ORAL ARGUMENT SCHEDULED FOR NOVEMBER 24, 2008

Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMAL KIYEMBA, Next Friend, et al.,
Petitioners-Appellees,

v.

GEORGE W. BUSH, President of the United States, et al.,
Respondents-Appellants.

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

BRIEF OF *AMICI CURIAE*, LEGAL AND HISTORICAL SCHOLARS, IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties and *Amici*

Except for the following, all parties, intervenors, and *amici* appearing before the District Court and/or in this Court on these appeals are listed in the Opening Briefs of the Government in *Kiyemba v. Bush*, Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429. In addition, the parties have consented to the filing of amicus briefs by the following:

(1) The Brennan Center, The Constitution Project, and The Rutherford Institute;

(2) The National Immigrant Justice Center and the National Association of Criminal Defense Lawyers;

(3) the Uighur American Association;

(4) Law Professors: Michael Churgin, Niels Frenzen, Bill Ong Hing, Kevin Johnson, Daniel Kanstroom, Steve Legomsky, Gerald Neuman, Margaret Taylor, Susan Akram, Chuck Weisselberg, Sarah H. Cleveland, Hiroshi Motomura, and Michael Wishnie; and

(5) Legal and historical scholars: Paul Finkelman, Eric M. Freedman, Austin L. Allen, Paul Halliday, Eric Altice, Gary Hart, H. Robert Baker, William M.

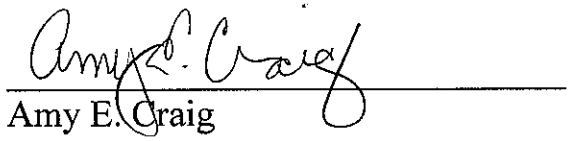
Wiecek, Abraham R. Wagner, David M. Cobin, Mark R. Shulman, Marcy Tanter, Cornell W. Clayton, Samuel B. Hoff, Nancy C. Unger, Karl Manheim, and Gabriel J. Chin.

B. Rulings Under Review

References to the rulings at issue appear in the Opening Brief of the Government.

C. Related Cases

The Opening Brief of the Government identifies the names and numbers of related cases pending that were previously before this Court.



Amy E. Craig

CERTIFICATE PURSUANT TO CIRCUIT RULE 29(d)

Pursuant to Circuit Rule 29(d), the undersigned counsel of record certifies as follows: A separate brief for *amici curiae* is necessary because we provide the Court with a unique focus on the early history of the writ of habeas corpus in England and the American colonies, the historical act of incorporating the Great Writ of habeas corpus into our Constitution, and the writ's application in the early years of the United States. The Framers believed habeas corpus to be an essential human right and check on governmental power that must be conscientiously safeguarded by the courts. *Amici curiae*, legal and historical scholars who have studied the history and formation of our government and Constitution, are uniquely suited to share with the Court the Framers' intent regarding the Great Writ, and the critical position it has held in our jurisprudence.

Amy E. Craig

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STATEMENT OF INTEREST OF AMICI CURIAE*

Amici Curiae are scholars who have studied and taught the history of our government and Constitution. Our studies have convinced us that the Constitution incorporates the Great Writ of habeas corpus as a fundamental protection against the passions of the legislative and executive branches. We offer our understanding of the history of the habeas guarantee because of the importance of the issue framed in this Court's Order of October 20, 2008. Based on this nation's long tradition of cherishing the habeas remedy, as well as the Framers' intent to guarantee that remedy would thrive, we urge the court to protect it as an essential attribute of our system of balanced government.

SUMMARY OF ARGUMENT

The government's interpretation of the habeas guarantee would gravely undermine the Great Writ as a check on unlawful government conduct. Although the government strains to transform this action into a squabble over immigration law, this is a habeas corpus case and the law of habeas should control its resolution. The most dangerous proposition argued by the government is that under the habeas guarantee, a prevailing petitioner is not entitled to the remedy of release from confinement.

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* All parties consent to the filing of this *Amicus Curiae* brief.

In this brief, we show that the writ of habeas corpus has always served as a practical remedy for those wrongly deprived of their liberty. As incorporated by the Framers in Article I of the Constitution, the writ would be meaningless if it did not include the remedy of release from custody. We derive these conclusions from the early history of the writ in England and the American colonies, from the framing of the Constitution, and from its application in the early years of the United States. Our studies also show that neither the Framers nor subsequent generations of Americans would have thought to detain or exclude the Uighurs based on the scanty factual allegations cobbled together by the government in this case.

