No. 03-1027

IN THE
Supreme Court of the United States

DONALD RUMSFELD, Secretary of Defense,

Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
as next friend of JOSE PADILLA,

Respondent.

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

BRIEF *AMICI CURIAE* OF LAW PROFESSORS WITH A PARTICULAR INTEREST IN HABEAS CORPUS LAW LISTED HEREIN IN SUPPORT OF THE RESPONDENT

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RULES

STATEMENT OF INTEREST[1]

This case raises the question whether the President can seize a U.S. citizen in the United States and detain him indefinitely by declaring him an "enemy combatant." *Amici curiae* are professors who teach criminal law or criminal procedure at law schools in the United States and who have a particular interest in habeas corpus law. The group of *amici* includes authors of leading texts and articles on habeas corpus. *Amici* do not contend that Founding-era history should be dispositive in the interpretation of the Constitution's Suspension Clause. The professional interest of *amici curiae* is in ensuring that this Court is completely and accurately informed about the precedents, understanding, and evidence regarding the writ of habeas corpus that, under this Court's precedents, are appropriately considered in examining the issues raised under the Suspension Clause and statutory codification of the writ. In their writing and teaching, *amici curiae* have frequently described the writ's historic role in safeguarding prisoners' constitutional rights and its importance as a post-conviction remedy. *Amici curiae* submit the within brief because this case implicates a function of the writ so basic that, at least until now, it has long been taken for granted: to prevent indefinite detention without trial.

SUMMARY OF ARGUMENT

In May, 2002, Jose Padilla, a U.S. citizen, was arrested at a Chicago airport pursuant to a material witness warrant; the following month, he was designated an "enemy combatant" by the President and transported to a naval brig in Charleston, South Carolina, where he remains confined today. In his brief to this Court, the Solicitor General maintains that the President, as Commander-in-Chief in time of war, has the authority to seize an individual, including a U.S. citizen, anywhere in the United

1. Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, or their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

States, designate him an "enemy combatant," and confine him indefinitely as a "simple war measure,"[2] without trial or any other meaningful opportunity to challenge the allegations against him. The Solicitor General further maintains that such sweeping executive detention power requires no specific authorization from Congress[3] and permits no "second-guess[ing]" by the Judiciary.[4]

These assertions represent a marked departure from centuries-old principles of individual liberty and the separation of powers embodied in the writ of habeas corpus and the Suspension Clause of the U.S. Constitution. In the United States, habeas corpus has provided an effective remedy for those whom "the government, through restraints, has separated from their rights under the fundamental Law of the Land."[5] Historically, courts enforced the writ's protections by guaranteeing prisoners the right to contest the allegations against them at trial and preventing confinement by executive fiat, even of suspected enemies of state.

The writ's protections applied even in time of war, and could not be trumped by executive assertions of a "war power." Indeed, the safeguards of habeas corpus were forged amid foreign invasions and internal strife in response to claims of an executive prerogative to dispense with common law process. The Anglo-American tradition permitted only two narrow exceptions: suspension of the writ by the legislative body or the imposition of martial law where the civil order had broken down and the courts rendered incapable of dispensing justice. Neither applies here. Instead, the Solicitor General concedes the writ is "available," but seeks to deprive it of all its historic force and meaning.

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2. Br. for the Pet'r at 29 (internal quotations and citation omitted).

3. *Id*. at 42.

4. Br. of Resp't-Appellant to the U.S. Court of Appeals for the Second Circuit at 47 (internal quotation marks and citation omitted).

5. Randy Hertz & James S. Liebman, 1 *Federal Habeas Corpus Practice and Procedure* § 2.3, at 23 (4th ed. 2001).

1. In England, habeas corpus provided an effective remedy against unlawful detention by guaranteeing the basic protections of due process which date to the Magna Carta. By the time of the celebrated Habeas Corpus Act of 1679, the writ provided that those arrested in England for suspected wrongdoing, even if designated a threat to national security by the king himself, could not be imprisoned indefinitely but had to be charged and tried at common law. Unless Parliament suspended the writ, the protections of habeas corpus remained in place. At the same time, Parliament placed the military under its firm control and curtailed its jurisdiction, thus ensuring that the protections of due process, secured by habeas corpus, would not be swallowed up by broad assertions of military power by the executive.

2. The Framers, steeped in the writings of preeminent common law jurists like Coke and Blackstone, understood the writ's central role in safeguarding individual liberty. They foresaw the potential need for emergency detention, but, keenly aware of its dangers, restricted it to the narrow circumstances set forth in the Suspension Clause and gave Congress the exclusive authority to suspend the writ. The protections of habeas corpus were never subordinated to a president's claim of military power. Faced with real threats to their new republic's survival, including the War of 1812, the only foreign war ever fought principally on U.S. soil, the Founding generation never sacrificed the writ's core protections or abandoned the rule of law.

ARGUMENT

I. Indefinite Executive Detention Contravenes Long Established Principles Of Habeas Corpus Law And The English Legal Tradition

A. Habeas Corpus Prevented Indefinite Detention Absent Suspension of the Writ by Parliament.

As this Court has repeatedly recognized, habeas corpus historically provided a remedy against unlawful executive detention, and "it is in this context that its protections have been

strongest."[6] Since the late 1500s, the writ has been used by prisoners of state seeking discharge from executive confinement.[7] The king's assertion of a prerogative to detain in circumvention of due process was first squarely challenged in *Darnel's Case*,[8] a landmark decision[9] that led to the establishment of habeas corpus as the foremost protection against indefinite executive detention. In the throes of a war against France and Spain, King Charles I had detained numerous individuals for refusing to contribute to his attempt to raise revenue for the military campaign. No charges were filed, and the individuals sought writs of habeas corpus claiming their imprisonment was unlawful and demanding release on bail. Without more specific charges, they argued, "imprisonment shall not continue for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually"[10] in

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6. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *see also Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."); *cf.* Daniel J. Meador, *Habeas Corpus and Magna Carta: Dualism of Power and Liberty* 38 (1966) ("Detention by executive authority . . . poses the oldest and perhaps greatest threat to liberty under law.").

7. *Howel's Case*, 74 Eng. Rep. 66 (C.P. 1587) (discharging prisoner for insufficient cause stated in return); *Peter's Case*, 74 Eng. Rep. 628 (C.P. 1586) (same); R.J. Sharpe, *The Law of Habeas Corpus* 7 (1976) (by late 1500s, habeas corpus "shown to be a remedy fit to challenge the authority of the crown"); *see generally* J.H. Baker, 6 *The Oxford History of the Laws of England* 94 (2003) (writ provided "an effective means of curbing arbitrary power" by crown officials).

8. 3 How. St. Tr. 1 (K.B. 1627).

9. *Id.* at 31 (Doderidge, J.) (case was "the greatest cause that I ever knew in this court"); Meador, *supra*, at 13 (case directly raised issue of executive's prerogative to deprive an individual of his liberty and thus "posed one of the great constitutional issues of all time").

