[ORAL ARGUMENT HELD SEPTEMBER 8, 2005]

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and *Amici*

Except for the following, all parties, intervenors, and *amici* appearing before the District Court and/or in this Court on these appeals are listed in the Opening Briefs of the Government in *Al-Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116, and of the Petitioners in *Boumediene v. Bush*, Nos. 05-5062 and 05-5063:

Amici Curiae British and American Habeas Scholars

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

B. Rulings Under Review

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

C. Related Cases

The Opening Briefs of the Government in *Al-Odah v. United States* and of the Petitioners in *Boumediene v. Bush* indicate which of the cases on review were previously before this Court and identify the names and numbers of related cases pending in this Court or in the District Court.

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GLOSSARY

CSRT – Combatant Status Review Tribunal

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

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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."

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 descendent of the English common law writ, Blackstone's Great Writ of Liberty, which was enshrined by the Framers in the Suspension Clause of the Constitution. *INS v. St. Cyr*¸ 533 U.S. 289, 301 (2001). 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. Govt's Supp. Br. dated Jan. 18, 2006 ("Gov't Supp. Br.") at 1-2. It further argues that section 1005(e) may be given retroactive effect because it is a "jurisdiction-ousting provision" that simply alters the forum in which pending claims may be heard, and does not affect Petitioners' substantive rights. *Id.* at 8 n.5; 10-11. The Government's characterization of the DTA is at odds with the nature of habeas process under the common law, which has been carried through to its codification under section 2241(c)(1).

As we demonstrate herein, habeas corpus has for centuries been a *substantive*

guarantee of common law process. Habeas courts historically undertook a searching inquiry into the factual and legal basis for a prisoner's detention and exercised broad remedial powers. This common law process ensured an individualized examination into both the crown's allegations and the prisoner's defense. One settled feature of this inquiry, unchanged for centuries, was a strict prohibition against 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. Further, to protect these substantive rights, the writ at common law – and likewise the statute codifying it – could not be suspended absent a clear and explicit statutory statement, and suspension was narrowly limited under the Constitution 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 eviscerate common law habeas. If construed to apply to pending cases, the DTA would effect a substantive change in the law, and would raise a serious constitutional question under the Suspension Clause.

ARGUMENT

I. At Common Law, Habeas Corpus Provided A Searching And Individualized Inquiry Into The Factual And Legal Basis For A Prisoner's Detention.

A. Habeas corpus has long provided a searching factual and legal inquiry into the basis for a prisoner's detention. This basic purpose of the writ crystallized in response to the seminal *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627). There, the king had indefinitely detained suspected enemies of state based solely upon his "special command," *id.* at 37, and sought to block any inquiry into the factual and legal basis for their confinement. When the court upheld the Crown, 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 manners of illegal confinement," 3 William Blackstone, Commentaries *131, and the most "effective remedy for executive detention," Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 460 (1966).

At common law, habeas courts did not simply accept the government's return to a prisoner's petition; rather, they often probed the return and examined additional evidence submitted by both sides to ensure the factual and legal sufficiency of the commitment. *See, e.g.*, *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); *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 women who "appeared to be absolutely free from the least appearance of insanity"); *Eleanor Archer's Case* 1701, Lincoln's Inn, MS Misc. 713, p.164 (K.B. 1701) (Holt, C.J.) ("court upon oath examined [woman]" to assess claim of mistreatment by her father); *Barney's Case*, 87 Eng. Rep. 683 (K.B. 1701) (allowing bail after affidavits proved malicious prosecution); *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, e.g.*, R.J. Sharpe, The Law of Habeas Corpus 66-68 (1989) (citing habeas cases involving factual inquiries); Oaks, *supra*, at 454 n.20 (observing that the instances where habeas courts conducted fact-finding in non-criminal cases are "sufficiently comprehensive to include most . . . cases"). Alleged enemy aliens could also challenge the factual basis of their commitment on habeas to ensure it was within the bounds prescribed by law. *Three Spanish Sailors' Case*, 96 Eng. Rep. 775 (C.P. 1779) (examining affidavit detailing facts supporting petitioners' release, but concluding that, "upon *their own showing*," they are alien enemies) (emphasis added); *accord R. v. Schiever*, 97 Eng. Rep. 551 (KB. 1759). Further, habeas courts exercised broad equitable powers to fashion remedies as the circumstances required. *See, e.g.*, *Earl of Aylesbury's Case*, Harv. L. Sch. MS 1071, fol. 52 (K.B. 1696) (bailing prisoner suspected of treason because it was "just and reasonable" to do so, and "within [the court's] power by the common law").

