No. 08-368

In The
Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,
Petitioner,

v.

DANIEL SPAGONE, UNITED STATES NAVY COMMANDER, CONSOLIDATED NAVAL BRIG,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF FORMER UNITED STATES DIPLOMATS J. BRIAN ATWOOD, HARRY G. BARNES, JR., F. ALLEN "TEX" HARRIS, SAMUEL F. HART, JOHN L. HIRSCH, GENTA HAWKINS HOLMES, GILBERT D. KULICK, L. BRUCE LAINGEN, ELIJAH PARISH LOVEJOY IV, LAURENCE E. POPE, PAUL K. STAHNKE, ALEXANDER F. WATSON AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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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. Most of the *amici curiae* also submitted a brief *amici curiae* before this Court in the *Rasul* and *Al Odah* cases in 2004 and the *Boumediene* case in 2006.[2] For those cases, we argued that the United States' policy of detention and denial of *habeas corpus* to prisoners at Guantanamo undermined the diplomatic credibility of the United States and eroded our country's most precious diplomatic asset – this nation's values and in particular its reverence for the fundamental constitutional guarantee of individual freedom from arbitrary government authority.

In some ways, the instant controversy eclipses the concerns present in those prior cases. This is so because the fiction that the extra-territoriality of Guantanamo provides cover for our decidedly un-American detentions there is destroyed by the stark reality that the Petitioner here was legally in the United States, arrested on U.S. soil, and is being detained in the United States without criminal charge. The undersigned *amici curiae* argue that allowing such a result to stand will undercut the

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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 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.

[2] *Rasul v. Bush*, 542 U.S. 466 (2004), *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

positive effects on American diplomacy of this Court's decision in *Boumediene* and the new Administration's order for the closure of the prison at Guantanamo.

Our names and diplomatic posts are as follows:

J. Brian Atwood served as Under Secretary for Management in 1993 and as Administrator of the United States Agency for International Development from 1993 to 1999.

Harry G. Barnes, Jr. served as Ambassador to Romania from 1974 to 1977, Director General of the Foreign Service and Director of Personnel in the Department of State from 1977 to 1981, Ambassador to India from 1981 to 1985, and Ambassador to Chile from 1985 to 1988.

F. Allen "Tex" Harris retired after serving with the United States Department of State for thirty-five years, including Foreign Service posts in Argentina, Australia, South Africa, and Venezuela. Mr. Harris is a past President of the American Foreign Service Association.

Samuel F. Hart served as Ambassador to Ecuador from 1982 to 1985.

John L. Hirsch served as Ambassador to Sierra Leone from 1995 to 1998.

Genta Hawkins Holmes served as Ambassador to Namibia from 1990 to 1992, Director General of the Foreign Service and Director of Personnel for the Department of State from 1992 to 1995, and Ambassador to Australia from 1997 to 2000.

Gilbert D. Kulick served as a Foreign Service Officer from 1966 to 1989, retiring as Deputy Director of Southern Africa Affairs.

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

Elijah Parish Lovejoy IV served as a consular officer at the Bridgetown, Barbados Embassy from 1997 to 1999.

Laurence E. Pope served as Associate Coordinator for Counter-terrorism from 1991 to 1993, Ambassador to Chad from 1993 to 1996, and Political Advisor to the Commander in Chief, U.S. Central Command, from 1997 to 2000.

Paul K. Stahnke is Minister Counselor, retired. Among other posts, he was Counselor of Mission at the

United States Mission to the Organization for Economic Cooperation and Development in Paris from 1978 to 1982, and Permanent Representative to the United Nations ESCAP (Economic and Social Council for Asia and the Pacific) from 1982 to 1988, while also serving as Economic Counselor in the United States Embassy in Bangkok during the same period.

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.

SUMMARY OF ARGUMENT

At stake in the instant controversy is whether the United States Supreme Court will put its imprimatur on a type of military "enemy combatant" detention that has undermined America's credibility and standing in the world during the last eight years. The Petitioner in this case was legally in the U.S., arrested on U.S. soil, and is being detained indefinitely in the U.S. without criminal charge or trial. The undersigned *amici curiae* argue that, based on our professional experience in the diplomatic service of this country, American diplomatic credibility and effectiveness in many areas of international relations suffer from the widely shared perception that the U.S. has

abandoned the rule of law. Indefinite detention without criminal charge or trial is, for most people, the essence of this abandonment. Accordingly, a decision upholding our government's right to arrest and imprison anyone within its borders, without charge, will not only undercut our ability to convince dictatorial regimes to abandon similar practices, it will substantially undermine efforts to restore our international reputation and to obtain more cooperation from our allies in combating terrorism.

