[ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2006]

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

Nos. 05-5064, and consolidated cases 05-5095 through 05-5116

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

No. 05-5062, and consolidated case 05-5063

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

On Appeal from the United States District Court
for the District of Columbia

SUPPLEMENTAL BRIEF *AMICI CURIAE* OF BRITISH AND AMERICAN HABEAS SCHOLARS LISTED HEREIN IN SUPPORT OF PETITIONERS ADDRESSING SECTION 1005 OF THE DETAINEE TREATMENT ACT OF 2005

Jonathan Hafetz
(D.C. Bar No. 49761)
BRENNAN CENTER FOR JUSTICE
AT N.Y.U. SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6289

Dated: March 10, 2006

*AMICI**

DENIS GALLIGAN
Professor of Socio-Legal Studies and Fellow
WOLFSON COLLEGE
UNIVERSITY OF OXFORD
England

DR. BENJAMIN GOOLD
University Lecturer in Law and Fellow
SOMERVILLE COLLEGE
UNIVERSITY OF OXFORD
England

BERNARD HARCOURT
Professor of Law
THE UNIVERSITY OF CHICAGO LAW SCHOOL
Chicago, Illinois

RANDY HERTZ
Professor of Clinical Law
NEW YORK UNIVERSITY SCHOOL OF LAW
New York, New York

DR. CAROLYN HOYLE
University Lecturer in Criminology and Fellow
GREEN COLLEGE
UNIVERSITY OF OXFORD
England

RIGHT HONOURABLE HELENA ANN KENNEDY
BARONESS (LADY) KENNEDY OF THE SHAWS QC
England

NASSER HUSSAIN
Assistant Professor of Law, Jurisprudence & Social Thought and History
AMHERST COLLEGE
Amherst, Massachusetts

DR. LIORA LAZARUS
University Lecturer in Law and Fellow
ST. ANNE'S COLLEGE
UNIVERSITY OF OXFORD
England

OWEN REES
Stipendiary Lecturer
LADY MARGARET HALL
UNIVERSITY OF OXFORD
England

IRA P. ROBBINS
Bernard T. Welsch Scholar and Professor of Law & Justice
AMERICAN UNIVERSITY,
WASHINGTON COLLEGE OF LAW
Washington, D.C.

JORDAN M. STEIKER
Cooper H. Ragan Regents Professor in Law
UNIVERSITY OF TEXAS SCHOOL OF LAW
Austin, Texas

CHARLES D. WEISSELBERG
Professor of Law and Director of Center for Clinical Education
UNIVERSITY OF CALIFORNIA, BERKELEY
SCHOOL OF LAW
Berkeley, California

* **Affiliations of *amici* are listed for identification purposes only.**

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*

All parties, intervenors, and *amici* appearing before the District Court and/or in this Court on these appeals are listed in the Opening and Supplemental 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.

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.

Jonathan Hafetz
(D.C. Bar No. 49761)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

* Authorities upon which *amici* chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Constitutional and Statutory Provisions

Miscellaneous

TABLE OF AUTHORITIES
(continued)

Page

GLOSSARY

CSRT – Combatant Status Review Tribunal

DTA – Detainee Treatment Act of 2005, Pub. L. No. 109-148 (2005)

J.A. – Joint Appendix

INTEREST OF *AMICI CURIAE*

Amici curiae are academic experts on habeas corpus and its development at common law in England and in the United States. *Amici* include authors of leading textbooks and articles on habeas corpus. This matter is of great professional interest to the *amici* because the Government's position concerning the Detainee Treatment Act of 2005 rests upon an erroneous conception of the writ of habeas corpus and threatens to undo centuries of Anglo-American common law relating to the "Great Writ."[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Rasul v. Bush*, the Supreme Court held that prisoners at the Guantánamo Bay Naval Base may seek a writ of habeas corpus, now codified in the United States at 28 U.S.C. § 2241(c)(1). 542 U.S. 466, 483-84 (2004). This statutory provision is the direct descendant of the English common law writ, Blackstone's Great Writ of Liberty, which was transported to America and guaranteed by the Framers in the Suspension Clause of the Constitution. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). "[A]t the absolute *minimum*, the Suspension Clause protects the writ as it existed in 1789." *Id.* (internal quotation marks omitted and emphasis added).

The Government argues that section 1005(e) of the Detainee Treatment Act, Pub. L. No. 109-148 (2005) ("DTA"), eliminates federal habeas jurisdiction under section 2241 over petitions filed by aliens detained at Guantánamo. Supplemental Brief

---

[1] *Amici* submit this brief pursuant to this Court's order filed on January 27, 2006. This brief expands upon the brief filed by *amici* on January 25, 2006. *Amici* request that this brief be substituted for the previously filed brief. This brief is submitted with the parties' consent pursuant to Circuit Rule 29.

This brief addresses the availability and nature of common law habeas in England and the United States; by contrast, the brief *amicus curiae* of Legal and Historical Scholars focuses on events surrounding the adoption of the Suspension Clause.

of the Federal Parties Addressing the Detainee Treatment Act of 2005 ("Supp. Br.") at 16-17. In its view, section 1005(e) may be given retroactive effect because it is a "jurisdiction-ousting provision" that simply alters the forum for pending claims without affecting Petitioners' substantive rights. *Id.* at 32-33. The Government further asserts that "as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights under the Suspension Clause," *id.* at 45-49, and that, in any event, Section 1005(e)(2) of the DTA provides an adequate substitute for habeas since the writ did not traditionally provide a judicial inquiry into the factual basis for a prisoner's detention, *id.* at 51-53.