The occasional general statement that at common law the petitioner could not controvert the truth of a return to a habeas petition must be read in the specific context in which it was made: *criminal* cases. Rollin C. Hurd, A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus 270-71 (1876). The reason is simple. In criminal cases, the prisoner either 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), or was confined pending such trial, in which case habeas guaranteed that he would receive that process without delay. Habeas Corpus Act of 1679, 31 Car. 2, c.2, § 7 (1679) (securing right to speedy trial); *see also* Hurd, *supra*, at 266 ("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.'") (emphasis omitted).[1] By contrast, in non-criminal cases, including and especially cases of executive detention without trial, the habeas court itself supplied common law process by undertaking a factual inquiry into the basis of detention in the first instance.

Thus, the government's characterization of habeas as a procedural device misconstrues the important protections that the writ historically afforded. Its very essence – its substance – was a searching inquiry by neutral judges into the factual and legal validity of the Executive's proffered justification for the detention. 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.

B. By providing a searching inquiry into the basis of detention, habeas supported another core guarantee at common law – the categorical prohibition on the use of

[1] And, even so, there were still numerous instances where prisoners controverted the return in criminal cases, especially to obtain release on 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); Sharpe, *supra*, at 129-30.

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 a subsequent 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 suspected traitor "might not be racked" to make him identify accomplices, and "whether there were any law against it." The judges' answer was unanimous: the prisoner could not be tortured because "no such punishment is known or allowed by our law." *Proceedings Against John Felton*, 3 Howell's St. Tr. 367, 371 (1628).

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.

C. The only way to deprive prisoners of the core common law process secured by habeas corpus was for Parliament to expressly and unequivocally suspend the writ. On various occasions, Parliament suspended the writ in time of war in order to authorize 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 and unequivocal 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 England 226 (1908). Further, 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. 67 (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. William F. Duker, A Constitutional History of Habeas Corpus 98, 115 (1980). As in England, the writ provided an individualized inquiry into the factual and legal basis for the detention, and did not depend upon statute. *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).

Habeas was "the only common-law process explicitly written into the Constitution," 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); *see also* The Federalist 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (constitutional guarantee of habeas corpus meant to protect against arbitrary detention by the executive). Indeed, 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 suspension of the Great Writ. *Compare* 2 The Records of the Federal Convention of 1787, at 438 (M. Farrand ed. 1966) (suspension should not be permitted except "on the most urgent occasions, and then only for a limited time") (proposal of Charles Pinckney) (internal quotation marks omitted), *with id.* (habeas corpus is "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 a source of common law process two years before, and perpetually independent from, the adoption of the Fifth Amendment.

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. *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 understood that habeas jurisdiction implied both the power and obligation to ensure a searching analysis of the factual and legal basis for detention. Moreover, the plenary nature of the habeas inquiry in *Bollman* did not turn on whether a constitutional violation had been alleged. *See also, e.g.*, *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).

Nor was this understanding 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). State judges conducted similarly probing inquiries into the factual basis of a commitment. *See, e.g., State v. Clark*, 2 Del. Cas. 578, 580-81 (Del. Ch. 1820) (discharging soldier after examining his testimony that he was intoxicated at time of enlistment and his father's testimony that he did not consent to such enlistment). Enemy aliens also obtained review of the factual basis for their detention on habeas. 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. G. Neuman & C. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Cannon*, 9 Green Bag 40, 41-43 (2005) (reporting decision in *United States v. Thomas Williams*, U.S. Cir. Ct. for Dist. of Va. 1813); *see also Lockington's Case*, Bright (N.P.) 269, 298-99 (Pa. 1813) (Brackenridge, J.) (although law permits detention of enemy aliens, habeas corpus may issue if applicant submits "affidavit . . . that he is not an alien enemy").[2]

[2] *Amici* express no view here about the validity of the "enemy combatant" definition applied to Guantánamo detainees. But it bears mentioning that the definition of an enemy alien at common law and by statute in the United States, Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577, was expressly limited to citizens of a nation or foreign government against which there was a declared war. As such, the habeas court's inquiry into the legality of the detention of enemy aliens necessarily required far less fact-finding than do detentions under the much broader definition of "enemy

B. The searching inquiry by a habeas court 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 447-48 (1836) ("'What has distinguished our ancestors? – That they would not admit of tortures, or cruel and barbarous punishment.'") (quoting Patrick Henry); s*ee also* Joseph Story, Commentaries on the Constitution of the United States § 931, at 662-63 (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, reliance on 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); *accord Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (coercive interrogation techniques are "revolting to the sense of justice"); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (conviction following admission of involuntary confession cannot stand, regardless of confession's purported reliability). Without the availability of habeas corpus to provide a searching inquiry into the basis for a prisoner's detention, and to determine whether evidence was obtained by torture or other coercive methods, this most fundamental of all common law prohibitions would be significantly compromised.