ARGUMENT

I. IN ENGLAND, HABEAS CORPUS GREW AS A REMEDY FOR THOSE DEPRIVED OF LIBERTY

A. By the Eighteenth Century, Habeas Corpus Served as a General Remedy for Unlawful Detention, Even In Periods of Upheaval and War

Beginning in the sixteenth century, the King's Bench of England developed the writ of habeas corpus as a remedy against unlawful detention. *See* J. Baker, An Introduction to English Legal History 168 (4th ed. 2002). As the writ was refined in court rulings, any person contending that he or she was unlawfully detained could petition for habeas corpus. *See generally* H. Nutting, *The Most Wholesome Law-The Habeas Corpus Act of 1679*, 65 Am. Hist. Rev. 527, 528 (1960). The

legal custodian of a person in confinement also could petition for the writ. In a writ, the issuing court ordered the person detaining the prisoner to bring his body before the court and state the legal basis for the detention. J. Baker, An Introduction to English Legal History 168.

In the seventeenth century, English courts extended the writ to reach all executive confinements, including those ordered by the Privy Council, High Commission, and Lord Chancellor. J. Baker, The Origins of Modern Freedom in the West 200-01 (R.W. Davis ed. Stanford 1995). As Chief Justice Coke noted, the writ extended to all detentions "*contra legem terrae,*" *i.e.*, against the laws of the land. Edward Coke, The Second Part of the Institutes of the Laws of England 54 (1986). Blackstone described the writ as "efficacious . . . in all manner of illegal confinement." 3 W. Blackstone, Commentaries on the Laws of England 131 (1769).

Despite these lofty descriptions, the early writ could sometimes fail to protect the individual against government powers. During the upheaval which began with the Glorious Revolution of 1688, when William and Mary replaced James II on the throne, the writ was suspended for the first time. *See* P. Halliday & G.E. White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 613 (2008) (hereinafter "Halliday &

White")[1]. Through that turmoil, England was beset with fears of foreign invasions and rumors of rebellion at home. In its efforts to defend the realm, the Privy Council ordered scores arrested for being Jesuits or "papists," or for making disturbing declarations of one sort or another. *Id.* As the number of detainees swelled into the hundreds, they were charged with treason, sedition, or a catchall offense, "treasonable practices." *Id.* at 613.

The detention of so many presented a practical challenge for the courts. Though the writ of habeas corpus was by then the traditional device for sorting the dangerous from the hapless, the English judiciary was in disarray. The chief justice of King's Bench and the Lord Chancellor, both appointed by James II, were prisoners themselves. *Id.* at 614. Faced with this dilemma, Parliament suspended the writ for a short time, but by October 23, 1689, the suspension statutes lapsed. *Id.* at 626. Newly-appointed justices of King's Bench then began using habeas corpus to examine the imprisonment orders for scores of prisoners to distinguish those who posed a danger known to law from those who did not. *Id.*

The judiciary approached its task with diligence, demonstrating a marked respect for the Great Writ. Professors Halliday and White report that:

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[1] Here, and throughout this brief, we benefit greatly from Professors Halliday and White's extensive research and analysis of habeas jurisprudence in the centuries leading up to 1789 in their recently published work. In so relying, we follow the Supreme Court's example. *See, e.g., Boumediene v. Bush*, 128 S. Ct. 2229, 2244, 2248 & 2251 (2008) (citing Halliday & White, 94 Va. L. Rev. 575). Professor Halliday is one of the scholars acting as an *amicus curiae* in submitting this brief.

> [f]rom the fall of 1689 through the end of 1690, King's Bench, led by Chief Justice Sir John Holt, handled more habeas cases (251) than in any other period of similar length before 1800. More than half of these cases (147) concerned accusations of treason, treasonable practices, or sedition, prompted by Parliament's and the Privy Council's fears about threats to the realm from the French, the Irish, and their erstwhile king, James II. King's Bench bailed or discharged eighty percent of those jailed for these wrongs against the state; compared to an average release rate on all wrongs across three centuries of fifty-three percent.[2]

Halliday & White at 626.

As Halliday and White note, the high release rate in 1689-90 is all the more striking because the judges ordering those releases were charged with guarding the new parliamentary order of which they were principal beneficiaries, and which the alleged traitors were supposed to threaten. *Id.* Yet even in that tumultuous time, when the security of England was at great risk, the Great Writ ensured the release of those who did not present a direct threat to the realm.

B. British Courts Extended the Habeas Remedy to Civil Circumstances

As the writ of habeas corpus became more entrenched in English courts, it was extended to safeguard liberty in civil as well as criminal contexts. For example, judges used habeas corpus on numerous occasions to redress the unlawful impressment of sailors into the British Navy. *See, e.g.*, *Ex parte Boggin*, 104 Eng. Rep. 484, 484 n.(a) (K.B. 1811); *Ex parte Drydon*, 101 Eng. Rep. 235,

[2] *See* Halliday & White at 625-28 for a complete statistical breakdown and discussion of these cases.