These arguments are inconsistent with the historical record. As we demonstrate herein, habeas corpus has for centuries been a *substantive* guarantee of common law process to individuals deprived of their liberty. At common law, the writ had a broad territorial reach, and was available to both citizens and aliens wherever the Crown exercised sufficient power and control to enforce the writ, including in territory over which the Crown was not sovereign.

At common law, habeas contemplated a searching examination of the factual and legal basis for a prisoner's detention. To vindicate this substantive right, the common law has long prohibited the use of evidence secured by torture. Through habeas, this common law process traveled from England to the colonies, and continued without interruption in the United States both before, and after, the adoption of the Fifth Amendment, where it stands codified in the very statute, 28 U.S.C. § 2241(c)(1), that the Government contends has no substantive content.

To protect the bundle of substantive rights guaranteed by habeas, the writ at

common law – and likewise the statute codifying it since 1789 – could not be suspended absent a clear statutory statement. Further, the Constitution narrowly limited Congress's power to suspend the writ to emergencies arising from an active "Rebellion or Invasion." U.S. Const., art. I., § 9, cl. 2. Though the DTA contains no such statement, it nonetheless purports to eliminate common law habeas without providing an examination into the factual and legal basis for a prisoner's detention. Yet, even as the DTA bars this inquiry, it permits evidence secured by torture. If construed to apply to pending cases, therefore, the DTA would eliminate the substantive protections of the common law writ without providing an adequate substitute.

ARGUMENT

I. At Common Law, Habeas Corpus Was Available Wherever The Crown Exercised Sufficient Power And Control To Enforce the Writ And Guaranteed A Searching Factual And Legal Inquiry Into The Basis For A Prisoner's Detention.

A. The Government's argument (Supp. Br. at 45-47) that the Suspension Clause does not apply to aliens at Guantánamo simply repeats the argument that it unsuccessfully urged upon the Supreme Court in *Rasul* – an argument bottomed on the same flawed recitation of history. Rejecting the Government's position, the Court wrote: "Habeas corpus is . . . a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." *Rasul*, 542 U.S. at 473 (internal quotation marks omitted). The writ extended to both aliens and citizens, *id.* at 481; *Somerset's Case*, 20 Howell's St. Tr. 1, 79-82 (K.B. 1772), in time of peace as well as in time of war, *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (reviewing habeas petition of alien

detained as prisoner of war; denying relief on the merits); *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (same).[2]

As the Supreme Court has recognized, the common law writ of habeas corpus had an "extraordinary territorial ambit." *Rasul*, 542 U.S. at 482 n.12 (internal quotation marks omitted). Habeas extended to any territory over which the Crown exercised sufficient power and control to compel obedience to the writ's command. *Id.* at 482 ("[T]he reach of the [common law] writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.") (internal quotation marks omitted). As Lord Mansfield wrote in 1759, "even if a territory was 'no part of the realm [of England],' there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'" *Id.* (quoting *R. v. Cowle*, 97 Eng. Rep. 587, 598-99 (K.B. 1759)).

Common law habeas was thus available in territories beyond the borders of England, such as the Isle of Man, the mainland American colonies and West Indies, and the Channel Islands of Jersey and Guernsey. *Rasul*, 542 U.S. at 482 nn. 11-13; *Cowle*, 97 Eng. Rep. at 600. It was available not only in territory over which England was sovereign, but also in territory over which England exercised exclusive control and jurisdiction but lacked sovereignty. In India, for example, England long exercised control through fortified settlements established by crown-chartered merchant companies

---

[2] *Cf. Fabrigas v. Mostyn*, 20 Howell's St. Tr. 81, 231 (K.B. 1775) (sustaining action by alien from military colony of Minorca for false imprisonment and banishment without trial; explaining that "to lay down in an English court of justice such monstrous propositions as that a governor . . . can do what he pleases . . . and is accountable to nobody [ ] is a doctrine not to be maintained; for if he is not accountable in this court, he is accountable nowhere").

like the British East India Company. *See generally* A.B. Keith, A Constitutional History of India, 1600-1935, at 24-25 (1969). By 1765, the company had become a substantial military power, with *de facto* control over large swaths of territory, even though India continued to retain ultimate sovereignty for many decades to come. P.J. Marshall, *The British in Asia: Trade to Dominion, 1770-1765*, *in* 2 The Oxford History of the British Empire 487, 503 (P.J. Marshall ed. 1998); 5 The Cambridge History of the British Empire 658 (Dodwell, H.H. ed. 1929). Yet, as early as 1775, English judges in India were issuing writs of habeas corpus without statutory authorization on behalf of both subjects and aliens alike. *See, e.g.*, *R. v. Ramgovind Mitter* (Sup. Ct. Calcutta 1781) (opinion of Chambers, J.), *reported in* 1 The Indian Decisions 1008 (T.A. Venkasawmy Row ed. 1911) (common law power of judges to issue writs of habeas corpus); *R. v. Hastings* (Sup. Ct. Calcutta 1775) (opinion of Impey, C.J.), *reported in id.* at 1005, 1007 (same).[3] Judges granted habeas relief to prevent imprisonment without trial resulting from the arbitrary exercise of power over aliens, B.N. Pandey, The Introduction of English Law into India 151 (1967), and held in contempt custodians who refused the writ's command to provide a lawful basis for the detention, *Ramgovind Mitter* (opinion of Hyde, J.), 1 The Indian Decisions, *supra*, at 1009; *In re Coza Zachariah Kahn* (Sup. Ct. Calcutta 1779), *reported in* 1 W.H. Morley, An Analytical Digest of all the Reported Cases Decided in the Supreme Court of Judicature in India 277 (1850).