10. *Darnel's Case*, 3 How. St. Tr. at 8.

violation of the Magna Carta.[11] The Attorney General responded that it was the king's prerogative to imprison by his "special command" for "a matter of state . . . not ripe nor timely" for the ordinary common law process of formal accusation and trial.[12] He emphasized the crown's overriding interest in protecting "a conspiracy-threatened commonwealth"[13] and insisted that judges defer to the king's judgment.[14]

When the court denied relief, Parliament responded with the Petition of Right, prohibiting imprisonment upon royal command and without formal charges.[15] The Petition made clear that responsible government could not coexist with sweeping executive claims to emergency powers of detention and arrest.[16] The king, however, continued to detain individuals without specifying any charge for which they could be tried, thus preventing them from testing the allegations against them.[17] Parliament, in turn, enacted the Habeas Corpus Act of 1641,[18] which required courts to issue writs of habeas corpus on behalf of prisoners "without delay."[19] The act commanded custodians to provide a legal basis for a prisoner's detention and instructed

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11. Magna Carta art. 39 (1215) ("No freeman shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the land.").

12. *Darnel's Case*, 3 How. St. Tr. at 37 (arguments of Attorney General Robert Heath).

13. Robert S. Walker, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* 67 (1960).

14. *Darnel's Case*, 3 How. St. Tr. at 45.

15. 3 Car. 1, c. 1, §§ 5, 10 (1628).

16. William F. Duker, *A Constitutional History of Habeas Corpus* 141 (1980).

17. *Six Members' Case*, 3 How. St. Tr. 235, 240 (K.B. 1629) (imprisoning "for notable contempts . . . against our self and our government, and for stirring up sedition against us"); Duker, *supra*, at 45 (*Six Members' Case* shows "how easily the King could follow the letter of the Petition while debasing its spirit entirely").

18. 16 Car. 1, c. 10 (1641).

19. *Id.* § 6.

judges to act promptly by discharging, bailing, or remanding the prisoner for trial.[20] The act also abolished the infamous Court of the Star Chamber, which had previously been a source of "arbitrary power and government."[21]

The most crucial blow against indefinite executive detention came with the Habeas Corpus Act of 1679,[22] which made the writ "the most effective weapon yet devised for the protection of the liberty of the subject."[23] The act remedied various procedural flaws in the common law writ to ensure a prompt judicial inquiry into the legality of confinement and prevented detainees from languishing in prison without common law process.[24] Even for those detained on the most serious allegations, charges had to be "plainly and specially" stated in the warrant of commitment,[25] and the prisoner released if not tried within a short period of time.[26] Blackstone praised the 1679 Act as a "second magna carta and stable bulwark of our liberties"[27] precisely because it categorically precluded evasion of the most elementary principle of due process in the common law tradition — continued confinement without opportunity to

20. *Id.*; Dallin H. Oaks, "Legal History in the High Court—Habeas Corpus," 64 *Mich. L. Rev*. 451, 460 (1966) (1641 act firmly established habeas corpus as "effective remedy for executive detention not based on common-law process").

21. 16 Car. 1, c. 10, §§ 2-3.

22. 31 Car. 2, c. 2 (1679).

23. 9 William S. Holdsworth, *A History of English Law* 118 (1926).

24. *E.g.*, 31 Car. 2, c. 2, § 3 (providing for issuance of writ during "the [v]acation," when common law courts were not in session); *id.* §§ 11-12 (prohibiting jailors from moving prisoners to avoid writ); *id.* §§ 2, 5 (penalizing jailors for not promptly producing prisoner and basis for detention in court); *see generally* Sharpe, *supra*, at 18-19.

25. 31 Car. 2, c. 2., §§ 2, 7

26. *Id.* § 7 (prisoner committed on charge of high treason or felony must be indicted within one term or session after commitment or bailed, and tried within two terms or sessions or discharged); *see also* Sharpe, *supra*, at 133 ("From the seventeenth century to the present, judges have considered this section to the very hub of the design of the [1679 act].").

27. 1 William Blackstone, *Commentaries* *137.

contest the state's allegations.[28] Indefinite detention was effectively abolished, even for supposed enemies of state.[29] As Edward Coke made clear, prolonged detention without "full and speedy justice" was contrary to the basic laws and customs of England.[30] Thus, even a body of foreign anarchists, suspected of a plot to blow up the Houses of Parliament, would be entitled to release on habeas unless promptly charged and tried.[31]

After the passage of the 1679 act, temporary suspension of the writ by Parliament became the only lawful means to indefinitely detain an individual in England suspected of wrongdoing.[32] Parliament passed the first suspension acts amid armed conflict abroad and fears of exiled King James II's attempts to regain the throne after the Glorious Revolution of 1688.[33] Other suspension acts followed during the next century to preserve the safety of the realm in time of danger and war by authorizing the detention of suspected enemies of state without common law process.[34] These acts increased the period of time

28. *E.g.*, Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus* 266 (2d ed. 1876) ("It was the hateful oppressiveness of long and close confinement, and not the dread of a trial by his peers, which made the suffering prisoner of state exclaim: 'The writ of habeas corpus is the water of life to revive from the death of imprisonment.'") (emphases omitted).

29. *E.g.*, *Crosby's Case*, 88 Eng. Rep. 1167, 1168 (K.B. 1694) (Holt, C.J.) ("The design of the [1679] Act was to prevent a man's lying [indefinitely] under an accusation for treason.").

30. Edward Coke, *The Second Part of the Institutes of the Laws of England* 43 (1817 ed.).

31. Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* 222-23 (1908).

32. *E.g.*, 1 William Blackstone, *Commentaries* *136.

33. 7 & 8 Will. 3, c. 11 (1698) (suspension to "secur[e] the Peace of the Kingdom in this Time of imminent Danger, against all Attempts and traitorous Conspiracies of evil disposed Persons"); 1 Will. & Mary, c. 7 (1688).

34. *E.g.*, 38 Geo. 3, c. 36 (1798) (suspension to protect king and "secur[e] the Peace and Laws and Liberties of this Kingdom," where

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such individuals could be confined, in effect suspending not habeas corpus itself but rather the principal right secured by the writ — to test the allegations at trial or be released.[35] Suspension acts all contained an express expiration date,[36] usually a year or less from the act's passage.[37] Those not specifically within a suspension act continued to enjoy the benefits of due process secured by the writ and the 1679 statute.[38] And, even when Parliament had suspended the writ, a detainee could still apply for habeas corpus to determine whether he had been committed on a sufficient warrant.[39] If so, the petition would be denied and the prisoner remanded to custody since the judicial process ordinarily secured by the writ had been suspended for such persons.[40] Thus, suspension gave "[e]xtreme powers . . . to the executive, but powers nonetheless distinctly limited by law."[41]

In short, the writ's history in England demonstrates the increasingly well established relationship between habeas corpus

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"his Majesty's Enemies are making Preparations with considerable and increasing Activity for the Invasion of his Majesty's Dominions"); 19 Geo. 2, c. 1 (1746) (suspension to secure peace and security of kingdom from threatened rebellion in Scotland, aided by enemies abroad); 17 Geo. 2, c. 6 (1744) (suspension to protect against danger of foreign invasion by those acting "in concert with disaffected persons in England"); *see generally* William Forsyth, *Cases and Opinions on Constitutional Law* 452 (1869) (citing suspension acts).