236 (K.B. 1793); *Goldswain's Case*, 96 Eng. Rep. 711 (K.B. 1778); *R. v. Kessel*, 97 Eng. Rep. 486 (K.B. 1758); *Gardener's Case*, 79 Eng. Rep. 1048 (K.B. 1601).

The unique circumstances of impressment led some English jurists to urge judicial examination into the truth of the facts alleged, rather than just relying on the facts as presented in the return. *See* J. Oldham & M. Wishnie, *The Historical Scope of Habeas Corpus and INS v. St. Cyr*, 16 Geo. Immigr. L.J. 485, 488 (2002). One advocate of this view, Justice Michael Foster, emphasized the need for those impressed to be present at a habeas hearing to contest the facts in the return. Otherwise, the sailor could be sent away far from any court without an opportunity to contest the deprivation of his liberty, leaving him without a remedy because "[a]n ineffectual remedy is no remedy; it is a rope thrown to a drowning man, which cannot reach him, or will not bear his weight." *Id.* at 489 (quoting M. Dodson, The Life of Sir Michael Foster 60 (1811)).

The writ also was used to prevent the removal of slaves from Britain, notably in the leading case of *Somerset v. Stewart*, 20 How. St. Tr. 1, 79-82 (1772). *See generally* William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. Chi. L. Rev. 86 (1974-1975) (hereinafter "Wiecek"); Paul Finkelman, An Imperfect Union: Slavery, Federalism and Comity (1981). In that case, a writ of habeas corpus issued to secure the release of James Somerset, an African slave purchased in Virginia by defendant

Charles Stewart. Somerset was confined on board a ship in English waters that was about to depart for Jamaica. The return stated that Somerset was a slave under Virginia Law. *See* J. Baker, An Introduction to English Legal History 542. Chief Justice, Lord Mansfield, avoiding the question of the lawfulness of slavery, ruled that the only question was whether a slave could be made to leave England against his will; since there was no authority under English law to force a slave out of the country, he determined "the black must be discharged." *Id.* (citing Ann. Reg. 1778, at 163 & *R. v. Thames Ditton,* 4 Dougl. K.B. 300, 301 (1785)).

In a lesser known case a year earlier, Lord Mansfield issued the habeas writ to release another slave, Thomas Lewis, who otherwise would have been sent by his master to Jamaica to be sold. *See R. v. Stapylton* (1771, unreported); *see also* Wiecek at 100-101 (discussing Lewis's case). These cases share common characteristics with the case at bar. Like the Uighurs, Somerset and Lewis were brought against their will to a foreign country and held captive (JA 1611); they in turn sought the writ of habeas corpus to challenge their unlawful detention. In Somerset's and Lewis's cases, the court determined that there was no basis for sending the men abroad to an adverse situation (continued slavery), so it ordered that they be released.

The current case parallels the slavery cases in some respects. Judge Urbina emphasized the government's forced removal of the Uighur prisoners to

Guantanamo, half a world away from where they had been found, and failure to release them many months after admitting they should no longer be imprisoned. "[T]he court's authority to safeguard an individual's liberty from unbridled executive fiat reaches its zenith," he concluded, "when the Executive brings an individual involuntarily within the court's jurisdiction, detains that individual and then subverts diplomatic efforts to secure alternative channels for release." JA1600-01; 1614-15. The impressment and slavery cases highlight the broad, equitable nature of the writ, which necessarily includes the power to release those wrongfully confined. *See Boumediene*, 128 S. Ct. at 2267 ("[T]he habeas court must have the power to order the conditional release of an individual unlawfully detained."); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas has never been "a static, narrow, formalistic remedy").

Moreover, the English courts' expansive use of the writ in non-criminal settings was based upon the common law, not statutory authority. Although habeas corpus was codified in England in the Habeas Corpus Act of 1679, judges continued issuing the writ on purely common law grounds. Halliday & White at 612-13; *See also Earl of Aylesbury's Case* (1696) (King's Bench released petitioner accused of treason as "a discretionary act . . . in their power by the common law" despite finding that petitioner was *not* bailable under the Habeas Corpus Act). And because the Habeas Act applied only to criminal matters,

common law writs remained the primary means for challenging noncriminal detention. *See* W. Holdsworth, 9 A History of the English Law 117-18 (2d ed. 1938).

II. IN COLONIAL AMERICA AND THE EARLY REPUBLIC, HABEAS CORPUS PROVIDED A REMEDY FOR UNLAWFUL DETENTION

A. Habeas Corpus Existed In Colonial America As Both a Creature of Common Law and of Statute

From the establishment of Britain's colonies in the New World, habeas corpus was a part of colonial law. As Justice Story noted in his Commentaries, each colonial charter "either expressly or by necessary implication . . . provided that the laws of England so far as applicable shall be in force there." Joseph Story, Commentaries on the Constitution of the United States § 156 (1851). A more recent scholar observed, "the common-law writ of habeas corpus was in operation in all thirteen of the British colonies that rebelled in 1776." William F. Duker, A Constitutional History of Habeas Corpus 115 (1980) (hereinafter "Duker").