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combatants" at issue here, which includes 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).

C. 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 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. The men then challenged their detention on habeas, and were discharged by the Supreme Court in *Bollman*.

Indeed, Congress has exercised its suspension power only four times in U.S. history. Duker, *supra*, at 149, 178 n.190. Each time, it 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, 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); 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] may require it") (emphasis added); Act of July 1, 1902, ch. 1369, 32 Stat. 691 (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 invasio*n" 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 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 Eviscerate The Common Law Writ of Habeas Corpus.

The foregoing analysis of the writ's history informs *amici*'s understanding of the DTA and its implications for habeas review. As explained below, *amici* believe that, if applied to pending cases, the DTA's repeal of section 2241(c)(1) would eviscerate the core substantive protections of common law habeas by depriving Petitioners of a searching examination of the factual as well as legal basis for their detention, including the opportunity to present evidence to controvert the government's allegations.

The Government (Supp. Br. at 2) suggests that the new mechanism created under section 1005(e)(2) of the Act 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 basis on which a person's detention rests.

The Government's comparison (Supp. Br. at 13) of the DTA to the Real ID Act of 2005 reveals its misunderstanding of the nature of habeas review. Like the Real ID Act, the government argues, the DTA merely shifts the forum for hearing Petitioners' claims from the district court to this Court and effects no substantive change. And, to be sure, the Real ID Act does eliminate district court habeas jurisdiction over immigration removal orders while providing for their review in the courts of appeals. Real ID Act, Pub. L. No. 109-13, Div. B, § 106(a), 119 Stat. 231, 310-11 (2005). The Real ID Act does not, however, eliminate a searching habeas inquiry into the factual basis for the detention precisely because that inquiry is already supplied in an underlying administrative hearing which bears the hallmarks of common law process, such as fair notice of the government's allegations and a meaningful opportunity to confront them. *Biwot v. Gonzalez*, 403 F.3d 1094, 1099 (9th Cir. 2005); *United States v. Jauregui*, 314 F.3d 961, 962-63 (8th Cir. 2003); *Hadjimehdigholi v. INS*, 49 F.3d 642, 649 (10th Cir. 1995). Here, by contrast, Judge Green found that the Petitioners were being detained based upon a Combatant Status Review Tribunal ("CSRT") that denied them that very same process. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468-74 (D.D.C. 2005); *cf. Crawford*, 541 U.S. at 49 (Scalia, J.) ("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."). If applied to pending cases, then, the DTA would do more than shift the forum: it would deprive the Petitioners of the historic and robust habeas inquiry into the truth and substance of the allegations on which their detention rests.

This substantive change in the law would depart from longstanding tradition in another important way. Specifically, if applied to pending cases, the DTA would

eviscerate common law process by in effect allowing detention based upon evidence secured by torture. The past CSRTs, it appears, did not prohibit use of such evidence, but instead required 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 of whether they actually relied on such evidence. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 473-74. If construed to apply to these appeals and other pending cases, the DTA would eliminate the very habeas process that would have provided what these CSRTs failed to provide: a searching factual inquiry to determine whether a petitioner's detention was unlawful, including whether it was based on evidence secured by torture.[3]

CONCLUSION

As *amici* have explained, the writ of habeas corpus has for centuries provided a searching inquiry into the factual and legal basis of a prisoner's confinement. The DTA, if construed to apply to pending cases, would effect a substantive change in the law by eliminating this core common law inquiry, and would raise a serious constitutional question under the Suspension Clause.

[3] 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.

Respectfully Submitted,

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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 of British and American Habeas Scholars is in 12-point, proportionally spaced Times-New Roman type, and is 15 pages in length.

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2006, two copies of the foregoing brief of British and American Habeas Scholars, along with one copy of the motion for leave to file, were deposited in the U.S. mail, first-class postage prepaid, and were also sent by e-mail transmission, to the following:

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