35. Sharpe, *supra* at 92; Duker, *supra*, at 142.

36. Sharpe, *supra*, at 92 n.1.

37. *Id*. at 92; Dicey, *supra*, at 226; *see also* 38 Geo. 3, c. 36, § 1 (1798) (nine-month suspension).

38. Sharpe, *supra*, at 92.

39. Duker, *supra*, at 142 & n.120; *see also R. v. Earl of Orrery*, 88 Eng. Rep. 75, 77 (K.B. 1722) (acknowledgment by king's counsel that courts may still inquire whether prisoner falls within suspension act).

40. *R. v. Despard*, 101 Eng. Rep. 1226, 1227 (K.B. 1798) (denying government's motion to quash writ based on assertion that detention fell within suspension act); Duker, *supra*, at 142.

41. Sharpe, *supra*, at 92.

and the executive's emergency detention power. Absent suspension of the writ by Parliament, the core principles of the English common law remained in force, even for those believed by the king to pose a danger to the State.

B. The Supremacy of the Civilian Authority over the Military Ensured the Protections of Habeas Corpus

In England, the safeguards of habeas corpus could not be subordinated to military power based on executive fiat. Even during war, as long as the courts were open and capable of dispensing justice, suspension of the writ by Parliament remained the only lawful way to confine someone in England suspected of wrongdoing without the established protections of due process.

With the Petition of Right of 1628, Parliament subjected the military to its control and curtailed its jurisdiction. The Petition denounced Charles I's expansive use of military commissions during periods of strife, which had led to the execution of both soldiers and civilians for crimes under a system of justice unknown to the common law.[42] It declared these commissions unlawful,[43] and asserted that the king must instead proceed against alleged offenses and threats to the realm "by the laws and statutes of the land."[44] Like the king's detention of prisoners without charges in *Darnel's Case*,[45] his use of military commissions in England violated the Magna Carta's guarantee that no one would be punished or otherwise deprived of his liberty without due process. In 1689, the Bill of Rights[46]

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42. Charles M. Clode, *The Administration of Justice under Military and Martial Law* 21 (1872) (such use of martial law "was a direct violation of the fundamental Laws of the Land"); *see also* Charles Fairman, *The Law of Martial Rule* 9 (1930) (king's use of martial law "precipitated a constitutional crisis").

43. 3 Car. 1, c.1, §§ 7-10 (1628).

44. *Id.* § 8.

45. 3 How. St. Tr. 1 (1627).

46. 1 Will. & Mary, c. 2 (1689) (prohibiting king, without consent of Parliament, from keeping standing army within kingdom in time of peace and from "suspending the laws or the execution of laws by regal authority").

and Mutiny Act[47] both further limited royal power and enshrined these principles in English law.

In the eyes of England's leading jurists, military law (or martial law, as it was sometimes also known) was something "built upon no settled principles," "entirely arbitrary in its decisions," and "in truth and reality no law" at all.[48] In England, military jurisdiction was restricted to offenses by soldiers[49] and justified as a means to maintain discipline within the ranks.[50] The use of military law in England was otherwise forbidden in time of peace, and, even in time of war, except when the common law courts were closed and one could not receive justice "according to the Laws of the Land."[51] Those who owed a duty

47. 1 Will. & Mary, c. 5, preamble (1689) ("[N]o Man may be forejudged of Life or Limb or subjected to any kind of punishment by Martial Law, or in any other Manner than by the Judgment of his Peers and according to the known and Established Laws of this Realm."), *reprinted in* William Winthrop, *Military Law and Precedents* 929 (2d ed. 1920); *see also* Robert D. Duke & Howard S. Vogel, "The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction," 13 *Vanderbilt L. Rev.* 435, 444 (1960) (Mutiny Act provided "ringing declaration of the supremacy of civil procedures over military law").

48. 1 William Blackstone, *Commentaries* *413; *see also* Matthew Hale, *The History of the Common Law of England* 26 (1755) (Charles M. Gray ed. 1971) (martial law "something indulged rather than allowed as a Law").

49. *E.g.*, Mutiny Act, 1 Will. & Mary, c. 5, preamble (1689) (providing for court-martial of soldiers who commit mutiny, sedition, or desertion); *see also* Duke & Vogel, *supra*, at 445 ("[T]he British articles of war in effect at the outbreak of the American Revolution reflect the plain purpose to confine the scope of courts-martial jurisdiction to the trial and punishment of military offenses, and in other respects to give precedence to the civil authorities.").

50. *E.g.*, 1 William Blackstone, *Commentaries* *413 (military law for "due regulation and discipline of the soldiery").

51. Hale, *supra*, at 27; *see also* 1 William Blackstone, *Commentaries* *414; 1 William S. Holdsworth, *A History of English Law* 339 (1903) ("It was . . . clearly settled that it was not a time of war

(Cont'd)

of allegiance and were suspected of acts endangering the king or safety of the realm were traditionally prosecuted for treason,[52] an offense that had encompassed the commission of war-like acts by enemies of state since the fourteenth century.[53]

With these principles firmly established, the king was stripped of the authority to suspend the established laws of the realm at will, and the guarantee of due process, secured by habeas corpus, became firmly established as the cornerstone of the Anglo-American legal tradition.

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unless the king's courts were shut up, or unless the sheriff could not execute the king's writ."); Fairman, *supra* at 17 ("'When the Courts are open, Martial-Law cannot be Executed.'") (quoting Edward Coke) (citation omitted); *cf*. *Wolfe Tone's Case*, 27 How. St. Tr. 614, 625-26 (Irish K.B. 1798) (issuing writ and suspending execution of death sentence over military's objection when father, as "next friend," claimed Tone was never member of armed forces and thus not subject to court-martial); Dicey, *supra*, at 289 (Tone's case demonstrates judges' resolve to "maintain[] the rule of regular law, even at periods of revolutionary violence").

52. *E.g.*, *Downie's Case*, 24 How. St. Tr. 1 (1794) (treason conviction for procuring weapons and for conspiring to seize castle of Edinburgh and attack king's forces); *Layer's Case*, 16 How. St. Tr. 93 (K.B. 1722) (treason conviction for plotting to take up arms against king); *Vaughan's Case*, 13 How. St. Tr. 485 (K.B. 1696) (treason conviction for cruising on French ship with intent to take English ships); *Parkyns' Case*, 13 How. St. Tr. 63 (K.B. 1696) (treason conviction for caching arms and obtaining horses for attempt to assassinate King William and wage war to restore exiled King James II to power); *Harding's Case*, 86 Eng. Rep. 461 (K.B. 1690) (treason conviction for hiring men to assist French in waging war against king and queen).

53. Statute of Treasons, 25 Edw. 3, c. 2 (1350) (treason to "levy war against . . . the King in his realm, or be adherent to the enemies [of the King] in the realm, giving to them aid and support in his realm or elsewhere"), *quoted in* Willard Hurst, "Treason in the United States," 58 *Harv. L. Rev.* 226, 226 n.1 (1944).

