ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2006

Nos. 05-5064, 05-5095 through 05-5116; Nos. 05-5062, 05-5063

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

KHALED A.F. AL ODAH, et al.,
Petitioners-Appellees/Cross-Appellants,
v.
UNITED STATES OF AMERICA, et al.,
Respondents-appellants/Cross Appellees.

LAKHDAR BOUMEDIENE, et al.,
Petitioners-Appellees/Cross-Appellants,
v.
GEORGE W. BUSH, et al.,
Respondents-Appellees.

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 ADDRESSING THE DETAINEE TREATMENT ACT OF 2005

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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 *Al-Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116, and of the Petitioners in *Boumediene v. Bush*, Nos. 05-5062 and 05-5063, and *Al-Odah v. United States*, Nos. 05-5064 and 05-5095 through 05-5116:

Amici Curiae British and American Habeas Scholars

Amicus Curiae World Organization for Human Rights USA in Support of Petitioners in *Al-Odah v. United States*

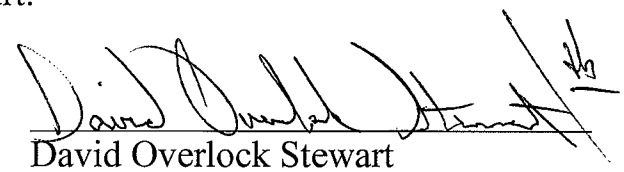
B. Rulings Under Review

References to the rulings at issue appear in the Opening Briefs of the Government in *Al-Odah v. United States* and of the Petitioners in *Boumediene v. Bush.*

C. Related Cases

The Opening Briefs of the Government in *Al-Odah v. United States* and of the Petitioners in *Boumediene v. Bush* indicate which of the cases on review were

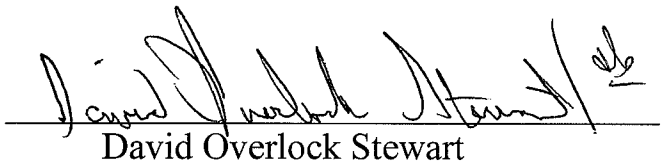
previously before this Court and identify the names and numbers of related cases pending in this Court or in the District Court.



David Overlock Stewart

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 historical act of incorporating the Great Writ of habeas corpus into our Constitution. 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 formation of our government, 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.



David Overlock Stewart

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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 incorporated 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 January 27, 2006. We urge this Court to consider the Framers' intent and to protect the habeas guarantee that they believed so essential to our system of checks and balances.

SUMMARY OF ARGUMENT

The government's interpretation of the Detainee Treatment Act of 2005 and of the habeas guarantee would undermine the Great Writ, perhaps fatally, as a check on unlawful government conduct. In this brief, we demonstrate first that the Framers precluded the government from suspending the writ of habeas corpus except in narrowly limited circumstances ("invasion" or "rebellion") which the government has not argued are presented by this case. We derive this conclusion from the deliberations of the Philadelphia Convention of 1787 and the state ratifying conventions, from the placement of the guarantee in Article I, Section 9, and from the text itself. These factors underscore that the constitutional habeas

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

guarantee was carefully insulated from manipulation by the government. Consistent with this original purpose, the courts have been firm in their enforcement of the constraints imposed by Article I, Section 9. Because the habeas guarantee creates a fundamental constitutional right, the courts have been searching in their review of threats to its availability.

ARGUMENT

I. THE FRAMERS INTENDED THE HABEAS GUARANTEE AS AN ESSENTIAL CHECK ON THE FEDERAL GOVERNMENT'S POWER

For the fifty-five delegates to the Philadelphia Convention in 1787, the principal goal was to replace a charter of government that was far too weak. Under the Articles of Confederation in the 1780's, the United States was more of an alliance than a nation. States had their own currencies, their own trade policies, even their own foreign policies and navies.[1] Each state cast a single vote in Congress, which was the only organ of national government. There was neither a national executive nor national courts. In late 1786, George Washington lamented "the consequences of lax or inefficient government," adding, "[t]hirteen