Our most effective diplomatic weapon – our nation's moral standing – is lost when our government holds itself to a different standard than it would have other countries apply. At this time, when a new Administration has come to power and seeks to gain traction in its various diplomatic efforts, the restoration of our standing in the world community is of particular import.

For these reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed with regard to the question presented in this appeal by Petitioner.

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 international relations. All are retired from public service.

It is not our purpose to argue the merits of the parties' respective legal positions in this case. Rather, we hope to expand on their presentation and what the Court may consider in its decision by setting forth our collective professional experience as to the significance for American diplomacy and international relations of the holdings of the court below.

We understand that in the case below, the United States Court of Appeals for the Fourth Circuit held that Congress, in the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), vested the Executive with the power to seize individuals residing in this country, even Americans, and detain them indefinitely in military custody without criminal charge or trial based solely on a determination by the Executive that the individual planned to engage in terrorist activities. We also understand that the procedures for determining whether such detentions are justified are at best murky and leave uncertain the potential scope of the exercise of this unprecedented executive authority. We profess no special expertise in these issues from a constitutional perspective.

However, our professional experience convinces us that American diplomatic credibility and effectiveness in many areas of international relations suffer greatly from the widely shared perception that the United States has abandoned the rule of law and lost its bearings with regard to its traditional bulwarks against the unchecked authority of its government to seize and detain its residents without criminal charge or trial. The

Petitioner here, who was lawfully residing the United States with his family while pursuing a master's degree, was arrested at his home in the middle-American city of Peoria, Illinois, and has been held within the territorial boundaries of the United States for the better part of eight years without criminal trial or any currently pending criminal charges. The Petitioner alleges that, during this period, he has been held in solitary confinement, held nearly *incommunicado*, and subjected to abuses that have never previously been tolerated in the modern American penal system.

One hallmark of a dictatorship is the government's assertion of a right to arrest and indefinitely imprison anyone within its borders, citizen or non-citizen, without criminal trial or charges, and to confine such individuals in harsh and inhumane conditions. Aside from undercutting our ability to exercise moral suasion against such regimes, a decision upholding such a claimed right by the United States Executive will ill-serve our country as we seek to restore our international reputation and to obtain more cooperation from our allies in combating terrorism, in supporting our efforts in the wars in Afghanistan and Iraq, and in dealing with the Israeli-Palestinian conundrum.

Our professional experience informs us that the United States faces an international credibility gap resulting from a "do as I say not as I do" foreign policy that placed perceived threats to American security as the paramount ethic above its once venerated respect for freedom from unjustified

restraints on liberty. Indeed, in its prosecution of the war on terror, the United States has largely dispensed with its most valuable diplomatic asset – its values – and adopted a duplicitous stance that exempts our country from the same standard to which we expect others to adhere.

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. Yet, the evidence is clear that the world has taken notice of, and reacted negatively to, our government's increasing willingness to dispense with first principles of individual liberty. The State Department Legal Advisor in the previous Administration has acknowledged Guantanamo's disastrous impact on our foreign relations, calling it a "huge black eye for the United States – an albatross round our neck."[3] The group Human Rights Watch now lists Petitioner's detention as an "enemy combatant" in annual reports detailing world-wide human rights abuses.[4] The group specifically warns of the increasing danger of U.S.

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[3] Jonathan Beale, *'Struggle' to close Guantanamo Bay*, BBC News, Jan. 21, 2009, *available at* http://news.bbc.co.uk/2/hi/americas/7841805.stm.

[4] Human Rights Watch, *World Report 2004*, at 162-67, *available at* http://www.hsc.usf.edu/nocms/publichealth/cdmha/toolkit_dm/Documents/PDF/HRW--Human%20Rights%20Watch%20World%20Report%202004%20Part%20A.pdf.

policy in applying war-time powers against its residents and the perilous path upon which the U.S. has embarked. As elaborated in its 2004 World Report:

> The U.S. Government asserts that its treatment of … al-Marri is sanctioned by the laws of war (also known as international humanitarian law) …. But the U.S. government is seeking to make the entire world a battlefield in the amorphous, ill-defined, and most likely never ending "war against terrorism." By its logic, any individual believed to be affiliated in any way with terrorists can be imprisoned indefinitely …. The laws of war were never intended to undermine the basic rights of persons, whether combatants or civilians, but the administration's rereading of the law does just that.[5]