As noted by Justice Story, most early colonists readily proclaimed adherence to the laws of England. *See id.* at 99. England, however, did not initially agree to extend the full protection of its laws to the colonists, particularly when it came to the Habeas Corpus Act. *Id.* at 100-110. In several instances, colonists imprisoned by Royal Governors applied for writs of habeas corpus, but their petitions were rejected on the grounds that England's Habeas Act did not extend to "the American

Plantations."[3] *Id.* at 110, 100-104 (citing the *Case of Robert Beverley*; the *Wise Case*; and the *Case of Dr. Thomas Cooper*).

As described by Dr. Duker, these cases demonstrate "the circumscribed effectiveness of the common-law writ, unaided by the remedial statutes, against a powerful executive." *Id.* at 100. Dissatisfied with this weakened writ, some colonies sought to enact provisions expressly applying the Habeas Act inside their borders. *See, e.g., id.* at 101 (describing Massachusetts's efforts to secure for its citizens the benefits of the 1679 habeas statute adopted by Parliament.) Although the Privy Council vetoed some of these early efforts to afford full habeas protection in America, by the early eighteenth century the crown began to apply the statutory habeas privilege to the colonies. In 1710 Queen Anne instructed Governor Spotswood to extend the Habeas Corpus Act to Virginia. *Id.* 100. Later royal instructions brought the benefit of the statutory writ to the Carolinas in 1730 (*id.* at 103) and Georgia in 1754. *Id.* at 106.

The colonists' struggles to gain the full breadth of the writ as enjoyed in England demonstrate how highly they valued it as the only real remedy for unlawful executive imprisonment. This was underscored during the confederation

[3] This is not to say that the colonists were completely denied the use of habeas corpus. As detailed by Duker, in those cases where there was no executive interference, the colonists were able to use the writ unfettered. Duker at 102. And many colonies enacted their own provisions securing the writ. For example, a 1687 Massachusetts act gave defendants the right of removal by habeas corpus from inferior courts to the Supreme Court of Judicature. *Id.* at 100-10.

period when several of the new states buttressed the common law writ of habeas corpus with acts "for the better securing personal liberty, and preventing wrongful imprisonment." *Id.* at 114 (describing Pennsylvania's laws.) These enactments foreshadowed the Framers' decision to inscribe the writ in the nation's fundamental law.

B. Writing Habeas Corpus into the Constitution

Drawing on the high regard for the writ in both British and colonial legal traditions, the Framers of the Constitution especially prized the protections of the habeas corpus remedy. Bitter experience with arbitrary British rule, including the suspension of the writ for Americans from 1777-1783, persuaded delegates to the Philadelphia Convention that a strong government can become a tyranny that denies individual liberties. As James Madison wrote, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). To balance their desire for a vigorous American government against their fear of governmental power, the Framers

developed a model of enumerated, rather than general, powers. The writ of habeas corpus was an important element in striking that balance.[4]

Habeas corpus was first mentioned at the Convention in Charles Pinckney's "Draught of a Federal Government," submitted on May 29, 1787, four days after the Convention was called to order. Although Pinckney's proposal was put to the side, and never specifically discussed by the Convention, it was shared with other delegates and submitted to the Committee of Detail which prepared the first draft of the Constitution in early August.[5] The delegates specifically referred the habeas issue to that committee on August 20, the day on which Pinckney proposed on the Convention floor that:

> The privileges and benefits of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited period not exceeding . . . months.

2 Max Farrand, The Records of The Federal Convention of 1787, at 341 (1911) (hereinafter "Farrand").

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[4] James Otis, The Rights of the British Colonies Asserted and Proved (1764), *reprinted in* I Pamphlets of the American Revolution 444 (Bernard Bailyn, ed. 1965) (Otis wrote in 1764 that every colonist was "entitled to all the natural, essential, inherent, and inseparable rights of our fellow subjects in Great Britain.").

[5] Duker at 127-28; 3 Farrand, at 595 (APPENDIX D THE PINCKNEY PLAN). After the Convention, Pinckney issued two different versions of his plan. One was published in late 1787, and the other was submitted in 1818 to the then-Secretary of State John Quincy Adams when the latter was assembling the government's archive of Convention-related documents. Madison said that both Pinckney drafts varied from the one presented at the Convention, an objection borne out by an apparent version of the actual Pinckney plan that was found in papers of James Wilson of Pennsylvania. All three versions, though, include a habeas corpus guarantee. 3 Farrand, at 602-04.