[1] Letter from James Madison to Thomas Jefferson (Aug. 12, 1786), *reprinted in* 9 PAPERS OF JAMES MADISON 93, 96-97 (Robert A. Rutland & William M.E. Rachal eds., 1975); Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *reprinted in id.* at 317-321; ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789 570, 603-04, 659 (1969, originally 1924).

sovereignties pulling against each other, and all tugging at the federal head, will soon bring ruin on the whole."[2]

Still, after bitter experience with British rule the Convention delegates also knew that a strong government can become a tyranny that makes short work of 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."[3] To balance their desire for a vigorous government against their fear of governmental power, the Framers developed a government of enumerated, rather than general, powers. The writ of habeas corpus was an important element in striking that balance.

Through the summer of 1787, the Convention delegates moved consistently towards greater constraints on power in the new government. After the first ten weeks of deliberations, the delegates had broadly defined the powers of the new legislature: "to legislate in all cases for the general interests of the Union, and also in those cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual

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[2] Letter from George Washington to James Madison (Nov. 5, 1786), *reprinted in* 4 THE PAPERS OF GEORGE WASHINGTON 331, *available at* http://gwpapers.virginia.edu/documents/constitution/1784/madison2.html.

[3] THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

legislation."[4] This expansive provision had drawn opposition. While still in the first week of debate, John Rutledge of South Carolina insisted on an "exact enumeration" of legislative powers, a demand he renewed on July 16.[5] His protests were supported by other South Carolinians, including Charles Pinckney and Pierce Butler.

At the end of July, Rutledge gained the opportunity to implement his objection to broad congressional powers. While the Convention took an eleven-day recess, a five-member Committee of Detail was appointed to assemble a draft constitution based on the nineteen skeletal resolutions the delegates had approved. Rutledge was chair of the committee, which promptly jettisoned the broad grant of general legislative power. In its place, Rutledge and his committee inserted a list of eighteen enumerated, specific powers.[6] Though some have proved over the years to be extensive, the message was plain that the new legislature should have only defined powers.[7]

When the delegates reconvened on August 6, 1787, this fundamental transformation of legislative powers drew no comment. Indeed, it survived to the

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[4] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (1911).
[5] 1 FARRAND, at 53; 2 FARRAND, at 17.
[6] U.S. CONST. art. I, § 8.
[7] *See McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (Chief Justice John Marshall) ("This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which it enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.").

final Constitution, while through the last five weeks of the Convention the delegates explored additional ways to control the powers of the new government. That exploration included the addition of the habeas guarantee.[8]

Habeas corpus had first been mentioned at the Convention in Charles Pinckney's "Draught of a Federal Government," which was 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 delegates, it had been shared with other delegates and submitted to Rutledge's Committee of Detail.[9] The Convention specifically referred the habeas issue to the Committee of Detail 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.[10]

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[8] Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFFALO L. REV. 451, 459-460 (Spring 1996).

[9] WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 127-128 (1980); 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 602-604.

[10] 2 FARRAND, at 341.

The Committee of Detail never reported on the habeas issue. Instead, Pinckney raised it again by motion eight days later, in a simplified version. Rutledge was not satisfied with it. Declaring that the individual's right to the habeas writ should be "inviolable," he criticized that part of Pinckney's motion that would have allowed 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 for a nationwide suspension of habeas corpus.[11]

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."[12] James Wilson of Pennsylvania saw no need to permit "suspension" of the habeas guarantee on a general basis, since judges would decide the merits of any individual prisoner's case.[13] The habeas guarantee itself was approved unanimously. The clause permitting suspension of habeas, even in Morris' narrower language, passed by a 7-3 margin. The dissenting states (South

[11] *Id.* at 438.
[12] *Id.*
[13] *Id.*

Carolina, North Carolina, and Georgia) evidently opposed granting any authority for Congress to suspend the writ.[14]