C. Habeas Corpus Ensured Meaningful Review for Individuals in Military Custody

For those detained by the executive in England on suspicion of wrongdoing, habeas corpus ensured the right to test the state's allegations at trial.[54] For those confined in "noncriminal" matters, and thus outside the safeguards of the 1679 act,[55] the habeas proceeding itself provided the only "effectual remedy" against unlawful restraint.[56] In such instances, judicial review was broader,[57] and individuals could contest the factual basis for their confinement at common law,[58] a right secured by statute in 1816.[59]

Military detention was no exception. In those circumstances where the military could properly exercise authority, the writ remained available when it exceeded those limits and thus afforded a remedy to "any one placed under Military arrest which

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54. *E.g.*, Hurd, *supra*, at 266.

55. 31 Car. 2, c. 2, § 2 (act applied only to those detained for "criminal or supposed criminal matters").

56. Hurd, *supra*, at 271; *see also* 6 *Encyclopedia of the Laws of England* 132 (A. Wood Renton ed. 1898) (those not included within 1679 act still protected by common law writ).

57. *Cf. Bushell's Case*, 124 Eng. Rep. 1006, 1010 (C.P. 1670) (Vaughan, C.J.) (return to habeas corpus insufficient because it lacked "full" and "manifest" evidence necessary to sustain commitment for contempt, as prisoners would never have opportunity to contest allegations at trial, in contrast to commitment for felony).

58. *E.g., R. v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761) (commitment for insanity); *R. v. Lee*, 83 Eng. Rep. 482 (K.B. 1676) (imprisonment of wife by husband); Oaks, "Legal History in the High Court," *supra*, at 454 n.20 (instances in which individuals could contradict facts in return too numerous to specify); *see also* Jonathan L. Hafetz, Note, "The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts," 107 *Yale L.J.* 2509, 2535 (1998) (common law judges' responses to questions of House of Lords on proposed 1758 bill to provide for review of facts in cases outside 1679 act show nearly all those judges either rejected they were bound by facts in return or believed such facts could be contested as practical matter).

59. 56 Geo. 3, c. 100. §§ 3-4 (1816).

he deems to be unlawful,"[60] even during wartime. The crown's assertion that an individual's detention was a military matter did not itself provide a sufficient justification.

First, even those seized and detained by the military as alleged prisoners of war could seek review on habeas of the jurisdictional facts underlying their "enemy" status.[61] Although courts would not discharge those ultimately found to be prisoners of war, they still could examine whether such persons were "improperly detained," either as a matter of fact or law, and grant relief accordingly.[62]

British soldiers confined without process likewise sought review on habeas. In *Wade's Case*,[63] the court considered a habeas petition filed on behalf of a sergeant claiming his continued detention for alleged desertion violated a provision of the articles of war requiring trial by court-martial "within eight days, or as soon after as a court martial can be held."[64] Lord Mansfield commanded the military to show cause for Wade's detention, and the prisoner was subsequently tried for

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60. Clode, *supra*, at 98; *see also* Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harv. L. Rev.* 441, 475 (1963) ("the classical function of habeas corpus was to assure the liberty of subjects against detention by the executive or *the military* without any court process at all") (emphasis added).

61. *Three Spanish Sailors' Case*, 96 Eng. Rep. 775, 776 (C.P. 1779) (prisoners not entitled to discharge because, based "upon their own showing," they are prisoners of war); *R. v. Schiever*, 97 Eng. Rep. 551, 552 (K.B. 1759) (denying relief on merits after reviewing petition to confirm petitioner's prisoner of war status).

62. Sharpe, *supra*, at 113; *see generally* William S. Church, *A Treatise on the Writ of Habeas Corpus* § 222, at 311 (2d ed. 1893) ("The question of jurisdiction . . . is always open and may be inquired into upon proceedings by habeas corpus.").

63. This case, decided by the King's Bench on January 28, 1784, is reported in *Blake's Case*, 105 Eng. Rep. 440, 441 n.(a)[1] (K.B. 1814).

64. *Id.*

his alleged offense.[65] Construing the same provision again in *Blake's Case*,[66] the court refused to dismiss the habeas petition based on the military's mere assertion that a court-martial could not conveniently be assembled because relevant witnesses were unavailable and because Blake's regiment was still engaged in foreign service.[67] The court ultimately denied relief, but only after affording Blake an opportunity to contest the military's claims[68] and determining that the delay was "satisfactorily explained."[69]

Habeas also provided a remedy for the unlawful impressment — or forcible seizure for naval service — of sailors during war, a practice that closely concerned assertions of executive prerogative.[70] In *Goldswain's Case*,[71] for example, the court entertained a habeas petition brought on behalf of an impressed sailor. Despite the official's assertion "of urgent necessity" in time of war, the judges refused to "shut their eyes" to the facts asserted by the applicant, which suggested that the admiralty lacked lawful authority over the impressed sailor,[72] and ordered his release.[73] Similarly, in *R. v. White*,[74] the court granted relief to an impressed seaman who had "no other

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65. *Id*. Although the reported version of the case does not describe the proceedings on the return, it suggests the writ's role in ensuring military officials remained within prescribed bounds when applying military law. *Id*.

66. 105 Eng. Rep. 440 (K.B. 1814).

67. *Id*. at 441.

68. *Id*. at 442 (Ellenborough, C.J.) (prisoner failed to show "something . . . to the contrary" of what military had asserted as basis for his continued detention without trial).

69. *Id*. at 441.

70. Dicey, *supra*, at 219.

71. 96 Eng. Rep. 711 (C.P. 1778).

72. *Id*. at 712.

73. *Id*. at 713 (impressed sailor initially released on own recognizance and subsequently discharged with consent of board of admiralty).

74. 20 How. St. Tr. 1376 (K.B. 1746).

remedy" after reviewing the factual assertions on both sides and finding the military lacked authority over him.[75]

In sum, habeas corpus traditionally ensured that individuals in England could not be confined on mere executive say-so. The crown's assertions of military power did not abridge this principle, and the writ provided an important remedy to those unlawfully in military custody even during wartime.

II. The Founding Generation Ensured The Writ's Protections Against Indefinite Detention Through The Suspension Clause And The Supremacy Of Civilian Rule

A. In Colonial America and under the United States Constitution, Habeas Corpus Provided the Ultimate Safeguard against Indefinite Detention.

The writ's history in colonial America and during the Founding era demonstrates that habeas corpus was understood as providing the same elementary check against unlawful executive detention as it had in England. Since the early colonial period, the writ has held a uniquely elevated place in American law.[76] Deeply influenced by the writings of eminent English jurists like Coke and Blackstone, the colonists viewed habeas corpus as the preeminent safeguard of due process, the

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75. *Id*. at 1377; *see generally* Hurd, *supra*, at 268 (in such cases where habeas proceeding was "first judicial hearing . . . upon the questions involved," there was "if not a clear necessity . . . at least a peculiar fitness in admitting evidence of all the facts important to be known to enable the court to determine whether the imprisonment was illegal").