The Committee of Detail never reported on the habeas issue. Instead, Pinckney raised it again before the full Convention eight days later, in a simplified version. His fellow South Carolinian and chairman of the Committee of Detail, John Rutledge, was not satisfied with Pinckney's proposal. Declaring that the individual's right to the habeas writ should be "inviolable," he criticized that part of Pinckney's motion that would allow suspension of the habeas guarantee "on the most urgent occasions, and then only for a limited time, not exceeding twelve months." Rutledge could imagine no justification, ever, for a nationwide suspension of habeas corpus. *Id.* at 438.

Gouverneur Morris of Pennsylvania attempted to bridge the gap between Pinckney's proposal and Rutledge's demand for an even stronger habeas provision. Morris offered an amendment that would narrow the right to suspend habeas to "cases of rebellion or invasion." *Id.* James Wilson of Pennsylvania sided with Rutledge, arguing that there would never be a need to permit "suspension" of the habeas guarantee on a general basis, since judges would decide the merits of any individual prisoner's case. *Id.* The habeas guarantee itself was approved unanimously. The clause permitting suspension of habeas, in Morris's narrower language, passed by a 7-3 margin. The dissenting states (South Carolina, North Carolina, and Georgia) evidently opposed granting any authority for Congress to suspend the writ. *Id.*

The original Constitution safeguarded relatively few individual rights: the right to trial by jury in criminal cases, prohibition on bills of attainder, and habeas corpus are the three most often cited. That the Framers especially valued the writ's protections is evident from its inclusion in the original constitutional text.

The habeas guarantee also figured in post-Convention debates. In a letter to Madison from his posting as minister to France, Thomas Jefferson insisted that liberty depends on "the eternal and unremitting force of the habeas corpus laws."[6] In reply to those who criticized the Constitution for its lack of a Bill of Rights, Hamilton in *The Federalist* pointed to the habeas guarantee, noting that Blackstone "is everywhere peculiarly emphatical in his encomiums on the habeas-corpus act, which in one place he calls 'the BULWARK of the British Constitution.'" The Federalist No. 84, at 510-12 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[7] Hamilton left no doubt as to the signal importance of the habeas guarantee,

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[6] Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 8 Documentary History of the Ratification of the Constitution 250 (John P. Kaminski & Gaspare J. Saladino eds., 1984). Indeed, during the ratification debates, Jefferson expressed hope that the Constitution would be amended "by a declaration of rights . . . which shall stipulate . . . no suspensions of the habeas corpus." Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), *reprinted in* 8 Documentary History of the Ratification of the Constitution 354 (John P. Kaminski & Gaspare J. Saladino eds., 1984). Though the suspension clause was not amended, Jefferson's views, like the derivation of the clause during the Philadelphia Convention, underscore its narrow parameters.

[7] There was virtually no agitation for a specific Bill of Rights amendment protecting the right to habeas corpus, presumably because the habeas guarantee in Article I, Section 9 was deemed adequate to ensure access to the writ. *See* Eric M. Freedman, *Milestones in Habeas Corpus Part I, Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 Ala. L. Rev. 531, 555 (Winter 2000) .

observing that "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." *Id.* at 512 (Hamilton).

The government's contention that the writ does not require a court to provide an actual remedy is antithetical to the Framers' explicit guarantee of the writ. That guarantee becomes empty words if it did not include the remedy of release from custody. For the writ to have meaning, it "must be effective." *Boumediene*, 128 S. Ct. at 2269.

C. In the Republic's Early Years, the Writ Was Used to Check Illegal Executive Detention

Like his English forebears, Chief Justice John Marshall enforced the writ's guarantee even during the most turbulent times. Marshall's insistence that the writ is the primary remedy for unlawful detention emerged in two politically sensitive cases – *Ex parte Bollman*, 4 Cranch 75, 136, 8 U.S. 75 (1807) and *United States v. Thomas Williams* (U.S. Cir. D. Va. 1813). The first is widely considered "the pivotal Suspension Clause case of the framing era" (Halliday & White at 683), while the second is a recently unearthed ruling in which Marshall enforced the writ to release a political prisoner during the War of 1812.

In *Bollman*, the Court had to decide whether it had the power to order the release of Dr. Erick Bollman and Samuel Swartwout, who allegedly conspired with Aaron Burr in 1806 to foment rebellion in the nation's western territories, or to invade Mexico, or both. In a closed session, the Senate passed legislation to

suspend the writ of habeas corpus and thus ensure the continued confinement of Swartwout and Bollman. The House, however, rejected the bill by an overwhelming vote of 113-19. The two prisoners, longtime confidantes of Burr, sought habeas relief from the Supreme Court. Eric M. Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty 20-21 (2001); Francis Paschal, *The Constitution and Habeas Corpus,* 1970 Duke L.J. 605, 623-24 (1970).