The location of the habeas guarantee in the Constitution also is significant. Pinckney proposed to add the habeas guarantee to the judiciary provision (then Article XI) of the draft constitution that had been produced by the Committee of Detail.[15] In early September, Gouverneur Morris reorganized the draft as a member of the Committee of Style. Morris placed the habeas guarantee in Article I, Section 9, with several other restrictions on Congress that had been added in the late weeks of the Convention, including the prohibitions against export taxes, bills of attainder, and ex post facto laws.[16] The placement of the habeas guarantee thus reflected the Convention's resolve that the right to habeas corpus would not be defined by Congress. Rather, it is an inherent right of the people *against* Congress, and thus it relies particularly on the judiciary to enforce it.[17] Morris' final language, never amended, provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[18]

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[14] *Id.*
[15] DUKER, at 128; Francis Paschal, *The Constitution and Habeas Corpus,* 1970 DUKE L.J. 605, 609-610 (1970).
[16] 2 FARRAND, at 596.
[17] *Id.* at 435; DUKER, at 131-132.
[18] U.S. CONST. art. I, § 9 cl. 2.

This review of the Convention's deliberations reinforces the importance of the habeas guarantee in two respects. First, the habeas guarantee was part of the delegates' central determination that the new government would be one of enumerated, not general, powers. Indeed, that determination was spurred by the same delegates from South Carolina – Rutledge and Pinckney – who were the most aggressive advocates of the habeas guarantee. Second, the delegates narrowed the circumstances in which the habeas guarantee might be suspended to only two: rebellion or invasion. Those triggering events may readily be determined and enforced by the courts.

This latter point emerged in the ratification debates in Massachusetts. A Mr. Taylor objected that there was no limit on the length of time that the writ might be suspended. In response, Judge Dana stressed the narrowness of the suspension clause: "[The] safest and best restriction arises from the nature of the cases in which Congress are authorized to exercise that power at all, namely, in those of rebellion or invasion. These are clear and certain times, facts of public notoriety, and whenever these shall cease to exist, the suspension of the writ must cease also." [19]

[19] 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1359 (John P. Kaminski & Gaspare J. Saladino eds., 1984); DUKER, at 133-134 (citing 2 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 108 (1845)).

The habeas guarantee also figured in post-Convention debates over the need for a Bill of Rights, an omission from the Constitution which was roundly criticized by many. From his posting in France, Thomas Jefferson raised that objection in a letter to Madison, insisting that liberty depended on "the eternal and unremitting force of the habeas corpus laws."[20] In reply to such critics, Hamilton 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.'"[21]

Hamilton also emphasized the placement of the habeas guarantee in Article I, Section 9, next to prohibitions against bills of attainder, ex post facto laws, and titles of nobility.[22] He denounced ex post facto laws, as "formidable instruments of tyranny,"[23] and both he and Madison feared bills of attainders for the same reason.[24] Hamilton left no doubt, however, of the primary importance of the habeas guarantee, observing that "the practice of arbitrary imprisonments, have

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[20] Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 250. 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 Jefferson to Alexander Donald (Feb. 7, 1788), *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 354. Though the suspension clause was not amended, Jefferson's views, like the derivation of the clause during the Philadelphia Convention, underscore its narrow parameters.

[21] THE FEDERALIST NO. 84, at 510-512 (Alexander Hamilton).

[22] *Id.* at 511-512.

[23] *Id.* at 512.

[24] *United States v. Brown*, 381 U.S. 437, 444 (1965) (quoting Hamilton); THE FEDERALIST NO. 44, at 282 (James Madison).

been, in all ages, the favorite and most formidable instruments of tyranny."[25] The Framers included all of these prohibitions and then grouped them in Article I, Section 9, to prevent the government from enacting arbitrary and vindictive legislation,[26] from encroaching on individual rights, and from usurping the power of other branches of government.[27] All of those constitutional guarantees, Hamilton proclaimed, were "great[] securities to liberty and republicanism."[28]

The importance of the habeas guarantee to the founding generation was reinforced a decade after ratification, during the dispute over the Alien and Sedition Acts.[29] In 1798, Madison argued that those statutes worked an unconstitutional suspension of the Great Writ. In his Report on the Virginia Resolution Concerning the Alien and Sedition Laws, he noted that under the Alien Act the writ of habeas corpus could be suspended even though there was no rebellion or invasion:

> In the administration of preventive justice, the following principles have been held sacred: that some probable ground of suspicion be exhibited before some judicial