76. *E.g.*, Francis Paschal, "The Constitution and Habeas Corpus," 1970 *Duke L.J.* 605, 608 ("abundant evidence of an early and persisting attachment" to habeas corpus in colonial America); 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) ("Habeas corpus was the only common-law process explicitly written into the Constitution, which is the most complete measure of its reception by the colonists and the high regard in which it was held.").

fundamental guarantee of English law derived from the Magna Carta.[77] The common law writ operated in all thirteen British colonies that rebelled in 1776,[78] and in practice judges often employed the remedial protections of the 1679 Habeas Corpus Act "as a matter of course."[79]

At the same time, however, the failure to extend the 1679 act uniformly throughout the colonies led to abuses by royal officials, especially where their authority was directly challenged.[80] As Alexander Hamilton made clear, it was precisely the act's protection against the supreme example of arbitrary government — imprisonment without formal accusation and trial[81] — that had made the writ "'the bulwark

77. Meador, *supra*, at 24; *see also* Larry W. Yackle, *Postconviction Remedies* § 4, at 7 (1981) (writ became "inextricably bound up with the Great Charter").

78. Duker, *supra*, at 115; A.H. Carpenter, "Habeas Corpus in the Colonies," 8 *Am. Hist. Rev.* 18, 21, 26 (1902).

79. Zechariah Chafee, Jr., "The Most Important Right in the Constitution," 32 *B.U.L. Rev.* 143, 146 (1952).

80. *E.g.*, Alan Clarke, "Habeas Corpus: The Historical Debate," 14 *N.Y.L. Sch. J. Hum. Rts.* 375, 393 (1998) (absent protections of 1679 act, colonists remained subject to "arbitrary detention" by royal governors and other executive officials); Duker, *supra*, at 101-03 (abuses by crown officials in Massachusetts). The colonists addressed these deficiencies after declaring independence from England. *E.g.*, Mass. Const. pt. 2, c. 6, art. VII (1780) ("The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner; and shall be not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months."); Duker, *supra*, at 111 (New York's enactment in 1789 of habeas corpus statute modeled on 1679 act ensured effective protections lacking under common law writ).

81. *The Federalist* 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("'To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.'") (quoting 1 William Blackstone, *Commentaries* *136).

of the British Constitution.'"[82] The king's abuse of his detention power was one of the grievances listed in the Declaration of Independence,[83] and reinforced the Founding generation's determination to ensure that the writ provide a secure guarantee of due process and the rule of law in their own new republic.[84] Indeed, the grant of habeas jurisdiction in the First Judiciary Act of 1789[85] pre-dated the Bill of Rights, and the answer made to the claim that the Constitution lacked a bill of rights was that the clauses guaranteeing habeas corpus and jury trial served that essential purpose because of their ever-present power to protect all other rights.[86]

Thus, the only debate over the habeas corpus clause at the Federal Convention of 1787 centered on whether there should be any authority to suspend the writ at all and, if so, how narrow that suspension power should be.[87] The proposals reflected the Framers' concerns about the writ's frequent suspension in

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82. *Id.* (quoting 4 William Blackstone, *Commentaries* *438).

83. *The Declaration of Independence* para. 20 (1776) (frequent deprivation of benefits of trial by jury).

84. Akhil Reed Amar, "Sixth Amendment First Principles," 84 *Geo. L.J.* 641, 663 (1996) ("[The 1679 act] stood alongside Magna Charta and the English Bill of Rights of 1689 as a towering common law lighthouse of liberty — a beacon by which framing lawyers in America consciously steered their course.").

85. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (granting federal courts power to issue writs on behalf of prisoners "in custody, under or by colour of the authority of the United States"). The present version of the habeas corpus provision of the 1789 act is codified at 28 U.S.C. § 2241(a).

86. *E.g.*, *The Federalist* 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

87. Paschal, *supra*, at 608 ("[I]n the Philadelphia Convention and in the struggle for ratification, there was never the slightest objection to according a special preeminence to the Great Writ."); *see also* Gerald L. Neuman, "Habeas Corpus and the Suspension Clause after INS v. St. Cyr," 33 *Colum. Hum. Rights L. Rev.* 555, 566 (2002) ("The records make clear that restricting Congress's power to suspend was not controversial. . . .").

England, where there was no express limitation on Parliament's power to suspend habeas corpus.[88] An early proposal stated that the writ shall not be suspended except "on the most urgent occasions, and then only for a limited time not exceeding twelve months."[89] This language was ultimately rejected in favor of the stricter restriction contained in the Suspension Clause, which forbids suspension outside of two circumstances — "Rebellion or Invasion" — both of which necessarily involve armed conflict and armed enemies within the United States.[90] Adopted with little debate,[91] the Suspension Clause represents the sole express

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88. Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 214 (5th ed. 1891) ("[I]t has frequently happened in foreign countries, and even in England, that the writ has upon various pretexts and occasions been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design . . . ."); *see also* Leonard W. Levy, *Origins of the Bill of Rights* 66 (1999) (noting Thomas Jefferson's warning that suspension power had been abused in England and invoked for both "real and sham" plots).

89. 2 *The Records of the Federal Convention of 1787*, at 438 (Max Farrand ed. 1966) (proposal of Charles Pinckney); *see also id.* (proposal to declare writ of habeas corpus "inviolable") (proposal of John Rutledge).

90. Art. I., § 9, cl. 2 ("The 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."); *see also* Paschal, *supra*, at 611 (purpose of Suspension Clause to establish "the strongest guarantee consistent with a power of self-preservation"). State constitutions provided similar guarantees. Dallin H. Oaks "Habeas Corpus in the States—1776-1875," 32 *U. Chi. L. Rev*. 243, 249 (1965) ("All twenty-one of the new states admitted after 1787 and prior to 1860 [except Vermont] wrote into their constitutions a habeas corpus provision practically (and in most cases exactly) identical to the federal provision.").

91. The only three colonies that voted against the provision did so because they believed no authority should be given to suspend the writ under any circumstances. Oaks, "Habeas Corpus in the States," *supra*, at 248.

grant of emergency detention power in the Constitution.[92] It provides the linchpin of the guarantees against unlawful government restraints contained in the Bill of Rights,[93] and has appropriately been called "the most important human right in the Constitution."[94]

The power to suspend habeas corpus required express authorization from Congress. This was the English practice with which the Framers were familiar; nor, given the climate of fear of executive power in the late 1780s, would they have given the president more power than the king.[95] Indeed, the king did not suspend the writ without Parliament's approval even during the Revolutionary War, when he sought to detain those suspected of offenses against the crown.[96] The post-1776 practice of the American states was no different,[97] including the last pre-

92. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) (Suspension Clause constitutes only "express provision for exercise of extraordinary authority because of a crisis" in Constitution).

93. U.S. Const. amend. VI (right to "speedy and public trial," to be confronted with adverse witnesses and to compel production of favorable ones, and to "the assistance of counsel"); *id.* amend. V (right to privilege against self-incrimination, to due process, and to presentment or indictment by grand jury for a "capital, or otherwise infamous crime" except in "cases arising *in* the land or naval forces, or *in* the militia, when in actual service in time of war or public danger") (emphases added); *see also id*. amend. IV (no "unreasonable searches and seizures" or warrants except based on "probable cause"). The right to a speedy trial, for example, also has "roots at the very foundation of our English law heritage." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (tracing guarantee not to "deny or defer to any man either justice or right" to the Magna Carta).

