brief are novel and necessarily warrant additional explanation. The argument presented herein has not been developed in the pleading of this case or in any related case. The arguments made here bear directly on the outcome appropriately to be reached by this court.

The present brief focuses on applicability of the Constitution to the Guantanamo Bay Naval Base. It reviews more than a century of jurisprudence addressing the Constitution's jurisdictional reach beyond the incorporated territories of the United States, and concludes there Constitution must apply to all proceedings conducted at Guantanamo Bay Naval Base pursuant to the Military Commissions Act of 2006 (MCA), 10 U.S.C. §§ 948, *et seq.* The brief begins with an examination of the historical legal and socio-political relationship of the United States to the Guantanamo Bay Naval Base, which supports the Supreme Court's most finding in *Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2229 (2008) (granting the constitutional right to *habeas corpus* to foreign-born detainees determined to be "enemy combatants") that although Cuba maintains ultimate, *de jure* sovereignty, the United States "by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory," *id.* at 2253 (citing to *Rasul v. Bush*, 542 U.S. 466, 480, *id.*, at 487 (KENNEDY, J., concurring in judgment)).

Given the United States' exercise of *de facto* sovereignty, the inquiry then becomes what is the scope of constitutional application to individuals charged as "alien enemy combatants" being held at the Guantanamo Bay Naval Base. *Amici* herein assert that because the Guantanamo Naval Base operates as part of the United States and not as a separate sovereign territory, the Constitution applies to all proceedings and all individuals held there subject only to the same limitations as would be found to apply to non-citizens in the territorial United States. At a minimum, though, based on the reasoning and holdings consistently put forth by the Supreme Court from the *Insular Cases* to the Court's decision in *Boumediene*, the Constitution's core protections, including First Amendment freedom of speech rights, Article 1 protections regarding *ex post facto* laws and bills of attainder, and Fifth Amendment rights to equal protection, must govern the proceedings at issue.

Respectfully Submitted,

Sarah H. Paoletti, Esq.
On behalf of *Amici Curiae*
Clinical Supervisor and Lecturer
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104
Phone: 215-898-1097
paoletti@law.upenn.edu

October 15, 2009

UNITED STATES COURT OF MILITARY COMMISSION REVIEW
***before* F. Williams, D. Conn, and C. Thompson**

	)	BRIEF OF AMICI CURIAE, HISTORIANS, POLITICAL SCIENTISTS, AND CONSTITUTIONAL LAW SCHOLARS
UNITED STATES	)	CMCR CASE NO. 09-001
Appellee	)	Tried at Guantanamo, Cuba on 7 May 2008, 15 August 2008, 24 September 2008, 27 October – 3 November 2008
v.	)	
AL HAMZA AHMAD SULIMAN AL BAHLUL	)	Before a Military Commission convened by Hon. Susan Crawford
Appellant.	)	Presiding Military Judge Colonel Peter Brownback USA (Ret.) Colonel Ronald Gregory, USAF
	)	DATE: 15 October 2009

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

Sarah H. Paoletti, Esq.
Counsel to *Amici Curiae*,
Historians, Political Scientists, and Constitutional Law Scholars
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-8427
paoletti@law.upenn.edu

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CERTIFICATE OF COMPLIANCE WITH RULES 14(g)(3) and (i)

CERTIFICATE OF SERVICE

INTEREST OF *AMICI CURIAE*

SUMMARY OF ARGUMENT

I. ARGUMENT 7

A. The legal history of the Constitution's application in unincorporated sovereign territories of the United States, reviewed in light of the United States' complete and total control over the Guantanamo Bay Naval Base, compels the conclusion that the Constitution must apply to the present proceedings... 7

1. It is undisputed that the United States maintains complete and total control over Guantanamo Bay Naval Station, exercising *de facto* sovereignty over the territory. 8

2. A review of the Supreme Court's jurisprudence on the applicability of the Constitution to non-contiguous territories of the United States compels the conclusion that the Constitution applies to proceedings at Guantanamo Bay. 15

B. Assuming *arguendo* that despite the United States' exercise of *de facto* sovereignty, it is determined that the Guantanamo Naval Base is not the legal equivalent of a fully incorporated territory, the inquiry then is whether there are permissible limitations on which Constitutional provisions must apply, and not whether the Constitution is in force at all. 19

C. The legal status of detainees held in Guantanamo Bay has no relevance on their right to fundamental protections under the Constitution 23

II. Conclusion 24

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Balzac v. Porto Rico, 258 U.S. 298 (1922).....20

Boumediene v. Bush, 553 U.S. ___, 128 S.Ct. 2229 (2008).....6-8, 10, 12, 14-19, 22-24