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[25] THE FEDERALIST NO. 84, at 512 (Hamilton).
[26] *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Stogner v. California*, 539 U.S. 607, 611 (2003).
[27] *See Cummings v. State of Missouri*, 71 U.S. 277, 286 (1866) (explaining that the guarantee against ex post facto laws is one of the critical protections against federal as well as state power); *Brown*, 381 U.S. at 442 (explaining that the Bill of Attainder clause was included in the Constitution to implement the separation of powers and prevent the "legislative exercise of the judicial function."); *Stogner,* 539 U.S. 607 at 615; *Carmell v. Texas*, 529 U.S. 513, 520 (2000).
[28] THE FEDERALIST NO. 84, at 511 (Hamilton).
[29] The Acts collectively known as the Alien and Sedition Acts are as follows: The Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801); The Alien Act, ch. 58, 1 Stat. 570 (1798) (expired June 25, 1800); The Naturalization Act, ch. 54, 1 Stat. 566 (1798) (repealed by Act of Apr. 14, 1802, ch. 28, § 5, 2 Stat. 153, 155); The Alien Enemies Act, ch. 66, 1 Stat. 577 (1798).

> authority; . . . . *that [a prisoner] may have the benefit of a writ of habeas corpus, and thus obtain his release if wrongfully confined*; and that he may at anytime be discharged from his recognizance, or his confinement, and restored to his former liberty and rights, on the order of the proper judicial authority, if it shall see sufficient cause.[30]

Madison argued the Alien Act wrongfully permitted the President to suspend the writ of habeas corpus, "although the Constitution ordains that it shall not be suspended unless when the public safety may require it, in case of rebellion or invasion,--neither of which existed at the passage of the act."[31] Likewise, Thomas Jefferson characterized the statute as "palpably in the teeth of the Constitution."[32] The protests against the Alien Act stirred such public uproar against any suspension of habeas corpus that President Adams never enforced the law.[33] Judges in later eras joined the denunciation of the statute.[34]

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[30] JAMES MADISON: WRITINGS 622 (Jack Rakove ed., 1999); 4 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (2d ed. 1836) (emphasis added).
[31] 4 J. ELLIOT, at 555.
[32] Letter from Thomas Jefferson to James Madison (June 7, 1798), *reprinted in* 8 THE WORKS OF THOMAS JEFFERSON 431, 434 (Paul Leicester Ford ed., 1904).
[33] *See, e.g.,* Frederick A.O. Schwarz, Jr., *The Constitution Outside the Courts*, 14 CARDOZO L. REV. 1287, 1298 (April 1993); DAVID MCCULLOUGH, JOHN ADAMS 505 (2001) ("Adams never invoked the law..."); *see also* JAMES GRANT, JOHN ADAMS: PARTY OF ONE (2005); STANLEY ELKINS AND ERIC MCKITRICK, THE AGE OF FEDERALISM (1993); 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE 71.01[1] (rev. ed. 1997) (the Alien Act "was never enforced"); Letter from John Adams to Thomas Jefferson (June 14, 1813), *reprinted in* 2 THE ADAMS-JEFFERSON LETTERS 329 (Lester J. Cappon ed., 1959) (stating that the Act "was never executed by me in any instance.").
[34] *See CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 156-157 (1973) (Douglas, J., concurring) ("The Alien and Sedition Acts, 1 Stat. 566, 570, 596, passed early in our history were plainly unconstitutional, as Jefferson believed."); *Fong Yue Ting v. United States.*, 149 U.S.

II. THE HABEAS CLAUSE CREATES A JUDICIALLY ENFORCEABLE GUARANTEE WHICH CONGRESSIONAL ACTION CANNOT ELIMINATE

The Framers understood that the habeas guarantee must be protected by the courts if it is to serve as an effective check on government power. Hamilton insisted on the judicial role, asserting that "trial by jury in criminal cases, aided by the habeas corpus act . . . [i]s provided for, in the most ample manner . . ."[35] Courts, including the Supreme Court, have implemented the Framers' intent that the habeas clause not be undermined by statute. Supreme Court decisions have noted carefully that the constitutional right to habeas corpus stands independent of those rights created by statute, though the Court has had no occasion to define the scope of the constitutional right.[36] Indeed, the Supreme Court has given a narrow reading to habeas-restricting statutes in order to avoid such constitutional questions, effectively affirming that the constitutional right stands separate from any enabling statute.[37]

698, 746-750 (1893) (Field, J., dissenting) (The Alien Act was "severely denounced by many of [America's] statesmen and jurists as unconstitutional and barbarous...").