---

[3] *See also* Nasser Hussain, The Jurisprudence of Emergency: Colonialism and the Rule of Law 81 (2003) (describing issuance of writ on behalf of alien debt collector detained over late payment); Thomas M. Curley, Sir Robert Chambers: Law, Literature, and Empire in the Age of Johnson 244-45 (1998) (court refused to "abdicate" its duty to remedy unlawful action and "honor[ed] applications for habeas corpus from anybody" including from aliens imprisoned by company agents in crown-controlled territory).

A judge's authority to issue writs of habeas corpus derived from the principle, articulated by Blackstone, that the availability of habeas to test the legality of imprisonment extended to all parts of the Crown's territory. Nasser Hussain, The Jurisprudence of Emergency: Colonialism and the Rule of Law 81 (2003). Habeas had such a far-reaching territorial ambit because it was a high prerogative writ, which could be issued at common law by the chief justice or any justice of the King's Bench. *Id.* Common law habeas thus became a substantive guarantee of the "fundamental 'principles'" of English law and justice in crown-controlled territory. *Id.* at 80. In India, as elsewhere, the power to issue writs of habeas corpus did not turn on formalisms like sovereignty but, rather, on the court's power to "judge of the cause" and "give relief upon it." *Cowle*, 97 Eng. Rep. at 600.

In sum, the Government's contention that the common law writ of habeas corpus secured by the Suspension Clause does not extend to aliens in a territory like Guantánamo is inconsistent with the historical record.[4] *Amici* are unaware of any case in which the common law writ of habeas corpus was held *not* to extend to territory under the Crown's exclusive control and jurisdiction. To the contrary, English courts have historically resolved questions about the common law writ's territorial reach in favor of

[4] The Government's reliance (Supp. Br. at 46-47) on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), is misplaced. Unlike the present cases, *Eisentrager* involved *conceded* enemy aliens who had previously been *tried, convicted and sentenced* by a military commission. 339 U.S. at 765-66; *see also Rasul*, 542 U.S. at 476 (distinguishing *Eisentrager*); *id.* at 487-88 (Kennedy, J., concurring) (same). Not only was the habeas inquiry traditionally narrower on *post-conviction* review, *see also infra* at 9-11, but the *Eisentrager* petitioners admitted the very facts – their status as enemy aliens – over which the common law writ supplied its searching review. In *Eisentrager*, moreover, the United States temporarily occupied Landsberg Prison with other nations – a degree of control far less complete than its century-long total and exclusive power over Guantánamo. *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).

the writ's availability, and only a legislative act explicitly *suspending* the writ for a time certain could place the detention of those imprisoned on territory within the Crown's power and control beyond habeas review.

B. The Government also asserts (Supp. Br. at 51) that habeas courts at common law "engage[d] in highly deferential sufficiency review" which precluded prisoners from contesting the facts alleged in the custodian's return. Again, however, the Government misconstrues history, conflating habeas review of executive detention with habeas review of criminal convictions.

The writ's guarantee of a searching inquiry into the factual and legal basis for a prisoner's detention crystallized in response to the Crown's efforts to detain individuals indefinitely without common law process. In 1591, the common law judges of England protested that, when they ordered the release of individuals unlawfully detained by the Crown, executive officials transported them to "secret [prisons]" to circumvent judicial review. William F. Duker, A Constitutional History of Habeas Corpus 42 (1980). As a result, the judges issued a resolution affirming their power to release prisoners if a return to the writ was not made. *Anderson's Reports*, 123 Eng. Rep. 482 (1592); *also* R.J. Sharpe, Law of Habeas Corpus 8 (2d ed. 1989).

The Crown, nevertheless, continued to avoid a judicial examination into a prisoner's detention by providing a general return that did not specify the cause of commitment. This issue came to a head in the seminal *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627). There, the Attorney General asserted that it was the king's prerogative to detain suspected enemies of state by his "special command," without a judicial inquiry into the factual and legal basis for their detention. *Id.* at 37. He emphasized the Crown's

overriding interest in national security and insisted that judges defer to the king's judgment and not "inquire further" into matters of state. *Id.* at 45.

When the court upheld the Crown by finding the return sufficient, it sparked a constitutional crisis that firmly established habeas as the pre-eminent safeguard of common law process and personal liberty with the enactment of the Petition of Right, 3 Car. 1, c.1 (1628); the Habeas Corpus Act of 1641, 16 Car. 1, c.10 (1641); and the Habeas Corpus Act of 1679, 31 Car. 2, c.2 (1679). By the late 1600s, habeas corpus had become – and would remain – "the great and efficacious writ, in all manner of illegal confinement," 3 William Blackstone, Commentaries *131, and "an effective remedy for executive detention," Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 460 (1966).