Chief Justice Marshall determined that the Court had jurisdiction to consider the case through the Judiciary Act of 1789. *Ex parte Bollman*, 4 Cranch at 95. Marshall's discussion centered on Congress's intent in passing the Judiciary Act:

> Acting under the immediate influence of this injunction [that the writ shall not be suspended unless in cases of rebellion or invasion], they [the first Congress of the United States] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; *for if the means be not in existence, the privilege itself would be lost*, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of habeas corpus.

Id. (emphasis added). As articulated by Marshall, the first Congress's understanding of the legal right to habeas could not be separated from the remedy of release from custody – "for if the means" to vindicate the right "be not in existence, the privilege itself would be lost."

Marshall emphasized this understanding (that the writ is meaningless without a remedy) throughout *Bollman*. Addressing the case against the prisoners, he acknowledged that although there was strong evidence that they were engaged

"in a most culpable enterprise against the dominions of a power at peace with the United States [Mexico]," there was no evidence that the prisoners had violated the statute with which they had been charged and thus the court's "only" option was to "direct them to be discharged." *Id.* at 136.

Marshall also addressed the habeas writ in *Williams*, while fulfilling his circuit duties six years later. The case, which recently was uncovered by two researchers, arose during the War of 1812. *See* Halliday & White at 709; Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 2d. 39 (2005) (hereinafter "Neuman & Hobson"). The 1813 ruling in *Williams* highlights the Chief Justice's commitment to applying the writ even during times of war. At issue in the case was whether habeas corpus could issue to test the legality of the Secretary of State's orders affecting enemy aliens during wartime. *Id.* Williams was a British subject residing in the United States. James Monroe, then Secretary of State, acting under section 1 of the Alien Enemies Act of 1798, ch. 66, 1 Stat. 577 (codified at 50 U.S.C. § 21 (2000)), issued a notice requiring all British subjects within the United States to report to federal marshals. When Williams was placed into the marshals' custody, he brought a habeas petition demanding release.

Williams came before the United States Circuit Court for the District of Virginia, the circuit to which Marshall was assigned, on December 4, 1813. *Id.* at

710. Marshall granted the habeas writ, ordering that Williams be brought to court. Hearing the case with District Judge St. George Tucker, Marshall then ordered the release of Williams, a citizen of a nation with which the United States was at war. Their order stated in pertinent part:

> [T]he Court is of opinion; that the regulations made by the President of the United States [through Secretary of State Monroe] respecting alien enemies, do not authorize the confinement of the petitioner in this case; Therefore, It is ordered that he be discharged from the custody of the Jailor so far as he is detained therein by virtue of the warrant of commitment from the Marshal of this District.

Neuman & Hobson at 42 (citing U.S. Circuit Court, Va., Order Book No. 9, at 240 (1811-1816), *United States v. Thomas Williams*). Marshall's order in *Williams* demonstrates the early judiciary's understanding that the courts must grant habeas writs when the Executive branch has wrongly detained individuals, even during wartime and even when the prisoner is an enemy alien.

Like their English counterparts, American judges also proved willing to use the writ to free slaves. *See, e.g.,* Paul Finkelman, An Imperfect Union: Slavery, Federalism and Comity. In 1836 Lemuel Shaw, Chief Justice of the Massachusetts Supreme Court, applied the writ to free a slave whose owner had brought her along on a visit to her family in Boston. *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836) (ruling that slaves brought temporarily into the state from slaveholding states were free). The New York Court of Appeals came to the same holding in

Lemmon v. People, 20 N.Y. 562 (1860). There Juliet Lemmon, a Virginia resident en route to Texas, stopped for a night in New York with eight of her slaves. The morning after her arrival, Louis Napoleon, a New York freeman, applied for a writ of habeas corpus to show cause why the slaves were not detained in violation of New York law. Justice Pain of the Superior Court of the City of New York issued the writ and ordered the slaves freed. Both the New York Supreme Court and the New York Court of Appeals affirmed his ruling.

The United States Supreme Court has continued to enforce the writ as a remedy against unlawful detentions. In three recent rulings, the Court has acted incrementally to apply the writ to those detained in Guantanamo. *Rasul v. Bush*, 542 U.S. 466, 481-82 (2004) (the facility at Guantanamo *not* beyond the reach of the courts); *Hamdan v. Rumsfeld,* 548 U.S. 557, 576-77 (2006) (the Detainee Treatment Act's jurisdiction-stripping provisions do *not* apply to cases pending when it was enacted); *Boumediene*, 128 S. Ct. 2229 (confirming that the constitutional privilege of habeas corpus reaches aliens designated as enemy combatants and detained at Guantanamo).