Dorr v. United States, 195 U.S. 138 (1904).....20

Downes v. Bidwell, 182 U.S. 244 (1901).....16-23

Hawaii v. Mankichi 190 U.S. 197 (1903).....16

Johnson v. Eisentrager, 339 U.S. 763 (1950).....17-19

Mathews v. Diaz, 426 U.S. 67, 77 (1976).....23

Murphy v. Ramsey, 114 U.S. 15, 44 (1885).....17

Plyler v. Doe, 457 U.S. 202, 215 (1982).....23

Rasul v. Bush, 542 U.S. 466 (2004).....6, 8, 15, 17-18

Reid v. Covert, 354 U.S. 1 (1956).....22, 24-25

U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990).....22

Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).....23

UNITED STATES CIRCUIT COURT CASES

Canal Zone v. Scott, 502 F.2d 566, 568 (5th Cir. 1974).....24

Cuban-American Bar Ass'n v. Christopher, 43 F.3d 11412 (11th Cir. 1995)...24

Haitian Ctrs. Council, Inc. v. McNary, 969 F. 2d 1326 (2d Cir. 1992) *vacated as moot sub nom Sale v. Haitian Centers Council, Inc.* 509 U.S. 918 (1993).....24

United States v. Husband R. (Roach), 453 F.2d 1344, 1058 (5th Cir. 1971) 24

Raven v. Panama Canal Co., 583 F.2d 169 (5th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979)..24

UNITED STATES CONSTITUTION

Article 1.....7, 20

1st Amendment.....21- 22

4th Amendment.....22

5th Amendment.....23

14th Amendment.....23

FEDERAL STATUTES

Military Commissions Act of 2006 (MCA), 10 U.S.C. §§ 948, *et seq*.....6

TREATIES AND LEASE AGREEMENTS

1903 Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Article III, T.S. No. 418 9-10

Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, Art. III, 48 Stat. 1683, T.S. No. 866.....11

SCHOLARLY AND MISCELLANEOUS MATERIALS

Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality after Boumediene*, 109 Colum. L. Rev. 973, 985 (2009).....21-22

Jana K. Lipman, *Guantanamo: A Working Class History Between Empire and Revolution* 21 (2008).....9, 12-14

M.E. Murphy, Rear Admiral, U.S. Navy, *The History of Guantanamo Bay, 1494-1964* (Jan. 5, 1953), available at: https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyvol1/gtmohistmurphyvol1ch03/CNIC_040535.....11

Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 Loyola Law Rev. 1, 39 (2004)..12

Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality In American Law* 191 (2009).....12

Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire. Landmark Law Cases and American Society* (2006).....16

Brief of Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae in Support of Petitioners in *Boumediene v. Bush*.....17

CERTIFICATE OF COMPLIANCE WITH RULE 14(I)

1. This brief complies with the type-volume limitation of Rule 14(i) because:

   This brief contains 6,740 words.

2. This brief complies with the typeface and type style requirements of Rule 14(e) because:

   This brief has been prepared in a monospaced typeface using Microsoft Word 2007 with 12 point, or 12 characters per inch and Times New Roman Font.

Dated: October 15, 2009

Sarah H. Paoletti, Esq.
Clinical Supervisor and Lecturer
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104
Phone: 215-898-1097
paoletti@law.upenn.edu

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to CAPT Edward White at [redacted]l on the 15th day of October 2009, as well as to MAJ Todd E. Pierce at todd.pierce@osd.mil on the 15th day of October 2009.

Dated: 15 October 2009

Sarah H. Paoletti, Esq.
Clinical Supervisor and Lecturer
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104
Phone: 215-898-1097
paoletti@law.upenn.edu

INTEREST OF *AMICI CURIAE*

Having sought leave of this Court for permission to file, *Amici Curiae*, historians, political scientists, and constitutional law scholars, submit this brief in support of Appellant out of their respect for principles of constitutional law and commitment to their application. They are recognized experts in the field, having researched, lectured and published extensively in the area of constitutional law, legal history, and the extraterritorial and territorial reach of the U.S. Constitution. See Appendix A for a complete list of Amici Curiae and their expertise.

SUMMARY OF ARGUMENT

Consistent with more than a century of jurisprudence addressing the Constitution's jurisdictional reach beyond the territory of the United States, there can be no doubt that the Constitution applies to proceedings conducted at Guantanamo Bay Naval Base pursuant to the Military Commissions Act of 2006 (MCA), 10 U.S.C. §§ 948, *et seq.* The Supreme Court most recently addressed this issue in *Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2229 (2008), granting the constitutional right to *habeas corpus* to foreign-born detainees determined to be "enemy combatants." Central to the Court's decision was its determination that although Cuba maintains ultimate, *de jure* sovereignty, the United States has "maintained complete and uninterrupted control" over the Guantanamo Naval Base "for over 100 years." *Boumediene*, 128 S.Ct. at 2258. In light of that history, the Court found it an "obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory," *id.* at 2253 (citing to *Rasul v. Bush*, 542 U.S. 466, 480, *id.*, at 487 (KENNEDY, J., concurring in judgment)).

