**ORAL ARGUMENT HELD SEPTEMBER 8, 2005 AND MARCH 22, 2006**

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

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Nos. 05-5064, 05-5095 through 05-5116
KHALED A.F. AL ODAH, *et al.*,
*Petitioners-Appellees/Cross-Appellants,*

v.

UNITED STATES OF AMERICA, *et al.*,
*Respondents-Appellants/Cross-Appellees*.

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Nos. 05-5062 and consolidated case 05-5116
LAKHDAR BOUMEDIENE, *et al.*,
*Petitioners-Appellants,*

v.

GEORGE W. BUSH, *et al.*,
*Respondents-Appellees*.

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ON CONSOLIDATED APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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# BRIEF OF *AMICI CURIAE* RETIRED FEDERAL JURISTS IN SUPPORT OF PETITIONERS' SUPPLEMENTAL BRIEF REGARDING THE MILITARY COMMISSIONS ACT OF 2006


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Dated: November 1, 2006

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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 Brief of the Government in *Al-Odah v. United States*, Nos. 05-5064, 05-5095 through 05-5116, in the Opening Brief of the Petitioners in *Boumediene v. Bush*, Nos. 05-5062 and 05-5063, in the Brief of the Government in *Boumediene v. Bush* filed on May 25, 2005, in the Guantanamo Detainees' Corrected Second Supplemental Brief Addressing the Effect of the Detainee Treatment Act of 2005 in *Al Odah v. United States* filed on March 10, 2006, and in the briefs filed on November 1, 2006 by the Petitioners in *Al-Odah v. United States* and *Boumediene v. Bush*.

*Amici curiae,* former federal judges, are:

- The Honorable Shirley M. Hufstedler, who served as a judge on the United States Court of Appeals for the Ninth Circuit from 1968 to 1979.
- The Honorable Nathaniel R. Jones, who served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.
- The Honorable George N. Leighton, who served as a judge on the United States District Court for the Northern District of Illinois from 1976 to 1987.

- The Honorable Timothy K. Lewis, who served as a judge on the United States District Court for the Western District of Pennsylvania from 1991 to 1992, and as a judge on the United States Court of Appeals for the Third Circuit from 1992 to 1999.

- The Honorable Frank J. McGarr, who served as a judge on the United States District Court for the Northern District of Illinois from 1970 to 1988, and as chief judge of the court from 1981 to 1986.

- The Honorable Abner J. Mikva, who served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as chief judge of this Court from 1991 to 1994.

- The Honorable Patricia M. Wald, who served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1999, and as chief judge of this Court from 1986 to 1991.

The law firms of Jenner & Block LLP and Cohen, Millstein, Hausfeld & Toll, PLLC have appeared for *amici*. Jenner & Block LLP currently represents fourteen Guantánamo detainees, only one of whom is a petitioner in these consolidated appeals. The firm previously submitted an *amicus* brief to this Court on behalf of petitioners in *Qassim, et al. v. Bush*, No. 05-5477. In addition, Jenner & Block LLP represented *amici* before the Supreme Court in *Hamdi v. Rumsfeld*, No. 03-6696, and *Rasul, et al. v. Bush*, No. 03-334. Cohen, Milstein, Hausfeld & Toll PLLC currently represents four Guantánamo detainees, but none of the detainees is a petitioner in these consolidated appeals.

## 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

| Term | Definition |
|---|---|
| CSRT | Combatant Status Review Tribunal |
| DTA | Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2739 (2005) |
| MCA | Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) |

## INTEREST OF *AMICI CURIAE*

The issue presented by these consolidated cases challenges the integrity of our judicial system: may this Court sanction life-long detention in the face of credible allegations that the evidence upon which the detention is based was secured by torture? As former federal judges, we believe that compelling this Court to sanction Executive detentions based on evidence that has been condemned in the American legal system since our Nation's founding erodes the vital role of the judiciary in safeguarding the Rule of Law. Therefore, pursuant to Federal Rule of Appellate Procedure 29 and this Circuit's Rule 29, *amici* respectfully submit this brief in support of Petitioners Al Odah, *et al.* and Boumediene, *et al.*

*Amici curiae* include the following former federal judges, as further identified in the Parties and *Amici* section of this brief: The Honorable Shirley M. Hufstedler, the Honorable Nathaniel R. Jones, the Honorable George N. Leighton, the Honorable Timothy K. Lewis, the Honorable Frank J. McGarr, the Honorable Abner J. Mikva, and the Honorable Patricia M. Wald.