The government's position in this proceeding has even less legal basis than the contentions that have failed in those three Supreme Court decisions. The writ of habeas corpus has always included the power to release individuals who are wrongly detained. The contention that a prisoner could be entitled to the writ yet

not entitled to release from detention would have made no sense to Chief Judge Holt in 1689, to James Madison and Alexander Hamilton in 1787, or to Chief Justice Marshall in 1813. It makes no sense today.

III. ANIMUS TOWARDS A FOREIGN COUNTRY HAS NEVER BEEN A BASIS FOR EXCLUDING PERSONS FROM THE UNITED STATES

The government cites a short list of unremarkable characteristics as the justification for continuing the Uighurs' detention indefinitely:

- The prisoners' oppression by and consequent hostility towards the Chinese government caused them to be in camps in Afghanistan;
- In those camps, they received unspecified "firearms training" that appears to have involved handling a rifle, training that would give them skills shared by millions of human beings currently walking the earth;
- Rather than confront American forces who entered Afghanistan in 2001, these individuals left that country and engaged in no hostile act against the United States and its representatives.

JA 1600-01; Order Granting Stay, at 4 (D.C. Cir. Oct. 20, 2008) (Rogers, J., dissenting); *Parhat v. Gates*, 532 F.3d 834, 837 (D.C. Cir. 2008). The sheer innocuousness of these characteristics has forced the government to abandon any claim that the prisoners are enemy combatants. Appellants Br. at 7. Yet the government demands that the nation's safety requires their continued imprisonment.

As students of history, we encourage this Court to compare the prisoners' characteristics with those of numerous other foreign nationals whose presence in this country has been deemed entirely satisfactory – indeed, in some instances, even desirable – despite their avowed hostility to foreign nations with whom the United States then had peaceful relations.

We note, first, the government's error in comparing these prisoners to prisoners of war held after World War II and the Korean War. Appellants Br. at 48-49. These Uighur prisoners were never members of an army – or any other group – that opposed the United States. The government does not allege that these seventeen individuals ever fought against or even expressed hostility towards this nation. As noted by the District Court, it is not even clear from the record whether they were lawfully detained at the time of their capture. JA 1604. To justify its refusal to release the prisoners, the government can cite only murky suggestions of past participation in rudimentary firearms training as part of the prisoners' unhappiness with the Chinese government. Appellants Br. at 17. The prisoners thus cannot plausibly be compared to prisoners of war; at most, they might be said to resemble foreign revolutionaries who have obtained refuge in the United States on numerous occasions in the past.

Neither the Framers nor subsequent generations of Americans detained or excluded foreign nationals solely because they had struggled against their own

oppressive governments. Neutrality laws have barred U.S. residents from taking active measures to topple foreign governments, but those statutes have never barred opponents of foreign regimes from residing here so long as they comply with that proscription.[8]

The tradition of welcoming foreign opponents of repression dates back to the country's founding. Upon his discharge from the Spanish military in 1783, the Venezuelan-born Francisco de Miranda immediately sought to lead a rebellion in Spain's American colonies. Philip John Sheridan, Francisco de Miranda: Forerunner of Spanish-American Independence 1-5 (1960). He traveled to the United States in 1784, meeting with political leaders and members of the American military including Alexander Hamilton, Governor John Dickinson of Pennsylvania, Gouverneur Morris, Colonel W. S. Smith, and Colonel William Duer. *Id.* at 7-9. At the end of that year, Miranda left for Europe, but he returned to this country twenty years later. *Id.* at 45. In December of 1805, he discussed with Secretary of State Madison and President Jefferson his plans to fight for independence in

[8] The Neutrality Act, 18 U.S.C. § 960, is the current incarnation of a law that was first enacted in 1794 in response to the French Revolutionary Wars. Lester H. Brune, 1 Chronological History of U.S. Foreign Relations 30-34 (2003). American neutrality law originally criminalized (1) the participation by American citizens in the military force of another nation, and (2) the organization, preparation, or funding of foreign military expeditions from the United States to nations with which the United States was at peace. Montgomery Sapone, *Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence,* 30 Cal. Western Int'l. L. J. 1, 29 (1999). Only the latter restriction is still in effect today. 18 U.S.C. § 960. The Neutrality Act is narrowly written and does not restrict revolutionary speech or other activities of "moral agitation." *Id.*; H. Lauterpacht, LL.D., *Revolutionary Activities by Private Persons Against Foreign States,* 22 Am. J. Int'l. L. 105, 116 (1928).