Given the United States' exercise of *de facto* sovereignty, the inquiry then becomes what is the scope of constitutional application to individuals charged as "alien enemy combatants" being held at the Guantanamo Bay Naval Base. *Amici* herein assert that because the Guantanamo Naval Base operates as part of the United States and not as a separate sovereign territory, the Constitution applies to all proceedings and all individuals held there subject only to the same limitations as would be found to apply to non-citizens in the territorial United States. At a minimum, though, based on the reasoning and holdings consistently put forth by the Supreme Court from the *Insular Cases* to the Court's decision in *Boumediene*, the Constitution's core protections, including First Amendment freedom of speech rights, Article 1 protections regarding *ex post facto* laws and bills of attainder, and Fifth Amendment rights to equal protection, must govern the proceedings at issue.

I. ARGUMENT

A. The legal history of the Constitution's application in unincorporated sovereign territories of the United States, reviewed in light of the United States' complete and total control over the Guantanamo Bay Naval Base, compels the conclusion that the Constitution must apply to the present proceedings.

The jurisprudence regarding the Constitution's applicability to unincorporated territories held by the United States developed concurrently with the United States' historical relationship as *de facto* sovereign over the Guantanamo Bay Naval Base and compels the conclusion that the Constitution indeed follows the flag to Guantanamo Bay. This conclusion is driven significantly by the political, social, and economic relationship of the United States to the Guantanamo Naval Base that leaves no question as to the United States' indefinite and unfettered control over the territory in question. That factual relationship informs the legal conclusion regarding the reach

of the Constitution to the Guantanamo Naval Base and is grounded in the broader historical context in which the law developed.[1] This section therefore focuses first on the relationship of the United States to the Guantanamo Naval Base, and then reviews the relevant legal precedents examining the application of the Constitution's protections to non-contiguous U.S. Territories. The following section analyzes the historical development of the intra-territorial and extraterritorial application of the Constitution and the distinctions made defining the scope of rights and protections that must be guaranteed. Finally, *Amici* assert the legal status of the Appellant is irrelevant to the determination that the Constitution applies.

1. It is undisputed that the United States maintains complete and total control over Guantanamo Bay Naval Station, exercising *de facto* sovereignty over the territory.

The Supreme Court has recognized the history of political, economic, social, and legal control exercised by the United States over Guantanamo Naval Base in concluding the United States exercised *de facto* sovereignty over the territory. In *Rasul v. Bush*, 542 U.S. 466, 476 (2004), the Court noted the United States "exercises exclusive jurisdiction and control" over the Guantanamo Naval Base. Justice Kennedy similarly took notice of the "unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay." *Id.* at 488 (Kennedy, J., concurring). That exercise of jurisdiction and control compels the conclusion that, at a minimum, those constitutional rights deemed critical to the operation of a free government must apply, and is a key factor in the Supreme Court's determination in *Boumediene v. Bush* that the constitutional right to *habeas corpus* attaches to detainees held on the Guantanamo Naval Base.

[1] See Kal Raustiala, Does the Constitution Follow the Flag? (2009),

The history of the United States' relationship with Guantanamo Bay began when the United States became involved in what had begun as the War of Cuban Independence, but was transformed into the Spanish-American War upon the involvement of the United States and the landing of U.S. Marines on the territory in 1898. As historian Jana Lipman has written: "[f]rom this incipient moment, the history of Guantanamo Bay became entangled with U.S. military history." Jana K. Lipman, *Guantanamo: A Working Class History Between Empire and Revolution* 21 (2008). At the conclusion of the Spanish-American War Spain ceded Cuba to the United States in the 1898 signing of the Treaty of Paris at the conclusion of the Spanish-American War.

For the next three years, the United States maintained military control over and governed Cuba holding it free for the Cuban people, until Cuba agreed to incorporate the Platt Amendment into its constitution. *Id.* at 23. The Platt Amendment continued the United States' exercise of control over Cuba which granted the U.S. military the right to invade Cuba when deemed necessary to "preserve" the independence of Cuba, limited Cuba's right to enter into treaty agreements with foreign governments, and requiring Cuba to enter into a lease agreement with the United States for the establishment of territory for coaling and naval stations "to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense." *Id.*[2] In 1902, one year after Cuba's acceptance of the Platt Amendment, the U.S. military withdrew from Cuba and the Republic of Cuba was established, but maintained a military presence at Guantanamo Bay. In 1903, the United States entered into a lease agreement, retaining control over the Guantanamo Naval Base. *Id.* at 24.

[2] Quoting from "The Platt Amendment," in *The Cuba Reader: History, Culture, and Politics*, ed. Aviva Chomsky, Barry Carr, and Pamela Maria Smorkaloff (Durham, NC: Duke University Press, 2003), 147-49.

The manner in which the United States came to take control the Guantanamo Bay Naval Base bore relevance to the Supreme Court's analysis that led to the finding in *Boumediene* that the United States has exercised and continues to exercise plenary jurisdiction over the Guantanamo Naval Base:

> 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.

Boumediene, 128 S.Ct. at 2252.