94. Chafee, *supra*, at 143.

95. "Developments in the Law—Federal Habeas Corpus," 83 *Harv. L. Rev.* 1038, 1264 (1970).

96. 17 Geo. 3, c. 9 (1777) (suspending writ for those charged with or suspected of committing high treason in American colonies or on high seas, or crime of piracy).

97. Oaks, "Habeas Corpus in the States," *supra*, at 251 ("[I]n each of at least six recorded instances where the writ was suspended during

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ratification instance of suspension, a 1786 Massachusetts act passed during Shays' Rebellion to preserve public safety against a "violent" insurrection "by armed bodies of men."[98] The principle of exclusive legislative suspension power was endorsed by the Supreme Court,[99] early commentators,[100] and, implicitly, President Jefferson himself, who sought (and was denied) Congressional authorization to suspend the writ in the face of Aaron Burr's conspiracy to wage war against the United States.[101] This principle embodies the Framers' fear of unchecked executive power and their belief that the "separate and distinct exercise of the different powers of government . . . was essential to the preservation of liberty."[102] Subsequent history confirms that Congress alone can authorize the suspension of habeas corpus,[103] and demonstrates that the writ's

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or before the War for Independence, this power was exercised by the legislature and not by the executive.").

98. Act of Nov. 10, 1786, ch. 10, 1786 Mass. Acts & Laws 510. The act expired by its own terms the following year. *Id*.

99. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.) ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.").

100. Story, *supra*, § 1342, at 214-15.

101. "Developments in the Law—Federal Habeas Corpus," *supra*, at 1265; Paschal, *supra*, at 623. A suspension bill was passed by the Senate, but rejected by the House. Paschal, *supra*, at 623-24. It would have suspended the writ for persons "charged on oath with treason, misprision of treason, or other high crime and misdemeanor, endangering the peace, safety, or neutrality of the United States." 16 *Annals of Congress* 402 (1807), *quoted in* Duker, *supra*, at 136.

102. *The Federalist* 51, at 321 (James Madison) (Clinton Rossiter ed. 1961).

103. Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14, 14-15 (authorizing suspension during Reconstruction to combat "armed" and "organized" "unlawful combinations" that directly threatened government); Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692 (Cont'd)

temporary suspension provides the proper means of detaining members of armed and organized groups that pose a danger to the state without the "usual procedures of due process."[104]

The Framers thus followed English practice by establishing habeas corpus as the ultimate safeguard against executive detention without due process. Congress was given exclusive authority to suspend the writ, and that power was expressly constricted by the text of the Suspension Clause itself.

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(authorizing suspension in Philippines); Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153 (1900) (authorizing later suspension of writ in Hawaii during World War II). President Lincoln's suspension of the writ during the Civil War was deemed unconstitutional. *Ex parte Merryman*, 17 F. Cas. 144, 148-49 (C.C.D. Md. 1861), and Congress later approved the suspension, underscoring the necessity of legislative authorization. Act of Mar. 3 1863, ch. 81, § 1, 12 Stat. 755. Moreover, Lincoln's executive suspension in places like Maryland, considered a site of insurrection, may be characterized as an "emergency military measure." *E.g.*, Daniel Farber, *Lincoln's Constitution* 163 (2003). The broader use of martial law was rejected in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), which reaffirmed the common law rule precluding its application where "the courts are open, and in the proper and unobstructed exercise of their jurisdiction." *Id*. at 127. This Court's narrow holding in *Ex parte Quirin*, 317 U.S. 1 (1942), did not displace the core principles of the Anglo-American tradition embodied by *Milligan*. *See* Brief *Amicus Curiae* of the ACLU.

104. Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871-1872*, at 46 (1996) (temporary suspension pursuant to 1871 act by President Grant in nine South Carolina counties in state of rebellion allowed officials "to make mass arrests quickly" and detain without formal charges); *see also Fisher v. Baker*, 203 U.S. 174, 179-80 (1906) (suspension pursuant to 1902 act in two provinces of Philippines to combat "organized" gangs whose violent acts had created "a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct [criminal investigations]") (internal quotation marks and citation omitted).

B. As in England, the Protections Secured by Habeas Corpus Were Not Subordinated to Military Power

Military abuses by the crown helped drive colonial leaders to seek independence from England,[105] and caused them to limit military power under their own Constitution. The Framers certainly recognized the importance of the executive's role as commander-in-chief under Article II, but refused to let those powers swallow up the protections against unlawful detention guaranteed by the Suspension Clause. Indeed, the Founding generation adhered to these principles despite a weak central government vulnerable to continued threats from more powerful European nations and hostile Indian tribes, the only foreign war fought principally on U.S. soil, and violent insurrections or conspiracies to destroy the United States during the first four presidencies.[106]

The Constitution grounded the executive's military power in approval by Congress.[107] The first Congress passed legislation

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105. *The Declaration of Independence* para. 14 (1776) (rendering military "independent of and superior to the Civil power"); *id.* para. 16 ("[q]uartering large body of armed troops among us").

106. President Washington confronted armed insurrection during the Whiskey Rebellion in Pennsylvania; President Adams also faced violent revolt in that state; President Jefferson encountered Aaron Burr's conspiracy to sever the western United States from the rest of the nation; and President Madison contended with plans of New England secessionists to break away from the Union during the War of 1812. David B. Kopel & Joseph Olson, "Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation," 21 *Okla. City U. L. Rev.* 247, 345 (1996).

107. U.S. Const. art. I, § 8, cl. 14 (authorizing Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces"); *id.* art. I, § 8, cl. 15 (authorizing Congress "[t]o provide for calling forth the militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); *id.* art. I, § 8, cl. 16 (authorizing Congress "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States").

placing military troops under congressional authority;[108] Congress amended this legislation in 1806 to establish articles of war to govern the country's military forces.[109] The 1806 statute carefully limited military jurisdiction, even in time of war, to those who were not citizens or did not otherwise owe allegiance to the United States, and who were apprehended spying in or near U.S. army fortifications or encampments,[110] thus codifying the unique wartime treatment of spies.[111] President James Madison, himself one of the key drafters of the habeas provision in the Constitution, and of the Bill of Rights, recognized the importance of the supremacy of civilian authority

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108. Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96 ("[Military] troops shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war, as may hereafter by law be established.").

109. American Articles of War of 1806, enacted April 10, 1806, *reprinted in* Winthrop, *supra*, at 976.

110. *Id*. art. 101(2), *reprinted in* Winthrop, *supra*, at 985. Congress lifted the limitation during the Civil War so that confederate soldiers and sympathizers could be tried. Winthrop, *supra*, at 766. Contemporary commentators construed other provisions of the 1806 Articles of War narrowly to exclude civilians and thus avoid the "military despotism" that comes with the subordination of civilian authority to military power. *E.g*. Isaac Maltby, *A Treatise on Courts Martial and Military Law* 37-40 (1815).