Spanish America. *Id.* at 46. Miranda armed a ship and set sail from New York harbor in February of 1806. His crew included William Steuben Smith, son of Col. William Smith and grandson of President John Adams. *Id.* at 48-49. When Miranda's expedition triggered complaints by the French and Spanish ministers to the United States, President Jefferson issued a statement that he had taken steps to "know as much of [the expedition] as we could," but denying that he had encouraged it. *Id.* at 50. Miranda and others were indicted under the Neutrality Act. *Id.* at 50-51. Although Miranda plainly had violated the statute, public sentiment remained strongly on his side; a jury acquitted him of all charges. *Id.*

More than four decades later, Italian revolutionary Giuseppe Garibaldi sought refuge in this nation in the midst of his fight to drive Austria from his homeland. *See* Jasper Ridley, Garibaldi (1974). Though many countries, including Great Britain, refused to take Garibaldi in, the United States granted him entry in 1850. The Italian revolutionary was publicly honored when he arrived in New York, and even received an American passport in 1851. H. Nelson Gay, *Garibaldi's American Contacts and His Claims to American Citizenship*, Am. Hist. Rev., at 1-2, 5, 6 (Oct. 1932).

Garibaldi's contemporary, Lajos Kossuth, came to the United States after leading the unsuccessful fight for Hungarian independence from Austria. Indeed, a joint resolution of Congress, conveyed by President Fillmore, brought Kossuth

here. Congress invited Kossuth to speak and mounted a banquet in his honor, while President Fillmore received him to the White House. During a nine-month stay, Kossuth traveled across America in response to invitations from state and local officials. William Warren Rogers, *The Nation's Guest in Louisiana: Kossuth Visits New Orleans*, Louisiana History: The Journal of the Louisiana Historical Association, at 355-58 (Autumn 1968).

Another nineteenth-century leader, Narciso Lopez of Cuba, found refuge here after being driven from his homeland by the Spanish colonial government. Lopez remained in the United States for three years, ultimately running afoul of the Neutrality Act for planning four armed expeditions to Cuba from the United States. Like Miranda, however, Lopez enjoyed the support of the American people. After three mistrials, the government abandoned its prosecution of Lopez under the Neutrality Act. Tom Chaffin, *"Sons of Washington": Narciso Lopez, Filibustering, and U.S. Nationalism, 1848-1851*, 15 J. of the Early Republic 79, 80, 86, 87 (Spring 1995).

During the last century, the United States continued its tradition of receiving foreigners who engaged in armed resistance against their oppressors. Between 1904 and 1906, numerous Russians took refuge here after their unsuccessful revolution against the czarist government. Arthur W. Thompson, *The Reception of Russian Revolutionary Leaders in America, 1904-1906*, 18 American Quarterly

452, 452-76 (Autumn 1966). In the 1930s, Cuban exiles armed a ship and left U.S. shores to fight Cuba's dictator, Gerardo Machado. Most died or were imprisoned, but Cuba's former president, Mario Garcia Menocal, returned to the United States. Alex Anton & Roger E. Hernandez, Cubans in America 113-15 (2003). In the 1950s, forty thousand Hungarian "freedom fighters" were welcomed after their failed uprising against Soviet control. Molly G. Schuchat, *Hungarian Americans in the Nation's Capital*, 54 Anthropological Quarterly 89, 90 (Apr. 1981).

This pattern of receiving foreign fighters continued in the last decade, when America received Gerry Adams, a leader of the Irish Republican Army ("IRA"), which had conducted years of terrorist activity against the British government, one of this nation's strongest allies. Yet Adams was granted a visa to the United States before the 1994 ceasefire between Britain and the IRA. Shortly after the ceasefire, Adams visited the United States to conduct fundraising for the IRA. During that trip, President Clinton invited Adams to celebrate St. Patrick's Day at the White House. Jonathan Stevenson, *Northern Ireland: Treating Terrorists as Statesmen,* 105 Foreign Policy 125, 140 (1996).

Compared to the foreign nationals involved in each of these historical episodes, the Uighur prisoners have taken far less significant action against the foreign government they oppose. In fact, the government has not demonstrated that any of the prisoners has taken a single hostile act against China, much less that

any of them plans to initiate hostile actions if released into the United States. Nothing in our history or traditions supports the government's contention that these individuals should not be paroled into this country.

CONCLUSION

For the foregoing reasons, and for those presented in the brief of appellees and those other amici supporting them, we urge this court to affirm Judge Urbina's order.

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Amy E. Craig

CERTIFICATE OF SERVICE

I, Amy E. Craig, hereby certify that on this 31st day of October, 2008, the original and 14 copies of the foregoing Brief of Amici Curiae, Legal and Historical Scholars, In Support of Petitioners, were dispatched to the clerk by hand delivery, and that 2 copies were deposited in the U.S. Mail, first-class postage prepaid, and were also sent by electronic mail, addressed to the following:

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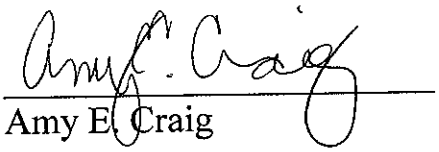

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