The 1903 lease agreement between the United States and Cuba granted the United States jurisdiction over the territory held as the Guantanamo Naval Base for the continued and indefinite benefit of the United States. The 1903 lease provided:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the *United States shall exercise complete jurisdiction and control over and within said areas* with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

1903 Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Article III, T.S. No. 418 (emphasis added).[3]

Further elaborating upon the sovereign rights established in the initial lease agreement, the United States and Cuba entered into a supplementary agreement providing clear jurisdictional guidelines regarding the criminally-charged, in a manner that mirrors a country's exercise of

[3] Complete version of 1903 Lease and the Supplementary Agreements are available at: https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyappendices/gtmohistmurphyappalease/CNIC_046865.

jurisdiction in extradition agreements between sovereign nations. Article IV of the 1903 Supplementary Agreement provides:

> Fugitives from justice charged with crimes or misdemeanors amenable to Cuban law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities. On the other hand, the Republic of Cuba agrees that fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed with said areas, taking refuge in Cuban territory shall on demand, be delivered up to duly authorized United States authorities.

Id.[4]

In 1934, the United States accepted Cuba's abrogation of the Platt Amendment and formally annulled it, while at the same time renegotiating its lease agreement with Cuba confirming and extending the same essential terms of control and jurisdiction of the initial lease agreement indefinitely or until the United States opts to abandon the Base. As M.E. Murphy, Rear Admiral, U.S. Navy, concluded in his writing of The History of Guantanamo Bay, 1494-1964, in the mid-twentieth century (originally published Jan. 5, 1953):[5]

> Thus it is clear that *at Guantanamo Bay we have a Naval reservation which, for all practical purposes, is American territory*. Under the foregoing agreements, the United States has for approximately fifty years exercised the essential elements of sovereignty over this territory, without actually owning it. Unless we abandon the area or agree to a modification of the terms of our occupancy, we can continue in the present status as long as we like. Persons on the reservation are amendable only to United States legislative enactments. There are a few restrictions on our freedom of action, but they present no serious problem.

(emphasis added). Stated another way, "Under the terms of 1934 Treaty… Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or

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[4] *Id.* Rear Admiral Murphy does note that, in practice, Cuba and the United States did not necessarily follow the provisions in the 1903 supplementary agreement related to who had jurisdiction over criminal defendants, in part because until the passage of the Uniform Code of Military Justice in 1951, there was "no peacetime legal machinery for trying such offenders. Accordingly, we have habitually requested local Cuban courts to exercise concurrent jurisdiction and handle such cases.… In a reciprocal manner, U.S. military personnel, charged with offenses in Cuba, are habitually turned over to U.S. jurisdiction for legal action."

[5] Text available on the U.S. Navy's website at: https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyvol1/gtmohistmurphyvol1ch03/CNIC_040535.

the United States abandons the base." *Boumediene*, 128 S.Ct. at 2252 (citing to Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, Art. III, 48 Stat. 1683, T.S. No. 866).

Throughout the past century, the United States' has repeatedly exercised that jurisdiction and control, of *de facto* sovereignty, over the Guantanamo Naval Base; evidence of this exercise of complete jurisdiction and control can be found in all areas of social, political, and economic life on the Naval Base and in the relationship between the United States and the Guantanamo Naval Base. The Guantanamo Naval Base is the only major U.S. Military Base not governed by a Status of Forces Agreement (SOFA), through which the United States negotiates the legal relationship with the host country, and sets forth a series of understandings regarding what laws apply to the occupants of the base and how they will be enforced. See Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 Loyola Law Rev. 1, 39 (2004); Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality In American Law* 191 (2009). As constitutional law scholar Gerald Neuman has noted: "Given the totality of U.S. territorial jurisdiction on the base, and the lack of access to the rest of Cuba since 1959, no such agreement is needed.... At Guantanamo, the United States is accountable only to itself." Neuman, *supra*, 50 Loyola L. Rev. at 39.

A leading historian in the area of Cuban socio-political life has conducted a comprehensive historical study of the relationship between the United States and the non-U.S. workers employed at the Guantanamo Naval Base, including the regulation of Cuban and non-Cuban foreign workers, and the broader socio-political implications of that relationship. Jana K. Lipman, *Guantanamo: A Working-Class History between Empire and Revolution* (2009). She notes at the outset, "In the years after the Cuban revolution, the U.S. government successfully redefined the naval base as an island unto itself," *id.* at 10, and elaborates upon the variety of

actions the United States has taken since carving out the territory for the Guantanamo Naval Base for its exclusive use in 1902 through the regulation of labor and admission of both Cubans and non-Cuban foreign nationals.[6] From the official opening of the Guantanamo Naval Base, the United States regulated the admission of employees onto and off the base, requiring specific admission cards and identification cards and subjecting employees to security checks, *Id.* at 40-42, and it has regulated and continues to regulate all activities taking place within its territorial confines. In 1933, when Cuba passed what has been referred to as the Law of Fifty Percent, mandating that fifty percent of all employment had to go to Cubans, the United States did not consider itself so bound, and operating outside of the jurisdiction of Cuba, did not follow the law. *Id.* at 44-46. As Lipman noted:

> Conceding to Cuban labor demands could create a slippery slope and erode U.S. authority. As one base commander stated, if Cuban labor laws applied to workers on the base, it "might easily progress to the application of other Cuban law" on GTMO. He feared that any adherence to Cuban law would "nullify" the United States' "complete jurisdiction."