Before the House Subcommittee on International Relations, a former Assistant Secretary of State for Democracy, Human Rights and Labor, testified that current U.S. policy detracts from our long term diplomatic goals in that it "needlessly antagoniz[es] our allies …. [and] unwittingly diminish[es] our capacity for exceptional leadership to address the global human rights

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[5] *Id.* at 167.

challenges ahead."[6] Petitioner's detention is specifically cited as an example of a practice that "encourage[s] other countries to commit similar abuses in the name of fighting terrorism and [as] undermin[ing] our ability to protest when they do."[7]

The double standards of the U.S. approach to human rights abroad and at home with regard to Petitioner, as well as Guantanamo, present an insurmountable challenge to our diplomatic mission. This is so because our most effective diplomatic weapon – our nation's moral standing – is lost when our government holds itself to a different standard than it would have other countries apply.

Consider that the United States Department of State provides an annual report to the Speaker of the House of Representatives and the Senate Committee on Foreign Relations offering "a full and complete report regarding the status of internationally recognized human rights" for

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[6] *House Comm. on Int'l Relations, 108th Cong., 1st Sess. (Statement of former Assistant Secretary of State for Democracy, Human Rights and Labor Harold Koh)* (July 9, 2003). Assistant Secretary Koh further counseled, as we believe, that:

> [D]emocracy and human rights should not be pursued in a selective or piecemeal fashion. The events of September 11th make clear that the United States must work to achieve its global objectives within a framework of international law and multilateral cooperation, holding ourselves to the same standards to which we hold others.

[7] *Id.*

essentially all countries in the world.[8] Among the offenses against "internationally recognized human rights" acknowledged and reported by the State Department are instances of "arbitrary arrest or detention" and "denial of fair public trials" – precisely what has happened to the Petitioner here.[9]

Petitioner has been held without criminal trial or legal justification for nearly eight years. He also alleges that he was held for periods as long as sixteen months *incommunicado*, when his family was denied access to see him, as were his attorneys. Petitioner further alleges that he was interrogated repeatedly in ways that bordered on torture, including sleep deprivation, painful stress positions, extreme sensory deprivation, and threats of violence or death.[10]

Compare this treatment with the further State Department report on human rights abuses in Iran, one of the most notorious totalitarian regimes in the world. For Iran, the State Department catalogued as human rights abuses the fact that:

> Detainees often went weeks or months without charges or trial, frequently were denied prompt contact with family, and often were denied access to

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[8] U.S. Department of State, *2007 Country Reports of Human Rights Practices* (Mar. 11, 2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/index.htm.

[9] *Id.* at http://www.state.gov/g/dr/rls/hrrpt/2007/100464.htm.

[10] *See* Petition for Writ of Certiorari, *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (Dec. 5, 2008) (No. 08-368).

> legal representation for prolonged periods ….[M]any detainees were held incommunicado …. In practice there was neither a legal time limit for incommunicado detention nor any judicial means to determine the legality of the detention ….[11]

This same State Department report on human rights abuses for Iran also describes common methods of prisoner abuse "includ[ing] prolonged solitary confinement with sensory deprivation, … long confinement in contorted positions, … [and] threats of execution if individuals refused to confess …."[12]

The United States has historically been viewed as a beacon of light for its commitment to a basic tenet of Anglo-American law – that no one may be subjected to indefinite detention without charge, and that the conditions of justified confinement shall be humane. In our professional experience, we have found our commitment to these fundamental precepts of human dignity to be the strongest asset of American diplomacy. The admiration and respect for this nation abroad is a function of our own commitment to liberty under law and we have led the world in this cause. When our nation is perceived as applying these principles selectively, or ignoring them all together, our voice abroad is not only weakened but our adversaries are also

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[11] U.S. Department of State, *2007 Country Reports of Human Rights Practices, available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100595index.htm.

[12] *Id.*

emboldened to conduct the very type of treatment against which we have historically rallied.

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."[13] Egypt has also moved to detain human rights campaigners as threats to national security, as have Ivory Coast, Cameroon and Burkina Faso.[14] Russia, in its recent campaign in Georgia and brutality in Chechnya, has also heralded the war on terror as its primary justification.

As we argued in our brief *amici curiae* in *Boumediene*, it is not just dictatorial regimes that have commented with scorn on our practices with regard to terror detentions. Our allies and the broader global community have grown increasingly impatient with the willingness of the United States to dispense with its traditional principles with regard to its indefinite detentions of "enemy combatants."[15] While most of this criticism has been aimed at Guantanamo Bay, Petitioner's detention serves to amplify the chorus of world disapproval. This is because much of the prior Administration's

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[13] Sean Yoong, *Malaysia slams criticism of security law allowing detention without trial*, Assoc. Press, Sept. 17, 2003.