111. Jonathan Turley, "Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy," 70 *Geo. Wash. L. Rev.* 649, 724 (2002); *see also* Winthrop, *supra*, at 769 ("Under the law of nations and of war, [a spy's] offense is an exclusively military one, cognizable only by military tribunals."); *id*. at 771 (special treatment of spies based not on "any peculiar depravity attaching to the act" but on particular logic of rules of warfare). The special treatment of spies was recognized by statute in 1776, Winthrop, *supra*, at 765 (citing Resolution of the Continental Congress of Aug. 21, 1776), and explains the fate of British spy John Andre, captured behind enemy lines in civilian clothes and executed after a proceeding before a board of inquiry. Turley, *supra*, at 720-24. Notably, Joshua Hett Smith, the civilian charged with Andre, was given a civilian trial for his involvement in espionage. *Id*. at 724.

even while serving as commander-in-chief during the War of 1812. When a court-martial found Elijah Clark guilty of spying in August of 1812 and ordered his execution, Madison intervened on the ground that the military lacked the power to try him as a spy, directing that Clark be released unless "arraigned by the civil courts for treason" or some other criminal offense.[112]

Throughout the Founding era, offenses by supposed enemies of state were prosecuted criminally for treason.[113] Indeed, the very definition of this offence in Article III of the Constitution contemplates the exercise of federal court jurisdiction over war-like acts against United States[114] by those who owe a duty of allegiance.[115] In *Ex parte*

112. "Case of Clark the Spy," 1 *The Military Monitor, and American Register* 121-22 (Feb. 1, 1813) (emphasis omitted).

113. *E.g.*, *Case of Fries*, 9 F. Cas. 924, 924, 932 (C.C.D. Pa. 1800) (conviction for assembling with a "great number" of persons "armed and arrayed in a warlike manner . . . to oppose and prevent, by means of intimidation and violence, the execution of [the laws of the United States]"); *United States v. Vigol*, 28 F. Cas. 376 (C.C.D. Pa. 1795) (conviction for participation in the Whiskey Rebellion, an armed resistance quashed by federal troops); *United States v. Mitchell*, 26 F. Cas. 1277 (C.C.D. Pa. 1795) (same); *see also United States v. Lee*, 26 F. Cas. 907 (C.C.D.C. 1814) (acquittal in prosecution for supplying enemy and informing them of troop locations); *cf*. Hurst, *supra*, at 272 (during colonial period, treason used to "ward off . . . extreme dangers to the security of the states").

114. U.S. Const., art. III, § 3, cl. 1 (defining treason as "levying War against [the United States], or in adhering to [its] enemies, giving them Aid and Comfort"); *see also United States v. Hoxie*, 26 F. Cas. 397, 398 (C.C. Vt. 1808) (construing treason to include "the embodying of a military force, armed and arrayed, in a warlike manner, for the purpose of forcibly subverting the government, dismembering the Union, or destroying the legislative functions of congress"). Moreover, like the provision for habeas corpus, the Treason Clause was listed in answer to the criticism that the Constitution lacked a bill of rights. *The Federalist* 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

115. Treason was not traditionally limited to citizens but also encompassed aliens residing in the United States who owed allegiance

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Bollman,[116] Chief Justice Marshall dismissed the charges against Aaron Burr's co-conspirators, Erick Bollman and Samuel Swartwout, for levying war against the United States.[117] He construed the offense narrowly, emphasizing the stigma treason accusations carried and the particular danger of their misuse.[118] Marshall, however, never suggested that individuals like Bollman and Swartwout could be confined outside a criminal proceeding, but rather emphasized Congress' power to enact statutes to punish militant conspirators for "[c]rimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society."[119] And, indeed, Congress has since enacted numerous

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to the country. *E.g.*, *Carlisle v. United States*, 83 U.S. 147, 155 (1872) (even temporarily domiciled aliens owe obligation of fidelity and obedience, and are subject to prosecution for treason). *Amici* do not address the distinct question posed by the preventative detention of "enemy aliens." *See* Alien Enemies Act of July 6, 1798, ch. 66, 1 Stat. 577 (currently codified at 50 U.S.C. §§ 21-24 (1994)). This emergency power is based on express congressional authorization, *e.g.*, *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814) (Marshall, C.J.), and, moreover, is confined to a declared war between the United States and a foreign nation or government and to the "natives, citizens, denizens, or subjects of that hostile nation or government," 1 Stat. 577, thus precluding the dangers to individual liberty a broader grant of executive power would pose. And, as in England, habeas corpus was available to "enemy aliens" to challenge the jurisdictional facts underlying their detention. *E.g.*, *Lockington's Case*, Bright (N.P.) 269, 283 (Pa. 1813) (Tilghman, C.J.) (British citizen detained during War of 1812); *id.* at 298-99 (Brackenridge, J.) ("I do not see that any *habeas corpus* can issue, *unless* the applicant can make an affidavit in the first instance, that he is not an alien enemy . . . .") (second emphasis added).

116. 8 U.S. (4 Cranch) 75 (1807) (Marshall, C.J.).

117. *Id.* at 135.

118. *Id.* at 125 ("[T]here is no crime which can more excite and agitate the passions of men than treason. . . .").

119. *Id.* at 126-27; *see also id.* at 127 (these individuals "should receive such punishment as the legislature in its wisdom may provide").

criminal statutes punishing war-like acts and conspiracies against the United States.[120]

In short, the protections of habeas corpus against unlawful and indefinite detention by the executive were not subordinated to military power, even during wartime.

C. Habeas Corpus Ensured Meaningful Review for those in Military Custody

Even if, as the Solicitor General asserts, the President has the authority to detain individuals like Padilla outside the civilian justice system, he nonetheless cannot confine such persons without meaningful judicial review of the allegations against them.[121] Since this Court's first habeas cases, the writ has enabled prisoners to contest the facts underlying their executive detention.[122] For those in military custody, the writ has ensured that the officials exercising their authority remained within proper bounds, thus providing a fail-safe against the "historic

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120. *E.g.*, 18 U.S.C. § 2384 (criminalizing seditious conspiracy, including conspiracy to levy war against United States); *id.* § 2332a(a) (criminalizing use, attempted use, or conspiracy to use weapons of mass destruction); *id.* § 844 (criminalizing certain manufacture and handling of explosive materials). None, of course, contains the particular evidentiary requirements of the Treason Clause. *E.g.*, U.S. Const. art. III, § 3, cl. 1 (conviction for treason only "on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court").

121. Whether the President has the authority to seize and detain Padilla as an "enemy combatant" encompasses the subsidiary issue of whether that purported authority is so broad as to include a denial of his right to contest the facts on which that unilateral executive designation is based, or to consult with counsel, which the government has only recently provided as a matter of discretion and with significant restrictions. Sup. Ct. R. 14(a). The issue of the President's authority to seize and detain individuals as "enemy combatants" without meaningful judicial review is also before this Court in *Hamdi v. Rumsfeld*, No. 03-6696, *cert. granted* Jan. 9, 2004.