Id. at p. 71. Thus, it was clear from the early days of regulating labor and employment on the Base, that the United States determined what rules would apply and how they would be enforced.

The United States' approach to Cuban migration after Castro's rise to power and the political split between the United States and Cuba went beyond the exercise of rule-making and enforcement in an exercise of jurisdictional control; it was clear evidence of the United States' treatment and recognition of Guantanamo Naval Base as part of the sovereign United States. The United States gave Cuban nationals working on the Base the option of staying on the Base full-time so long as they continued working, or returning to Cuba; most Cuban nationals were no longer allowed to enter the Base in the morning for work and return home to their families at

[6] As Lipman notes, foreign nationals comprise the overwhelming majority of individuals working at Guantanamo Bay Naval Base as cooks, gardeners, and laborers. *Id.* at 9.

night. In doing so, the United States essentially extended its sovereign border into Cuba carving out the Guantanamo Naval Base as part of its sovereign territory exercising complete and total control of migration across the border.

The United States then granted the "permanent base residents" similar rights to family migration to the United States as permitted to Cubans living in the United States. During the 1965-1971 airlifts of Cubans to Miami, following the 1965 Varadero Family Claim Program allowing Cuban residents to bring family members to the United States, Cubans who were considered "permanent base residents" had the same rights as those Cubans who were residents of the United States. *Id.* at 200. In doing so, the United States essentially recognized the Guantanamo Naval Base as the legal equivalent of the territorial United States, though was able to do so outside the public eye.

The United States' tacit, and in some cases explicit, recognition of the Guantanamo Naval Base as being the legal equivalent of the territorial United States, was evidenced again during what has been dubbed the "Mariel Boat Lift." In describing the historical moment when the United States changed course on its open reception of Cuban migrants after the government of Cuba opened the Mariel port in 1980, Lipman recounts:

> [S]everal U.S. politicians openly suggested sending these undesirable refugees back to Cuba, specifically through the U.S. naval base in Guantanamo Bay. They recognized GTMO's ambiguous position as a stateless space, within Cuba, but not of it.... The Reagan administration considered transporting these individuals to GTMO. Presidential spokesperson David Gergen emphasized that such a move would not technically be deportation, because the United States did not *"consider the base to be Cuban territory."* [Citation omitted] (emphasis added).

Id. at 206-07. The historical record demonstrates that the United States operates as the sole legal authority on the Guantanamo Naval Base, a legal authority that extends beyond matters of immigration and employment to the governance of all aspects of life. As the *Boumediene* Court

concluded, there is "no reason to believe an order from a federal court would be disobeyed at Guantanamo." 128 S.Ct. at 2251.

This significance of this legal, political and socio-economic history is recognized in the Supreme Court's decision in *Boumediene* where the Court explicitly distinguished between the narrow, technical definition of *de jure* sovereignty and actual sovereignty, and "took notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory," *Boumediene*, 128 S.Ct. at 2253 (citing to Rasul v. Bush, 542 U.S. at 480; *id.*, at 487 (Kennedy, J., concurring in judgment)). That determination was central to the Court's analysis regarding the jurisdictional reach of the Constitution to Guantanamo Bay in *Boumediene* and is central to the argument herein.

2. A review of the Supreme Court's jurisprudence on the applicability of the Constitution to non-contiguous territories of the United States compels the conclusion that the Constitution applies to proceedings at Guantanamo Bay.

While the jurisprudential history of the Constitution's intra-territorial and extraterritorial reach began with the U.S. territorial expansion South and West, in accordance with Art. IV §3 of the Constitution, an inquiry into the territorial reach of the Constitution over locations such as Guantanamo Naval Base best begins with the series of cases collectively referred to as the *Insular Cases*, from the turn of the 20th Century.[7] Those cases addressed the applicability of the Constitution to unincorporated U.S. territories, including Puerto Rico, Guam, the Philippines,

[7] Earlier cases addressing the reach of the Constitution over newly acquired territories are ambiguous as to whether the Constitution was applied by its own force, or as a result of legislation. Rev. State. §1891 provided: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the Organized Territories, and in every Territory hereafter organized as elsewhere within the United States." See Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality after Boumediene*, 109 Colum. L. Rev. 973, 985 (2009).

and later Hawaii.[8] As the Supreme Court noted in *Boumediene*, in each of the *Insular Cases* the Court held "the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace." *Boumediene*, 128 S.Ct. at 2254. Justice White provided the clearest statement regarding the reach of the Constitution in his concurring opinion in *Downes v. Bidwell*, 182 U.S. 244 (1901):

> In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is accountable.