Common law courts did not simply accept the government's return to a prisoner's habeas petition; instead, they routinely probed the return and examined additional evidence submitted by both sides to ensure the factual and legal sufficiency of the commitment. *See, e.g.*, *Case of the Hottentot Venus*, 104 Eng. Rep. 344, 344-45 (K.B. 1810) (ordering examination of "native of South Africa" to assess whether alien was confined against her will); *Goldswain's Case*, 96 Eng. Rep. 711, 712 (C.P. 1778) (judges temporarily discharge impressed sailor, refusing to "shut their eyes" to facts in petitioner's affidavits showing he was legally exempt from impressment); *Richard Good's Case*, 96 Eng. Rep. 137, 137 (K.B. 1760) (reviewing affidavits showing petitioner exempt from impressments); *R. v. Delaval*, 97 Eng. Rep. 913, 915-16 (K.B. 1763) (scrutinizing affidavits and concluding that girl had been fraudulently indentured as an apprentice and was being misused as a prostitute); *R. v. Turlington*, 97 Eng. Rep.

741, 741 (K.B. 1761) (discharging woman from "mad-house" after ordering medical inspection, reviewing doctor's affidavit, and inspecting woman who "appeared to be absolutely free from the least appearance of insanity"); *R. v. Lee*, 83 Eng. Rep. 482, 482 (K.B. 1676) (reviewing affidavits to adjudicate wife's assertion of "ill usage, imprisonment and danger of her life" by husband); *see also Goldswain's Case*, 96 Eng. Rep. at 712 (Gould, J.) ("I do not conceive, that either the Court or the party are concluded by the return of a habeas corpus, but may plead to it any special matter necessary to regain his liberty."); *Bushell's Case*, 124 Eng. Rep. 1006, 1010 (C.P. 1670) (Vaughan, C.J.) (deeming return insufficient because it lacked "full" and "manifest" evidence necessary to sustain commitment); *see generally* Sharpe, *supra*, at 66-68 (citing habeas cases involving factual inquiries).

These principles applied equally to the detention of enemy aliens during wartime. Alleged enemy aliens could thus challenge the factual basis of their commitment on habeas to ensure it was within the bounds prescribed by law, including by submitting evidence to the court. *Case of Three Spanish Sailors*, 96 Eng. Rep. at 776 (examining affidavit detailing facts supporting petitioners' release, but concluding that, "upon *their own showing*," they are alien enemies) (emphasis added); *accord Schiever*, 97 Eng. Rep. at 551-52; *see also* Sharpe, *supra*, at 115-16 (habeas court will investigate whether detainee "is both in fact and in law" an enemy alien or a prisoner of war).

The Government (Supp. Br. at 51) asserts that petitioners at common law could not controvert the truth of the facts asserted in a return. But the Government relies on *post-conviction* criminal cases for this proposition. *Jackson v. Virginia*, 443 U.S. 307 (1979) (*post-conviction* challenge based on sufficiency of the evidence at trial); Note,

Developments in the Law – Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1113-16 (1970) (discussing *post-conviction* challenges in, *e.g.*, *Frank v. Mangum*, 237 U.S. 309 (1915)); Oaks, *supra*, at 453 (discussing *post-conviction* petitions by prisoners confined pursuant to "the *judgment and sentence of a court*") (emphasis added). The reason for a more limited habeas inquiry in those cases is simple: the prisoner had already been convicted at a trial that provided full common law process, including the opportunity to confront and cross-examine any witnesses against him, *Crawford v. Washington*, 541 U.S. 36, 49 (2004), and the requirement that the government prove its allegations beyond a reasonable doubt, *United States v. Booker*, 543 U.S. 220, 230 (2005). Similarly, to the extent some prisoners detained before trial could not controvert the truth of a return, it was because habeas guaranteed their common law right to a speedy trial. Habeas Corpus Act of 1679, 31 Car. 2, c.2, § 7 (1679) (securing right to speedy trial); Edward Coke, The Second Part of the Institutes of the Laws of England 43 (1817 ed.) (prolonged detention without "full and speedy justice" contrary to the basic laws and customs of England).[5] Even the article by Professor Dallin H. Oaks cited by Government (Supp. Br. at 51) explains that individuals detained without charge contested the facts in the return in "*most* . . . cases." Oaks, *supra*, at 454 n.20 (internal quotation marks omitted and emphasis added).

---

[5] Moreover, petitioners detained pending trial routinely controverted the truth of the return to obtain bail. *See, e.g.*, *R. v. Greenwood*, 93 Eng. Rep. 1086 (K.B. 1739) (reviewing affidavits asserting prisoner not at place of robbery, but denying bail); *Kirk's Case*, 87 Eng. Rep. 760, 760-61 (K.B. 1704) (reviewing affidavits to determine whether defendant eligible for bail "on account of *ill health*"; denying relief on the merits) (emphasis in original); *Farington's Case*, 84 Eng. Rep. 1227 (K.B. 1682) (granting bail based on affidavits "showing good reason for it"); *see generally* Sharpe, *supra*, at 128-30.