[35] THE FEDERALIST NO. 83, at 499 (Alexander Hamilton).

[36] *See, e.g., Rasul v. Bush*, 542 U.S. 466, 477 (2004) (acknowledging the separate status of the habeas constitutional right); *INS v. St. Cyr,* 533 U.S. 289, 305 (2001) (rejecting a statutory interpretation that would strip the courts of habeas jurisdiction in violation of the Constitutional habeas guarantee); *McNally v. Hill*, 293 U.S. 131, 135 (1934) (Court acknowledged that use of writ as an incident of federal judicial power is implicitly recognized by Constitution, but failed to specify scope of writ); *Ex parte Milligan*, 71 U.S. 2, 130-31 (1866) (discussing the distinction between a suspension of the privilege of the writ and suspension of the writ itself).

[37] *See, e.g., St. Cyr*, 533 U.S. at 305.

The government argues that the Detainee Treatment Act of 2005 completely eliminates the Petitioners' right to bring a habeas corpus proceeding, consistent with Congress' supposed right to "freely repeal habeas jurisdiction" if it "affords an adequate and effective substitute remedy."[38] As explained in the briefs by the detainees, the DTA provides no such acceptable substitute, offering only crabbed and wholly inadequate review of the actions of the Combatant Status Review Tribunals, which themselves afford wholly inadequate procedural rights. The government's extreme view conflicts with the Framers' plain intent (as explained above) to provide a critical restraint on government powers, and with the courts' consistent view of that restraint.

A. The Supreme Court Recognizes A Constitutional Habeas Right That Is Independent Of Any Statute

The government points to *Ex parte Bollman*[39] as evidence that the right to habeas corpus derives from statute, and not from the Constitution. Yet the Supreme Court has made clear that the dicta cited by the government in that case does not define the constitutional habeas guarantee.[40] Moreover, the *Bollman* dicta, articulated in a moment of political expediency, cannot be reconciled with

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[38] Supplemental Brief of the Federal Parties Addressing the Detainee Treatment Act of 2005, at 49-50. We respectfully refer the Court to the discussion of this issue in the briefs submitted on behalf of the detainees.

[39] *Ex Parte Bollman*, 8 U.S. 75 (1807).

[40] *St. Cyr,* 533 U.S. at 304, n.24 (rejecting the dissent's reading of *Bollman* and asserting that Chief Justice Marshall did not mean to suggest that Congress could erase the habeas guarantee through inaction).

the core principles embodied in the habeas guarantee. Thus, the Supreme Court has never accepted the conclusion that the government attempts to draw from that dicta.

In *Bollman*, the Supreme Court had to decide whether it had the power to grant a writ of habeas corpus to Dr. Erick Bollman and Samuel Swartwout, who had allegedly conspired with Aaron Burr in 1806 and 1807 to separate certain western territories from the United States. Legislation was introduced in Congress, but not approved, to suspend the writ of habeas corpus and ensure the continued confinement of Swartwout and Dr. Bollman. The prisoners then sought habeas relief from the Supreme Court.[41]

Chief Justice Marshall determined that the Court had jurisdiction to consider the case through the Judiciary Act of 1789, properly looking to a statutory source of jurisdiction before considering any constitutional basis. Marshall then offered some further comments. In dicta, he addressed whether a statutory grant of jurisdiction over habeas corpus proceedings was required, and answered that it was. With no support or explanation, he asserted "the power to award the writ by any of the courts of the United States, must be given by written law."[42] That

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[41] 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, 559 (Winter 2000); ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 20-21 (2001); Paschal, 1970 DUKE L.J at 623-624.