Downes, 182 U.S. at 292 (White, J., concurring).

The Supreme Court in *Boumediene* agreed. Precedent provided the Constitution applied in full in fully incorporated territories "surely destined for statehood," and applied at least in part in the unincorporated territories. While the Court noted the difficulties in the enforceability of constitutional rights and protections at issue, and conceded the enforceability of certain constitutional provisions due to the practical difficulties associated with doing so, those issues create an inquiry separate and distinct from the question as to whether the Constitution has force at all.[9]

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[8] The following Insular Cases were cited by the *Boumediene* Court: *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi* 190 U.S. 197 (1903); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 .S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901). For a complete history of the Insular Cases, see Bartholomew H. Sparrow The Insular Cases and the Emergence of American Empire. Landmark Law Cases and American Society (2006). A comprehensive review of territorial application of the Constitution, beginning with the United States' acquisition of contiguous territories as the United States expanded, is provided in Kal Raustiala Does the Constitution Follow the Flag? *passim* (2009).

[9] T he Brief of Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae in Support of Petitioners in *Boumediene v. Bush*, drew the following conclusion from their clear analysis of the Insular Cases:

> The *Insular Cases* concluded that constitutional provisions to not extend to a particular territory by will of Congress, but rather, as a result of the relationship that Congress creates between the United States and the territory. *Downes v. Bidwell*, 182 U.S. 244, 289 (1901) (Opinion of White, J.); *Dorr v. United States*, 195 U.S. 138, 142 (1904). The *Insular Cases* struck a compromise between the forces of constitutionalism and the forces of empire by guaranteeing that the Constitution's most fundamental rights would be honored wherever the United States possesses

In its decision in *Boumediene v. Bush*, the U.S. Supreme Court put to rest any lingering questions about the application of the Constitution to Guantanamo Naval Base when it held unequivocally that detainees charged by the U.S. Government as unlawful enemy combatants, possess the constitutional right to habeas corpus. As the Court unequivocally stated:

> Our basic Charter cannot be contracted away.... 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."
>
> *Boumediene,* 128 S.Ct. at 2259 (citing to *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).

In reaching its holding, the Court advanced the legal analysis put forth in *Rasul v. Bush* which had most recently held the statutory right to habeas corpus under 28 USC §2241 applied to the detainees held in Guantanamo. While both decisions looked extensively at the history of the writ of habeas corpus and historically grounded importance of the writ, as Justice Kennedy stated in his concurring opinion, "What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay." *Rasul*, 542 at 487 (Kennedy, J., concurring). It is that exercise of "plenary and exclusive jurisdiction," discussed *supra*, that ultimately mandates application of constitutional protections as well.

In distinguishing its decision of more than half a century earlier in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court analyzed the six criteria used to decide constitutional rights did not apply.[10] The Court identified the legal, physical and temporal nature

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> governing authority. In such cases, it is the exercise of complete U.S. jurisdiction and control, not nominal sovereignty, that justifies the application of a correlative set of rights.

2007 WL 2441580 , 16.

[10] The criteria employed by the Court in determining the Writ of Habeas did not extend to detainees held in the Landsberg Prison in Prison in occupied Germany were: the persons seeking the writ were enemy aliens; they had never been to or resided in the United States; they were captured outside of U.S. territory and had been held in military custody as prisoners of war; they were tried and convicted outside the United States by a Military Commission; they were tried for laws of war committed outside the United States; and their place of imprisonment was at all times outside the United States. 339 U.S. at 777.

of control exercised by the United States over the territory where the detainees were held to be a key distinguishing factor in determining detainees at the Guantanamo Naval Base were entitled to the writ of habeas corpus while the detainees in Landsberg Prison in occupied Germany were not. Petitioners in *Rasul* were "imprisoned in territory over which the United States exercises exclusive jurisdiction and control." Justice Kennedy's analytical framework for distinguishing the Petitioners in *Johnson v. Eisentrager* and the petitioners in his concurring opinion in *Rasul* provided the basis for the Court's determination that not just the statutory right but the constitutional right to habeas corpus applied in *Boumediene*. That analysis is worth repeating here as it provides the framework for concluding the applicability of the Constitution more generally to detainees held at Guantanamo Naval Base. The first critical distinguishing fact was the following:

> Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities.... What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay.

Rasul, 542 U.S. at 488 (KENNEDY, J., concurring). In reaching that conclusion, he notes the Court's explanation of the history of the Guantanamo Naval Base, and the lease agreement governing the territory, noting: "this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States." *Id.* He goes on to state: "From a practical perspective the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it." *Id.* (citation omitted).