The Government's reliance (Supp. Br. at 51) on Justice Wilmot's views in *Opinion on the Writ of Habeas Corpus*, 107 Eng. Rep. 29 (H.L. 1758), is similarly misplaced. In 1758, a bill was introduced in Parliament that would have extended certain procedural reforms available in criminal cases under the Habeas Corpus Act of 1679 to non-criminal cases and codified the common law practice of permitting the habeas petitioner to controvert facts stated in the return. 15 Parliamentary History 871-74 (London, T.C. Hansard 1813). When asked to provide their opinions to the House of Lords, *most* of the common law judges maintained that individuals *could* contest the Government's factual assertions on habeas, including Lord Mansfield, who opposed the bill precisely because he believed that the common law writ *already permitted* what the bill sought to achieve. Sharpe, *supra*, at 66 n.16 (citing opinions of the judges); Rollin C. Hurd, A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus 259 (1876) (same). Thus, Wilmot's view that a prisoner could not controvert the truth of the return was a minority one, and, moreover, reflected his belief that it was the "province of a jury" to determine the ultimate question of guilt or innocence based upon the presentation and cross-examination of witnesses. *Opinion on the Writ of Habeas Corpus*, 107 Eng. Rep. at 43; *id.* ("[N]othing does so effectually explore the truth as a cross-examination, which strikes so suddenly that fiction can never endure it."); *see also Ex parte Beeching*, 107 Eng. Rep. 1010 (K.B. 1825) (refusal of judges to try criminal defendants by affidavit).[6]

[6] The Government (Supp. Br. at 51-52) also mistakenly relies on habeas review of convictions by military commissions. Unlike the petitioners here, the defendants in those cases did not maintain their innocence and were not indefinitely detained without trial; rather, they were *conceded* enemy aliens who had been tried and convicted of war crimes by lawfully established tribunals that provided them with a full and fair opportunity to

In short, the Government ignores the important protections that the writ has historically afforded by minimizing it as a jurisdictional provision devoid of substantive content. The very essence of habeas – its substance – was a searching inquiry by neutral judges into the factual and legal validity of the proffered justification for the detention. In cases where an individual was held without trial, especially in cases of executive detention, the habeas court itself supplied common law process by undertaking a factual inquiry into the basis of confinement in the first instance. And, to the extent that the lawfulness of the detention turned upon disputed issues of fact, the courts conducted adversary hearings in which the parties presented evidence for courtroom examination. It was these broad equitable features, not the technicalities of pleading, that made the Great Writ of Liberty great.

C. By providing a searching inquiry into the factual and legal basis for a prisoner's detention, habeas vindicated another core guarantee of the common law – the categorical prohibition on the use of evidence obtained by torture. During the sixteenth century, crown officials occasionally issued warrants authorizing the torture of prisoners. John H. Langbein, Torture and the Law of Proof: Europe and England in the Ancien Regime 130 (1977). Pain was inflicted by a variety of ingenious devices, including thumbscrews, pincers, and the infamous rack. David Hope, *Torture*, 53 Int'l & Comparative Law Qtr'ly 807, 811 (2004). The use of torture declined after an

---

contest the government's allegations. *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942); *accord Rasul*, 542 U.S. at 476 (distinguishing *Eisentrager*). Thus, the Nazi saboteurs in *Quirin*, for example, were given a lengthy trial in which the government proved its case "in mind-numbing detail," and in which they freely cross-examined all of the government's witnesses. Pierce O'Donnell, In Time of War: Hitler's Attack on America 152-53, 156, 165-66 (2005). By contrast, the petitioners here were afforded no such process. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468-78 (D.D.C. 2005).

investigation showed that a suspected traitor had been "tortured upon the rack" based upon false allegations. Langbein, *supra*, at 130-31. Shortly thereafter, the king asked the common law judges whether another alleged traitor "might not be racked" to make him identify accomplices, and "whether there were any law against it." *Proceedings Against John Felton*, 3 Howell's St. Tr. 367, 371 (1628). The judges' answer was unanimous: the prisoner could not be tortured because "no such punishment is known or allowed by our law." *Id.*

This longstanding common law prohibition was recently reaffirmed in the unanimous decision of a specially convened panel of seven members of the House of Lords. *A (FC) v. Secretary of State*, [2005] UKHL 71 (appeal taken from Eng.). In ruling that evidence obtained by the torture of witnesses by a foreign State could not be admitted even when the United Kingdom had not been complicit in the torture, the law lords explained that the "common law has regarded torture and its fruits with abhorrence for over 500 years" – an abhorrence "now shared by over 140 countries which have acceded to the Torture Convention." *Id.* ¶ 51 (per Lord Bingham). This categorical prohibition against evidence obtained by torture has long been a distinguishing feature of the common law, not simply because of its "inherent unreliability" but also because "it degraded all those who lent themselves to the practice." *Id.* ¶ 11.

D. The only way to deprive prisoners of the core common law process secured by habeas corpus was for Parliament to unequivocally suspend the writ's protections. On various occasions, Parliament suspended habeas corpus in time of war in order to authorize the indefinite detention of suspected enemies of state. *See generally* William Forsyth, Cases and Opinions on Constitutional Law 452 (1869) (citing suspension acts).