[42] *Ex parte Bollman*, 8 U.S. at 94.

comment, unadorned by citation to precedent, announced a starkly illogical position. On the one hand, Marshall stated that the Constitution required Congress to pass a jurisdictional statute allowing habeas petitions. On the other, and without explanation, he recognized no judicial remedy if Congress violated that constitutional obligation.

Marshall's dicta – that the writ would be suspended if Congress enacted no parallel statute[43] – contradicts the habeas guarantee itself, which plainly states that Congress may suspend the writ only upon "rebellion or invasion." That provision is clear that mere Congressional inaction cannot cancel the habeas guarantee; rather, the guarantee can be suspended only by some positive act of government. Second, the text confines the suspension of the habeas guarantee to situations of "invasion" or "rebellion": nowhere does the provision permit the suspension of the writ for "inaction." It would surely be anomalous if such a restriction on congressional power could be nullified by Congress' failure to enact a parallel statute.[44]

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[43] *Ex parte Bollman*, 8 U.S at 95.

[44] The puzzling character of the *Bollman* dicta may be explained by the complex politics of the times, and of the Burr conspiracy. Marshall had written just a few years earlier in *Marbury v. Madison* that no statute of Congress was needed to give the federal courts authority to remedy essential common law rights. *Marbury v. Madison*, 5 U.S. 137 (1803) (recognizing that actions to protect common law rights must be cognizable by the courts); 6 THE PAPERS OF JOHN MARSHALL 486 n.11 (Charles F. Hobson et al. eds. 1990) (recognizing that the courts had jurisdiction over common law issues not addressed by statute). His contradictory dicta in *Bollman* may have been crafted to appease the federal government. Because the release of Dr. Bollman and Swartwout was likely to anger the President and Congress, the dicta might mitigate

The *Bollman* dicta in no way alters the force of the habeas guarantee. Indeed, within months of writing *Bollman*, Marshall himself acknowledged that other dicta in the opinion did not have the force of binding precedent: he departed from the definition of treason set forth in *Bollman*, finding it both wrong and "extrajudicial."[45] Courts began to ignore still other dicta in *Bollman* – regarding jurisdiction over state prisoners – shortly after the decision was rendered.[46] Since then, each time the Supreme Court has been presented with a statute that came dangerously close to denying the constitutional habeas guarantee, the Court has construed the statute to avoid any constitutional violation, refusing to following *Bollman*'s dicta that Congress might alter the constitutional habeas guarantee.

The Supreme Court has "constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme,"[47] recognizing that the habeas guarantee provides a "safeguard against invasion of the basic civil rights of

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that reaction by suggesting that Congress still had power over the habeas jurisdiction of the Court. This approach was the inverse of his strategy in *Marbury*, where he upheld the jurisdiction of the courts but his substantive ruling favored the President. *Marbury,* 5 U.S. 137.

[45] *In re Burr*, 8 U.S. 470, 10-11 (1807) ("It may not be proper to notice the opinion of the Supreme Court in the case of the *United States against Bollman and Swartwout.* It is said that this opinion, in declaring that those who do not bear arms may yet be guilty of treason, is contrary to law, and is not obligatory, because it is extrajudicial, and was delivered on a point not argued. This court is, therefore, required to depart from the principle there laid down.").

[46] Freedman, 51 ALA. L. REV. 531, 595-600 (citing to *Daze v. The Keeper of the Debtors Apartment*, (D.Pa. May 22, 1814), *Jouet v. Jones,* (C.C.S.D.N.Y. Apr. 7, 1800), and *United States v. Desfontes & Gaillard,* (2d Cir. Feb. 12, 1830), in which three courts exercised habeas jurisdiction over state prisoners despite Marshall's comment that there was no statutory authority for such jurisdiction).