[14] Shehu Sani, *U.S. actions send a bad signal to Africa: Inspiring intolerance*, Int'l Herald Trib., Sept. 15, 2003.

[15] *See* Brief of Diego C. Asencio *et al.* as *amici curiae* in support of Petitioners at 10-14 in *Boumediene v. Bush* and *Al Odah v. United States*, nos. 06-1195 and 06-1196 (2006).

position on Guantanamo related to the fiction that the conduct there was justified because the detentions were occurring in Cuba and not within the territorial limits of the United States. While that technical distinction was lost on most, any persuasive effect that it did have is obliterated by the fact that Petitioner's arrest and confinement have all occurred within the United States.

Reversing the tide of negative sentiment against the United States and garnering the support of our allies has never been more critical than at this moment in history when a new Administration has come to power and seeks to gain traction in its various diplomatic efforts. President Obama has signed executive orders for the closure of the Guantanamo prison and for a change in course with regard to its practice of detention of "enemy combatants." The President's orders represent a genuine step toward renewal of our country's image in the world;[16] but the international goodwill inspired by his actions will quickly dissipate if we nonetheless insist on exercising the right to arrest and imprison without charge people legally within our own borders.

In the case of some sixty individuals who have been declared non-combatants but are still being held in U.S. custody, the cooperation of our allies is particularly critical because many of these

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[16] *See* Gerry J. Gilmore, *Gates Cites Positive Response to Pending Guantanamo Closure*, Am. Forces Press Serv., Jan. 22, 2009, *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=52774.

individuals face the risk of persecution if returned to their home countries.[17] At least one close ally has already refused to accept exonerated detainees, and our ability to convince others to join us in finding a solution to this conundrum remains an open question that is no doubt hampered by the continued detention of Petitioner and others similarly situated to him.[18]

Our professional experience tells us that the first step in repairing our relationship with our allies and restoring American diplomatic credibility in the world at large is to renew our singular commitment to due process, the rule of law and human dignity without regard to the perceived justifications for dispensing with them. As former Secretary of State Madeleine Albright stated shortly before the attacks of September 11, 2001:

> One of the most dangerous temptations for a government facing violent threats is to respond in heavy-handed ways that violate the rights of innocent civilians …. We have found through experience around the world, that the best way to defeat terrorist threats is to increase law enforcement capacities

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[17] *Likely closure of Guantanamo raises question of what to do with inmates*, Irish Times, Jan. 10, 2009, *available at* www.irishtimes.com/newspaper/world/2009/0110/1231515470065.html.

[18] *Detainee migration "unlikely,"* Gold Coast Bulletin (Jan. 3, 2009) (noting that Australia refused a request in 2008 to resettle a small number of Guantanamo detainees).

> while at the same time promoting democracy and human rights.[19]

As Secretary Albright's words suggest, our experience tells us that we must be equally as vigilant in promoting liberty as we are in fighting terrorism. To do otherwise would be to sacrifice our values and to continue to lose standing as a just world presence. As we previously quoted to this Court, the words of George Kennan in describing the challenge of our previous generational fight against communism remain true today:

> [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.[20]

Indeed, President Obama's Inaugural Address hearkened to the very same theme:

> As for our common defense, we reject as false the choice between our safety and our ideals. Our Founding Fathers… faced with perils that we can scarcely imagine, drafted a charge to assure the

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[19] Secretary of State Madeleine K. Albright, Speech at University of World Economy and Diplomacy, Tashkent, Uzbekistan (Apr. 17, 2000), http://www.civilsocietyinternational.org/resource/albright.htm.

[20] George Kennan, "*The Long Telegram*" from Moscow (Feb. 22, 1946), in Foreign Relations of the United States 706 Vol. VI, *available at* http://www.gwu.edu/~nsarchiv/coldwar/documents/episode-1/kennan.htm.

> rule of law and the rights of man – a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience sake.[21]

We add our names in support of Petitioner's brief and urge the Court to reverse the finding of the Court below because we believe that it is in America's long term diplomatic interest to conduct itself justly in fighting a just cause. Should we lose sight of the principles on which this country was founded, we will lose that which is most worth protecting.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed with regard to the question presented in this appeal by Petitioner.

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[21] Barack Obama, President of the United States, Inaugural Address (Jan. 20, 2009), *available at* http://www.whitehouse.gov/blog/inaugural-address/.

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