Unlike the DTA, however, these acts were clear suspensions that were deemed necessary to secure the public safety from an actual invasion or insurrection. *See, e.g.*, 38 Geo. 3 c.36 (1798) (suspension to protect against imminent invasion); 19 Geo. 2 c.1 (1746) (suspension to secure peace from threatened rebellion in Scotland). Further, the parliamentary suspension acts all contained an express expiration date, which was usually a year or less from the act's passage. Albert V. Dicey, Introduction to the Study of the Law of the Constitution 226 (1908). And, habeas corpus was again available at the expiration of the statute, showing the natural condition to which the law reverts upon a suspension's conclusion. *See, e.g.*, 6 Anne, c. 67, § 3 (1707-08). In short, suspension gave "[e]xtreme powers . . . to the executive, but powers nonetheless distinctly limited by law." Sharpe, *supra*, at 95.

II. Habeas Corpus Continued To Safeguard Common Law Process Both During The Colonial Period And After The Adoption Of The Constitution.

A. Habeas corpus was part of colonial law from the establishment of the American colonies, and the common law writ operated in all thirteen British colonies that rebelled in 1776. Duker, *supra*, at 98, 115. The writ's availability was rooted in the common law, and did not depend on statute. Local courts frequently entertained petitions challenging detention by crown officials, and, when they denied relief, they did so on the merits. *See, e.g.*, Emory Washburn, Sketches of the Judicial History of Massachusetts 105-06 (1840) (describing denial of habeas relief in 1687 to Reverend John Wise and others accused of "contempts and high misdemeanor" and ordering prisoners to stand trial) (internal quotation marks omitted).

The Framers of the Constitution viewed habeas corpus as a fundamental safeguard in their new nation, just as it had been throughout the British empire. *See, e.g.*,

The Federalist 84, at 511 (Alexander Hamilton) (C. Rossiter ed., 1961) (habeas corpus among the "greate[st] securities to liberty and republicanism"). That habeas was "the only common-law process explicitly written into the Constitution" is evidence of the "complete measure of its reception by the colonists and the high regard in which it was held." Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development*, *in* Freedom and Reform: Essays in Honor of Henry Steele Commager 55, 74 (H. Hyman & L. Levy eds. 1967).

Indeed, among the Framers of the Constitution, restricting Congress's power to suspend the writ was never controversial: the only debate at the Federal Convention of 1787 concerned what conditions, *if any*, could *ever* justify Congress's suspension of the Great Writ. *Compare* 2 The Records of the Federal Convention of 1787, at 438 (M. Farrand ed. 1966) (no suspension except "on the most urgent occasions, and then only for a limited time not exceeding twelve months") (proposal of Charles Pinckney) (internal quotation marks omitted), *with id.* (habeas corpus "inviolable" and should never be suspended) (proposal of John Rutledge). Habeas corpus was secured under the Suspension Clause, and confirmed under the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, thus codifying the writ as a source of common law process two years before, and perpetually independent from, the adoption of the Fifth Amendment. *See also* Brief *Amici Curiae* of Legal and Historical Scholars.

B. As in England, in America the writ provided an individualized inquiry into the factual and legal basis for a prisoner's detention. *See, e.g.*, A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 Am. Hist. Rev. 18, 22 (1902) (examination by habeas court to determine if imprisonment by governor was arbitrary). In its first habeas cases, the

Supreme Court affirmed the writ's historic function at common law: to determine whether there was an adequate factual and legal basis for the commitment. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the Court applied the habeas statute, but looked to the common law for the writ's content and meaning. *Id.* at 93-94. Chief Justice Marshall "fully examined and attentively considered" the "testimony on which [the prisoners] were committed," in the prisoners' presence, during proceedings that stretched over five days. *Id.* at 125. Marshall made clear that it was the Court's responsibility to undertake a plenary examination of the evidence, which, he noted, "the court below ought to have done." *Id.* at 114. The Court then discharged the prisoners because there was insufficient proof of the "actual assemblage of men for the purpose of executing a treasonable design" which the crime of levying war against the United States required. *Id.* at 125-36; *see also Ex parte Hamilton*, 3 U.S. (3 Dall.) 17, 17-18 (1795) (report of decision describing examination of affidavits submitted by prisoner and witnesses about propriety of prisoner's conduct and Court's order releasing him on bail).

The Supreme Court thus made clear that habeas jurisdiction implied the power to conduct a searching analysis of the factual and legal basis for detention. Moreover, the plenary nature of the habeas inquiry did not turn on whether a constitutional violation had been alleged but, rather, examined whether there was *any* lawful basis for the detention. *Bollman* 8 U.S. (4 Cranch) at 125; *see also, e.g., St. Cyr*, 533 U.S. at 301 n.14 ("At common law, . . . 'an attack on an executive order could raise *all issues* relating to the legality of the detention.'") (quoting *Developments in the Law*, *supra*, at 1238) (emphasis added); *Ex parte D'Olivera*, 7 F. Cas. 853, 854 (Cir. Ct. D. Mass. 1813) (Story, J., on circuit) (discharging Portuguese sailors arrested as alleged deserters); *United States v.*

Villato, 28 F. Cas. 377, 378-79 (Cir. Ct. D. Pa. 1797) (discharging non-citizen arrested for treason).