[47] *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

the individual."[48] For that reason, *Johnson v. Avery* invalidated a state prison regulation that prohibited inmates from helping one another prepare habeas petitions, thereby foreclosing habeas relief to poor prisoners.[49] Before reaching its conclusion, the Court noted that "there is no higher duty than to maintain [the writ] unimpaired."[50] Because of this high duty, the Court has eschewed formalism in its habeas decisions. In *Ex Parte Mitsuye Endo*, the Court found that an American citizen of Japanese ancestry was entitled to unconditional release from a Relocation Center (Internment Camp) even though the petitioner had subsequently been removed from the territory in which she filed her petition.[51] In *Rasul*, the Court rejected the government's argument that the facility at Guantanamo Bay was beyond the reach of the courts.[52]

The Court has consistently acknowledged the constitutional nature of the habeas right and the courts' central role in determining when the right is unconstitutionally abrogated. In *Jones v. Cunningham,* the Court stated that the "jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available."[53] Lest this comment be interpreted to mean that

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[48] *Ex parte Mitsuye Endo*, 323 U.S. 283, 299 (1944); *see also*, *In re Burrus*, 136 U.S. 586, 589 (1890) (noting that the inclusion of the habeas guarantee in the constitution "added to the exalted estimate in which that writ has always been held in this country and in England).
[49] *Johnson*, 393 U.S. at 485, 487.
[50] *Id.* at 485 (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)).
[51] *Ex parte Mitsuye Endo*, 323 U.S. at 307.
[52] *Rasul*, 542 U.S. at 481-482.
[53] *Jones v. Cunningham,* 371 U.S. 236, 238 (1963).

the writ could be eliminated in the absence of statute, the Court warned in *Sanders v. United States* that statutory changes that "derogate from the traditional liberality of the writ . . . might raise serious constitutional questions."[54] In *Jones*, the Court refused to limit the habeas right to instances of traditional confinement, holding that a habeas petition was the proper medium for a parolee to contest restrictions on his liberty. The Court explained that the Great Writ "is not now and [has] never been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose-the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[55]

INS v. St. Cyr illustrates the power of the habeas guarantee. In that case, the Court considered the effect of two statutes on the U.S. Attorney General's ability to waive deportation for aliens who had committed aggravated felonies. The government argued that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Antiterrorism and Effective Death Penalty Act of 1996 removed the Attorney General's discretion to waive deportation, even for those aliens who had committed felonies before the laws were passed. The government also asserted that the laws left no judicial forum to evaluate this

[54] *Sanders v. United States*, 373 U.S. 1, 11-12 (1963) *abrogated on other grounds McClesky v. Zant*, 499 U.S. 467 (1991), superseded by statute.
[55] *Jones*, 371 U.S. at 243.

interpretation. The Supreme Court flatly disagreed with both assertions.[56] According to the Court, the government's position on jurisdiction "would entirely preclude review of a pure question of law by any court," and thus raised a serious constitutional question under the habeas guarantee in Article I, Section 9.[57] The Court insisted on a narrow statutory reading that preserved the Court's jurisdiction over habeas petitions, emphasizing the importance of the constitutional guarantee: "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest."[58]

B. The Courts Have Carefully Preserved the Rights Articulated Alongside the Habeas Guarantee In Article I, Section 9

The judicial enforceability of the constitutional habeas guarantee can be seen in rulings enforcing other rights protected in Article I, Section 9. As the Framers noted, rights such as the guarantees against ex post facto laws and bills of attainder complement the habeas guarantee by establishing further limits on federal power. S*ee supra* p. 7. To ensure that these rights survive as checks on federal power, the courts have enforced them regardless of Congressional action or inaction.[59]

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[56] *St. Cyr*, 533 U.S. at 298-300.
[57] *Id.* at 300.
[58] *Id.* at 301.
[59] *United States v. Lovett*, 328 U.S. 303 (1946); *Consolidated Edison Co. of New York, Inc. v. Pataki*, 292 F.3d 338, 355 (2d Cir. 2002); *Foretich v. United States*, 351 F.3d 1198 (D.C. 2003).

The Supreme Court set forth this necessary truth in *United States v. Lovett*.[60] Congress had passed an Act preventing the payment of salary or compensation to three specific federal employees, acting out of concern that the government was employing subversives who sought to overthrow it. The three officials sued for their pay in the Court of Claims, arguing that the law was an unconstitutional bill of attainder. The Supreme Court agreed. Writing for a unanimous Court, Justice Black recognized that the Court's exercise of jurisdiction over such cases is essential. "Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result."[61]

Drawing on the historical basis for the provisions in Article I, Section 9, *Lovett* recognized that its conclusion applied to the other guarantees in that provision. Quoting Hamilton, the Court found that:

> a limited constitution is one which contains certain specified exceptions to the legislative authority, such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the

[60] *Lovett,* 328 U.S. 303.
[61] *Id.* at 314.

> Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[62]

Though *Lovett* concerned a bill of attainder, its reasoning was not limited to that particular guarantee. Rather, the Court's reasoning also requires judicial enforcement of the other limits on federal power contained in Article I, Section 9.

More recently, this court and the Court of Appeals for the Second Circuit have so enforced Article I, Section 9's limits on government conduct. In *Foretich v. United States,*[63] this Court invalidated, as a bill of attainder, a congressional enactment that prevented a particular divorced father from winning visitation privileges absent the consent of his daughter because the law unconstitutionally branded the plaintiff a sexual offender.[64] In *Consolidated Edison Co. of New York, Inc. v. Pataki,* the Second Circuit rejected a state law as an unlawful bill of attainder under Article I, Section 10 (which applies the prohibition to the *states*). That decision, like *Lovett*, quoted Hamilton in explaining that courts must enforce the constitutional guarantee to prevent the legislature from enacting statutes "manifestly retrospective in focus, and unavoidably punitive in operation."[65]

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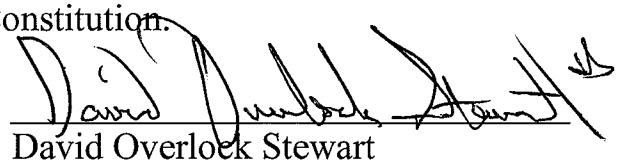
[62] *Id.* at 314 (quoting FEDERALIST PAPER NO. 78 (Hamilton)).
[63] *Foretich*, 351 F.3d 1198.
[64] *Id.* at 1210, 1214; Judicial redress is similarly available for violations of the guarantee against ex post facto legislation. In *Wilkinson v. Dotson*, 125 S. Ct. 1242, 1248 (2005), the Supreme Court confirmed that challenges to ex post facto laws can be brought under 42 U.S.C. § 1983. That violations of the ex post facto provision in Article I, Section 9 are recognized as constitutional torts further illustrates that Courts believe these rights to be Constitutionally, rather that statutorily, based.
[65] *Consolidated Edison*, 292 F.3d at 355.

The habeas guarantee commands no lesser constitutional respect than the bill of attainder and ex post facto provisions. Indeed, because it sweeps far more broadly, it is even more central to the Framers' purpose of restraining arbitrary and oppressive government action. Accordingly, that constitutional guarantee can and must be enforced by the courts without regard to legislative attempts to eliminate the remedy.

CONCLUSION

"Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves."[66] The DTA of 2005 is a vivid example of this unfortunate tendency. This Court should vindicate the core habeas right that the Framers valued so highly that they specifically and unequivocally incorporated it in the Constitution.



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[66] *Brown*, 381 U.S. at 444 (quoting JOHN C. HAMILTON, HISTORY OF THE REPUBLIC OF THE UNITED STATES 34 (1859)).

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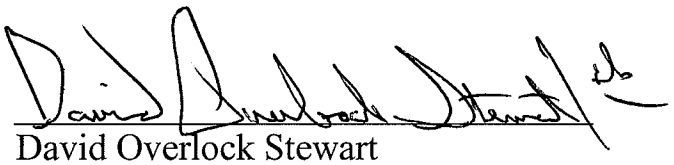

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I, David O. Stewart, hereby certify that on this 10th day of March, 2006, the original and 14 copies of the foregoing Brief of *Amici Curiae*, Legal and Historical Scholars, In Support of Petitioners Addressing the Detainee Treatment Act of 2005, were 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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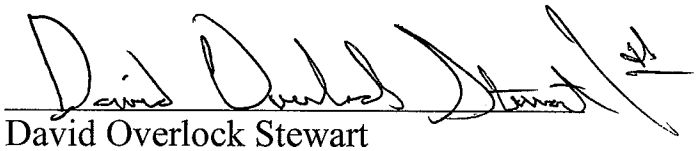

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