122. *E.g.*, *Bollman*, 8 U.S. (4 Cranch) at 135 (discharging prisoners charged with treason based on insufficient evidence); *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 17-18 (1795) (bailing prisoner arrested for treason after review of factual basis for commitment).

fear of the corrosive effect upon liberty of exaggerated military power."[123] By scrutinizing the legality of military confinement, the writ has historically performed "what is its perhaps most essential judicial task: freeing persons from illegal official restraints not founded in judicial action."[124]

During the War of 1812, habeas was viewed as a remedy against unlawful military confinement.[125] For example, in *In re Stacy*,[126] the court reviewed a habeas petition filed by Samuel Stacy, detained as a spy and traitor at Sackets Harbor on Lake Ontario, an area both sides viewed as critical to the success of the war.[127] Stacy's capture had come shortly after British troops had landed, attacked, and nearly captured Sackets Harbor,[128] and U.S. military commanders blamed Stacy for the near-loss of this critical military post.[129] Stacy claimed he was exempt from military jurisdiction based on U.S. citizenship, and the court issued a writ of habeas corpus commanding the military to produce him.[130] When the official refused, Chancellor Kent sought enforcement, declaring that "[a] military commander" was "assuming criminal jurisdiction over a

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123. "Developments in the Law—Federal Habeas Corpus," *supra*, at 1210 (internal quotation marks and citation omitted).

124. Oaks, "Habeas Corpus in the States," *supra*, at 266.

125. Counsel for *amici* are grateful for the suggestions of Professor Ingrid Brunk Wuerth, which informed this section's discussion of judicial review of executive detention during the War of 1812, and which are discussed in greater detail in Ingrid Brunk Wuerth, "The President's Power to Detain 'Enemy Combatants': Modern Lessons from Mr. Madison's Forgotten War," 98 *Nw. U.L. Rev.* (forthcoming 2004).

126. 10 Johns. 328 (N.Y. Sup. Ct. 1813) (Kent, C.J.).

127. Robert Malcomson, *Lords of the Lakes: The Naval War on Lake Ontario, 1812-1814*, at 16 (1998).

128. *Id*. at 127-29.

129. 2 *The Naval War of 1812: A Documentary History* 499, 521 (William S. Dudley ed. 1992) (citing letter from Commodore Isaac Chauncey to Secretary of the Navy William Jones).

130. 10 Johns. at 328-29.

private citizen, . . . holding him, in the closest confinement, and contemning the civil authority of the state."[131]

The military's unlawful confinement of a civilian was also the basis for the court's decision in *Smith v. Shaw*.[132] Shaw too had been held at Sackets Harbor on spying and other charges. When Shaw sued for false imprisonment following his release, the military maintained it had the authority to detain him pursuant to a court-martial or, at a minimum, pending its investigation of the facts since Shaw's detention was "essential to the public safety."[133] The court, however, concluded that Shaw, as a U.S. citizen, was not subject to military jurisdiction and affirmed the damage award[134] for his approximately two-week-long confinement.[135] Its decision rested partly on basic principles of habeas law. Specifically, Chief Judge Smith Thompson explained that the military's contention that Shaw's detention was for the purpose of trying him by court-martial would have been insufficient to defeat a habeas petition, as it was for the courts to determine whether Shaw was subject to military detention in the first place.[136]

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131. *Id.* at 334. Stacy was subsequently released by the Secretary of War, who recognized the military lacked authority over him. 2 *The Naval War of 1812*, *supra*, at 521 n.1 (no authority for military to detain citizen as spy under Articles of War of 1806); *cf.* Abraham D. Sofaer, "Emergency Power and the Hero of New Orleans," 2 *Cardozo L. Rev.* 233, 242-43, 248 (1981) (court imposed contempt sanction and fine on General Andrew Jackson for flouting writ of habeas corpus challenging Jackson's exercise of court-martial jurisdiction in New Orleans near end of War of 1812). Although decided under state law, cases from this era demonstrate courts' general understanding of the nature and purpose of habeas corpus. *Cf.* Gerald L. Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens," 98 *Colum. L. Rev*. 961, 993 (1998) (state courts' application of habeas law to enemy aliens).

132. 12 Johns. 257 (Sup. Ct. N.Y. 1815) (Thompson, C.J.).

133. *Id.* at 261.

134. *Id.* at 259, 268.

135. *Id.* at 257-58.

136. *Id.* at 266-67.

Enlistment cases from the same period further underscore the writ's role in remedying abuses by the military. To meet a pressing military need during the war, the federal government paid bounties to enlistment brokers for each new recruit obtained, a practice that led to a number of fraudulent enlistments, including of minors.[137] On habeas petitions challenging the enlistments, courts refused to be bound by the facts stated in the return, and instead exercised their power "to inquire into the circumstances" under which an individual was unlawfully restrained of his liberty.[138] Federal courts similarly held evidentiary hearings in challenges to military enlistments on habeas, allowing applicants to contest the facts asserted in the custodian's return.[139] In providing relief against "abuses of power by government officials," the writ thus enforced "the principle that in a free country, the civil power must predominate."[140]

Here, the Solicitor General maintains that the district court must confine its inquiry solely to whether the executive's submissions provide "some evidentiary support" that Padilla falls within the class of persons the President has deemed "enemy combatants."[141] Such an eviscerated notion of habeas review is

137. Marc M. Arkin, "The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners," 70 *Tul. L. Rev.* 1, 14-15 (1995).

138. *Commonwealth v. Harrison*, 11 Mass. 63, 65 (1814); *see also Commonwealth v. Cushing*, 11 Mass. 67, 67, 71 (1814) (accepting alleged deserter's affidavit and ordering his release from military custody on ground enlistment was void since he was minor when enlisted); Arkin, *supra*, at 18 (state courts generally refused to accept returns of military officials "at face value").

139. Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 27-28 & 165 n.55 (2001) (citing cases).

140. William E. Nelson, "The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws," *in Law in Colonial Massachusetts, 1630-1800*, at 419, 457 (1984).

141. Br. of Resp't-Appellant to the U.S. Court of Appeals for the Second Circuit at 47. The "some evidence" standard has been (Cont'd)

at odds with the writ's long established role of remedying unlawful and indefinite executive detention. Indeed, the scope of review articulated by the government is strikingly similar to the minimal review exercised under a suspension act, where, as noted above, a court's inquiry was confined to determining whether a prisoner was within the category of persons for whom the writ's core protections — accusation and trial — had temporarily been suspended.[142] Congress, however, has not suspended habeas corpus, and the writ's history demonstrates that the President thus lacks the authority to detain Padilla indefinitely without criminal charges and trial or, at a minimum, without some other meaningful opportunity to contest the allegations against him.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the judgment of the Court of Appeals.

(Cont'd)
inappropriately transported from an entirely different context, where a habeas court exercises supervisory review over a prior administrative proceeding conducted in accordance with due process, and not, as here, where it provides the sole safeguard against indefinite executive detention without any underlying process at all. Resp. Br. for Resp't-Appellant-Cross Appellee to the U.S. Court of Appeals for the Second Circuit at 41 (citing cases). *See generally* Gerald L. Neuman, "The Constitutional Requirement of 'Some Evidence,'" 25 *San Diego L. Rev.* 631 (1988) ("some evidence" standard method of review employed when applicant seeks judicial scrutiny of previous adjudicatory proceeding in which he could present evidence and contest government's factual assertions).

142. *See supra* notes 39-40; *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130-31 (1866) ("[T]he suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.").

Respectfully submitted,

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