This understanding was by no means confined to the Supreme Court. The lower federal courts routinely exercised their habeas jurisdiction to conduct evidentiary hearings that examined the substantive legality of, and factual basis for, the detention. *See, e.g.*, *Matter of Peters*, M-1215 (D.W. Tenn. Dec. 31, 1827) (conducting detailed factual inquiry into petitioner's state of mind and determining petitioner "enlisted . . . when he was wholly incapable of transacting business or understanding it by reason of intoxication," thus invalidating legal basis for commitment), *cited in* Eric M. Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty 28 & 166 n.56 (2001); *United States v. Irvine*, M-1184, roll 1 (C.C.D. Ga. May 8, 1815) (discharging petitioner because, despite having been given opportunity, detaining officer had failed to provide proof to support statement in his affidavit that enlistment was based on the necessary parental consent), *cited in* Freedman, *supra*, at 165 n.55; *see also Wilson v. Izard*, 30 F. Cas. 131, 131 (Cir. Ct. D. N.Y. 1815) (reviewing petitioners' sworn testimony that they were "alien enemies," but rejecting their claim that this made them ineligible for military service).

As in England, alleged enemy aliens also obtained habeas review of the factual basis for their detention. In one case Chief Justice Marshall, on circuit, required an enemy alien to be produced in court and ordered his release because he found that the marshal had failed to designate a place where he could be removed, as the operating instructions required him to do. Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 40, 41-43 (2005)

(reporting decision in *United States v. Thomas Williams*, U.S. Cir. Ct. for Dist. of Va. 1813). Thus, habeas corpus would issue if a petitioner contested the Government's factual assertions by submitting an "affidavit . . . [stating] that he is not an alien enemy." *Lockington's Case*, Bright (N.P.) 269, 298-99 (Pa. 1813) (Brackenridge, J.).[7]

C. A habeas court's searching inquiry into the basis for a prisoner's detention also served the same vital function that it did at common law – to vindicate the prohibition on the use of evidence obtained by torture. The Framers of the Constitution abhorred torture, and viewed it as a mechanism of royal despotism. *See, e.g.*, 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 447 (1836) ("What has distinguished our ancestors? – That they would not admit of tortures, or cruel and barbarous punishment.") (Patrick Henry); *see also* 3 Joseph Story, Commentaries on the Constitution of the United States § 1782 (5th ed. 1891) ("[The Self-Incrimination Clause] is but an affirmance of a common law privilege. But it is of inestimable value [since it] is well known, that in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt."). As the Supreme Court has repeatedly held, the use of evidence obtained by torture is forbidden not merely because it is inherently unreliable but also because such "interrogation techniques [are] offensive to a civilized system of justice." *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *see also Rogers*

---

[7] It also bears mentioning that the definition of an enemy alien in the United States, Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577, has always been limited to citizens of a nation or foreign government against which the United States had declared war. As such, a habeas court's inquiry into the legality of an alleged enemy alien's detention required far less fact-finding than an inquiry under the broader and more elastic definition of an "enemy combatant" offered by the Government here, which sweeps in any person "part of *or supporting* Taliban or al Qaeda forces *or associated forces* that are engaged in hostilities against the United States." Joint Appendix 1207, ¶ a (emphasis added).

v. Richmond, 365 U.S. 534, 540-41 (1961) (conviction following admission of involuntary confession cannot stand, regardless of confession's purported reliability); *Rochin v. California*, 342 U.S. 165, 173 (1952) (coercive techniques "offend the community's sense of fair play and decency"). Without the availability of habeas corpus to provide a searching inquiry into the basis for a prisoner's detention, and to determine whether, in fact, evidence justifying the detention has been obtained by torture or other coercive methods, this fundamental common law protection would be significantly compromised.

D. In America, suspension of habeas corpus has required a clear and unequivocal legislative statement and has been carefully limited to the duration of an ongoing rebellion or insurrection where necessary to preserve the public safety. That habeas could be suspended only with Congress's express authorization and then only under the most extraordinary circumstances was recognized from the beginning of the Republic. Faced with a possible conspiracy to wage war against the United States, President Jefferson sought to detain two alleged traitors without common law process. But Jefferson understood that Congress first had to suspend the writ before he could deprive them of the protections of habeas corpus, which Congress refused to do. Francis Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 605, 623-24.

Indeed, Congress has exercised its power to suspend the habeas statute only four times in U.S. history. Duker, *supra*, at 149, 178 n.190. Moreover, each time, Congress specifically stated it was authorizing suspension and, each time, the suspension itself was limited to the duration of the reason for the suspension, was done amid an ongoing insurrection or invasion, and was based upon a determination that the public safety

required it. Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755 (authorizing President Lincoln during Civil War "*to suspend the privilege of the writ of habeas corpus* in any case throughout the United States, or any part thereof" for duration of "the present *rebellion*" and where "the public safety may require it") (emphasis added); Act. of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14-15 (authorizing President Grant amid armed rebellion in Reconstruction South "*to suspend the privileges of the writ of habeas corpus*" for "the continuance of such *rebellion*" and where "the public safety shall require it") (emphasis added); Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692 (authorizing President or Governor amid armed rebellion in Philippines to "*suspend*[ ]" the "*privilege of the writ of habeas corpus*" for duration of "*rebellion, insurrection, or invasion*" and where, "during such period the necessity for such suspension shall exist") (emphasis added); *Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946) (suspension of habeas corpus immediately after attack on Pearl Harbor, pursuant to express authorization in Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153 (1900)). In short, the narrow emergency power to suspend habeas corpus, and the common law process it provides, has always required an express statement of suspension by Congress and has been limited in time to the duration of active rebellion or invasion that necessitated the suspension. Congress, certainly, did not provide any such express and unequivocal statement of suspension in enacting the DTA.