Reiterating the findings in *Rasul*, and central to the argument as to the applicability of the Constitution in the case at hand, the Court in *Boumediene* held: Guantanamo Bay "is no transient possession.... In every practical sense, Guantanamo is not abroad, it is in the constant jurisdiction of the United States." *Boumediene,* 128 S.Ct. at 2261, and in that way it is very

different from the Landsberg Prison in occupied Germany. Unlike the Landsberg Prison in occupied Germany, where the United States was accountable to the Allied Forces, only the United States operates at the Guantanamo Naval Base. As noted by the Supreme Court: "No Cuban court has jurisdiction to hear these petitioners' claims, and no law other than the laws of the United States applies at the Naval Station." *Boumediene v. Bush*, 128 S.Ct. at 2251.[11] Scholars, advocates, and courts alike have noted that because Guantanamo Naval Base operates independent of any other sovereign, and is under the complete and indefinite control of the United States, to allow it to operate outside the laws of the United States would result in the creation of "legal black hole."

The Court's repeated statements affirming that Guantanamo Bay is under the *de facto* sovereign jurisdiction of the United States is entirely consistent with the social, historical, and legal record discussed above. That historical exercise of *de facto* sovereign jurisdiction compels the conclusion that the Constitution applies. Consistent with the Supreme Court's precedent from the *Insular Cases* to *Boumediene*, and the intervening decisions, therefore, the Constitution must be deemed to be in force over the proceedings at issues in this case.

B. Assuming *arguendo* that despite the United States' exercise of *de facto* sovereignty, it is determined that the Guantanamo Naval Base is not the legal equivalent of a fully incorporated territory, the inquiry then is whether there are permissible limitations on which Constitutional provisions must apply, and not whether the Constitution is in force at all.

Insular Cases provided the first opportunity for the United States courts to explore the reach of the Constitution over unincorporated territories. And in those cases, the Court repeatedly resolved that the Constitution did apply, but then looked at whether the specific

[11] See also, discussion *infra*, I.A.1.

constitutional provisions at issue were applicable and enforceable. As the Supreme Court clearly stated in *Dorr v. United States*, 195 U.S. 138 (1904), it is settled law that "the Constitution of the United States is the only source of power authorizing action by any branch of the Federal government. *Id.* at 140.

In the case of *Downes v. Bidwell*, 182 U.S. 244 (1901) (upholding Art. 1, § 8 of the Constitution declaring "all duties, imposts, and excises shall be uniform throughout the United States" did not apply to the unincorporated territory of Puerto Rico), the Supreme Court began to draw the line between those constitutional rights that cannot be transgressed anywhere at any time because they are central principles to the exercise of a free government. Justice Brown stated there exists "a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time of place, and such as are operative only 'throughout the United States' or among the several states." 182 U.S. at 277.

In the last of the *Insular Cases*, the Court in *Balzac v. Porto Rico*, 258 U.S. 298 (1922) held the Constitution applies "by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements." *Id.* at 312. The Court in *Balzac* goes on to state that the United States is bound to provide "guaranties of certain fundamental personal rights declared in the Constitution." *Id.* As with the Court's determination in *Balzac* and the earlier *Insular Cases*, the inquiry this Court is bound to consider is not whether the Constitution applies: "The Constitution of the United States is in force … wherever and whenever the sovereign power of the government is exerted." *Id.* The query instead is where to draw the lines regarding those constitutional rights that apply at all times, and those from which the United States may deviate depending on the circumstances.

In *Downes v. Bidwell*, Justice Brown provided some guidance for identifying constitutional rights applicable to territories over which the United States exercises legal jurisdiction:

> We suggest … that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, …; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws.

Downes, 182 U.S. at 282-283. While not seeking to provide a definitive list of which provisions must govern at all times, Justice Brown went on to elaborate:

> Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' … it goes to the competency of Congress to pass a bill *of that description*. Perhaps the same remark may apply to the 1st Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people … to petition to government for a redress of grievances.'

Downes, 182 U.S. at 277. Thus he began to categorize those "certain natural rights" which cannot be transgressed, and those that are "remedial rights which are peculiar to our own system of jurisprudence," a distinction central to the Court's determination in subsequent cases that certain constitutional provisions do not necessarily extend beyond the territorial United States. *Id.* at 282.

As constitutional law scholar Christina Duffy Burnett has concluded:

> While the Insular Cases also alluded more generally to "principles which are the basis of all free government" and to "restrictions of so fundamental a nature that they cannot be transgressed although not expressed in so many words in the Constitution," all of the Justices agreed that prohibitions such as those respecting bills of attainder, ex post facto laws, and titles of nobility limited Congressional power even in the unincorporated territories, thus confirming the Constitution's central referent in the analysis.

Christina Duffy Burnett, *A Convenient Constitution?: Extraterritoriality after Boumediene*, 109 Colum. L. Rev. 973, 1013 (quoting from *Downes v. Bidwell*, 182 U.S. 244, 291).