III. If Applied To These Appeals And To Other Pending Habeas Cases, The DTA Would Not Provide An Adequate Substitute For The Common Law Writ of Habeas Corpus.

The Government has suggested that the new mechanism created under section 1005(e)(2) of the DTA provides for judicial review in this Court of the Petitioners' federal statutory and constitutional claims. But "judicial review" has historically meant

something different from common law habeas review. *Cf. St. Cyr*, 533 U.S. at 311. As shown above, the latter has long included the power not only to review a particular case but also to probe the factual and legal basis on which a prisoner's detention rests, and to ensure that no person be deprived of his liberty based on evidence secured by torture. *Amici* believe that the DTA's repeal of section 2241(c)(1), if applied to pending cases, would eliminate the core substantive protections of common law habeas without providing an adequate substitute.

First, the DTA, if construed to eliminate habeas in pending cases, would deprive petitioners of any searching inquiry into the factual basis for their detention. As Judge Green found, the Petitioners were being detained based upon a Combatant Status Review Tribunal ("CSRT") that denied them the necessary predicates for this inquiry: notice of the government's allegations and a fair opportunity to rebut them. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468-74 (D.D.C. 2005); *cf. Crawford*, 541 U.S. at 49 ("It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."). Yet, the Government (Supp. Br. at 50-53) indicates that the "exclusive review" provision of Section 1005(e)(2) of the DTA does not provide petitioners with any opportunity for fact-finding. If, therefore, the DTA is construed to apply to pending cases, Petitioners would be subject to exactly what the common law writ of habeas corpus protected against: indefinite detention without any meaningful examination into the factual and legal basis for the government's accusations.[8]

---

[8] The Government's reliance (Supp. Br. at 53-54) on the Real ID Act of 2005 is misplaced. The Real ID Act does not eliminate the searching inquiry into the factual and legal basis for detention guaranteed by habeas corpus because that inquiry has already

Second, the DTA would effectively sanction detention based upon evidence secured by torture. The past CSRTs, it appears, did not prohibit use of such evidence, requiring only that information be "relevant and helpful to resolution of the issue before it." Joint Appendix ("J.A.") 1209, ¶ 9. Indeed, the Government previously represented that these CSRTs may rely on information obtained by torture if deemed "reliable." J.A. 0947 (Oral Argument Transcript, Dec. 2, 2004, *Khalid v. Bush*, 04-CV-1142 (RJL); *Boumediene v. Bush*, 04-CV-1166 (RJL), at 84:7-84:22). Further, as Judge Green found, the CSRTs at issue here do not allow for a determination by a reviewing court of whether they actually relied on such evidence. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 473-74. In short, if construed to apply to these appeals and other pending cases, the DTA would eliminate the very habeas process that would have supplied what these CSRTs did not: a probing factual examination to determine whether a petitioner's detention was unlawful, including whether it was based on evidence gained through torture.[9]

---

been supplied in an underlying administrative hearing which bears the hallmarks of common law process, including fair notice of the government's allegations and a meaningful opportunity to rebut them. *United States v. Jauregui*, 314 F.3d 961, 962-63 (8th Cir. 2003); *Hadjimehdigholi v. INS*, 49 F.3d 642, 649 (10th Cir. 1995).

[9] Section 1005(a) of the DTA provides that "[n]ot later than 180 days after the date of the enactment of this Act," the Secretary of Defense is to submit to Congress new procedures for the conduct of future CSRTs in accordance with the Act. The validity of the new CSRT procedures is not before this Court, and *amici* express no view as to whether more circumscribed court review might be appropriate in determining the lawfulness of detention decisions made under those procedures.

CONCLUSION

Habeas corpus has for centuries provided a searching inquiry into the factual and legal basis for a prisoner's confinement in territory over which there is sufficient power and control to enforce the writ. The DTA, if construed to apply to pending cases, would effect a substantive change in the law by eliminating this core common law inquiry, without providing an adequate substitute.

Respectfully Submitted,

Jonathan Hafetz
(Counsel of Record)
(D.C. Bar No. 49761)
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6289

Dated: March 10, 2006

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief *amicus curiae* of British and American Habeas Scholars is in 12-point, proportionally spaced Times-New Roman type, and is 6,990 words in length (which does not exceed the applicable 7,000 word limit).

Jonathan Hafetz
(D.C. Bar No. 49761)

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2006, two copies of the foregoing brief *amicus curiae* of British and American Habeas Scholars, were sent via Federal Express or hand-delivery and via e-mail transmission to the following:

Robert M. Loeb
Douglas N. Letter
U.S. Department of Justice
Civil Division, Appellate
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
Robert.Loeb@usdoj.gov

Thomas B. Wilner
Neil H. Koslowe
Shearman & Sterling
801 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004-2634
twilner@shearman.com
neil.koslowe@shearman.com

Stephen H. Oleskey
Robert C. Kirsch
Melissa A. Hoffer
Mark Fleming
Wilmer Cutler Pickering Hale & Dorr
60 State Street
Boston, MA 02109
Melissa.Hoffer@wilmerhale.com
Mark.Fleming@wilmerhale.com

Douglas F. Curtis
Wilmer Cutler Pickering Hale & Dorr LLP
339 Park Avenue
New York, NY 10022
Douglas.Curtis@wilmerhale.com

Jonathan Hafetz
(D.C. Bar No. 49761)