In *Reid v. Covert*, 354 U.S. 1 (1956), the Court introduced the inquiry as to whether judicial enforcement would be "impracticable and anomalous." *Id.* at 74-75. While returning to this inquiry in *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990), the Court was careful to distinguish "a remedial question" regarding the Fourth Amendment rights, and the separate and distinct question about "the existence *vel non* of the constitutional violation." 494 U.S. at 264.[12] At issue in *Verdugo-Urquidez* was whether the Fourth Amendment applied to the United States' DEA's warrantless search and seizure of evidence obtained in Mexico and used to convict a Mexican national. The Court therefore was able to categorize the Fourth Amendment exclusionary rule as a remedial rule, and therefore distinct from those "principles which are the basis of all free government." Having categorized the right as remedial, the next line of inquiry is whether enforcement of the remedial rights is "altogether impracticable and anomalous." (Kennedy, J., concurring, citing to Reid v. Covert, 354 U.S. at 74).

In considering the Constitutional arguments put forth by the Appellant in the present case, what matters first is that the Constitution has full force and effect at Guantanamo Naval Base. The next inquiry is then whether the constitutional rights raised by Appellant – First Amendment, *ex post facto* and Bill of Attainder, and Equal Protection – should be granted full force and effect, and the clear answer there is also yes. The situation in Guantanamo is much more analogous to the Panama Canal and fully incorporated territories and therefore all

[12] Justice Kennedy provided a careful and comprehensive summary of the law on this issue in his concurring opinion, stating: "I take it to be correct, as the plurality in *Reid v. Covert* sets forth, that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic. [Citation omitted.] The question before us then became what constitutional standards apply when the government acts, in reference to an alien, within its sphere of foreign operations.... We must interpret constitutional protections in light of the undoubted power and authority abroad." *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 277 (J. KENNEDY, concurring).

provisions should apply. Assuming *arguendo* that not to be the case, it is clear the rights asserted are in nature those very rights contemplated by the Court in earlier decisions, and even specifically mentioned in *Downes v. Bidwell*, to be central to the operation of a free government and therefore must have application here. Finally, there are no sound arguments regarding the impracticality and anomalousness of the constitutional claims raised herein that can trump their application and enforcement.

C. The legal status of detainees held in Guantanamo Bay has no relevance on their right to fundamental protections under the Constitution.

As the Supreme Court has repeatedly held, non-citizens are entitled to the protection of their fundamental constitutional rights regardless of their legal status. In the first of the *Insular Cases* to address the constitutional rights of non-citizens outside the United States and its formally incorporated territories, the Court clearly stated:

> Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356 (additional citations omitted).

Downes v. Bidwell, 182 U.S. at 283. The Supreme Court in *Yick Wo* held the Equal Protection and Due Process Clauses of the Fourteenth Amendment are "universal in their application, to all persons within the territorial jurisdiction." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). *See also Plyler v. Doe*, 457 U.S. 202, 215 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). And the Court repeated in *Boumediene*, "the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, see *Yick Wo v. Hopkins,* 118 U.S. 356, 374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), protects persons as well as citizens," and

therefore one's alienage cannot be used to deprive that person of fundamental constitutional rights. *Boumediene*, 128 S. Ct. at 2246.

The doctrine emanating from the *Insular Cases* regarding the rights of non-citizens has parallels in cases arising out of the Panama Canal Zone, a territory governed much in the same way as the Guantanamo Naval Base. In *Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974), the Fifth Circuit held: "non-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive." *See also*, *United States v. Husband R. (Roach)*, 453 F.2d 1344, 1058 (5th Cir. 1971); *Raven v. Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). As with the *Insular Cases* and those arising out of the Panama Canal Zone, it is the nature of the territory and exercise of *de facto* sovereign control over that territory, and not the alienage of the individuals, that matters in determining the reach of the Constitution.[13]

II. Conclusion

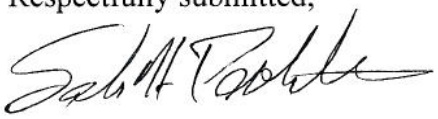
Justice Black, writing for the majority in *Reid v. Covert*, warned:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.

[13] The Second and Eleventh Circuits issued conflicting decisions about the applicability of the Bill of Rights asylum seekers captured at sea and held at the Guantanamo Naval Base. *Compare Haitian Ctrs. Council, Inc. v. McNary*, 969 F. 2d 1326 (2d Cir. 1992) *vacated as moot sub nom Sale v. Haitian Centers Council, Inc.* 509 U.S. 918 (1993), *with Cuban-American Bar Ass'n v. Christopher*, 43 F.3d 11412 (11th Cir. 1995) (denying the application of the Bill of Rights).

Reid v. Covert, 354 U.S. 1, 14 (1957). Justice Black's statement resonates more than half a century later; this court should not collude in the attempt to render the protections of the constitution inoperative be geographical manipulation.

Respectfully submitted,



Sarah H. Paoletti, Esq.
Counsel to *Amici Curiae*,
Historians, Political Scientists, and Constitutional Law Scholars
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-8427
paoletti@law.upenn.edu

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