## SUMMARY OF ARGUMENT

After the Supreme Court found in *Rasul v. Bush*, 542 U.S. 466 (2004), that detainees at the Guantánamo Bay Naval Base in Cuba were entitled to challenge their detentions in federal court, the United States Defense Department announced

that each prisoner would appear before a "Combatant Status Review Tribunal." At the same time, the Defense Department also stated that every prisoner at the base had been determined "through multiple levels of review" to be an "enemy combatant."[1] The stated purpose of the CSRT was to decide whether this determination would be upheld.[2] Between August 2004 and January 2005, the military conducted 558 CSRT hearings, finding all but 38 prisoners to be enemy combatants.[3]

On December 30, 2005, the President signed the Detainee Treatment Act. Pub. L. No. 109-148, 119 Stat. 2739 (2005). The DTA purported to replace plenary district court review over the prisoners' habeas petitions with the CSRT and limited review in this Court. On June 29, 2006, the Supreme Court held that the DTA did not apply to pending habeas cases which, like these consolidated cases, "challeng[ed] the very legitimacy" of the CSRTs. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 (2006). On October 17, 2006, the President signed the Military Commissions Act. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

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[1] Memo. of Deputy Sec'y of Def. to Sec. of Navy, *Order Establishing Combatant Status Review Tribunal* 1 (July 7, 2004) (A442). *Amici* respectfully submit with this brief an Addendum of cited materials marked A1 to A445.

[2] *Id.*; Memo. of Deputy Sec'y of Def., *Implementation of Combatant Status Review Tribunal Procedures* (July 29, 2004) (A382) (hereinafter "CSRT Procedures").

[3] Dep't of Def., *Combatant Status Review Tribunal Summary*, *available at* http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf.

In their briefs, the Petitioners discuss the various statutory and constitutional infirmities of the MCA. *Amici* direct this brief at one specific and fundamental flaw.[4] With the CSRT, the Government created a tribunal that was permitted to accept evidence secured by torture and presume that evidence was genuine and accurate. Furthermore, the limited review in this Court provided by the MCA/DTA cannot remove the stain of torture because the Court – at least according to the Government – cannot alter or expand the record created by the military.

One of the most hallowed judicial roles in our constitutional democracy is to ensure that no person is imprisoned unlawfully. The statutory scheme created by the MCA/DTA inhibits the Judiciary's ability to ensure that Executive detentions are not grounded on torture or cruel, inhuman, or degrading treatment. Because no habeas court would permit detentions based on evidence obtained in this manner, the MCA/DTA scheme is not an adequate substitute for habeas review and is therefore unconstitutional.

[4] *Amici* take no position on other constitutional deficiencies in the MCA.

## ARGUMENT

**ADOPTING THE GOVERNMENT'S INTERPRETATION OF THE MCA/DTA WOULD UNCONSTITUTIONALLY FORCE THIS COURT TO CONDONE THE USE OF EVIDENCE SECURED BY TORTURE.**

### A. The CSRTs Failed to Consider Whether Evidence Relied Upon Was Obtained By Torture.

Two of the rules governing the CSRT procedures are particularly relevant to our purpose: First, the CSRT could rely on any information it deemed "relevant and helpful to a resolution of the issues before it," and second, the CSRT was obligated to accept the Government's evidence against the prisoner as presumptively "genuine and accurate."[5] Applying these rules, the CSRTs were allowed to and apparently did conclude that prisoners' incriminating statements were both "relevant and helpful" to the decision, and presumptively correct.

Yet, case after case for which transcripts of the CSRT hearings are publicly available,[6] prisoners told the CSRT panels that their so-called confessions were false and had been wrung from them through torture.[7] Often they assured the

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[5] CSRT Procedures, Encl. 1 ¶¶ G(7) and G(11) (A390) ("There is a rebuttable presumption that the Government Evidence . . . to support a determination that the detainee is an enemy combatant, is genuine and accurate.").

[6] *See* Dep't of Def., *Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) Documents*, *available at* http://www.dod.mil /pubs/foi/detainees/csrt/index.html (last visited Oct. 29, 2006).

[7] Because the prisoners did not have access to counsel and many did not attend their CSRT hearing, the CSRT record likely underreports the extent to which evidence obtained by torture formed the basis of enemy combatant determinations.

CSRT their account could be confirmed by review of medical records or other reports. But the Executive has maintained that investigating allegations of torture was not "the CSRT's role," and that it was permissible for the Tribunal to rely on evidence "obtained through a non-traditional means, even torture" to determine that a prisoner was an enemy combatant.[8] *Amici* take no position on the veracity of the prisoners' accounts,[9] nor do we attempt here to distinguish between torture and other illegal forms of coercion. But we do firmly contend that Article III courts have a duty to inquire whether, in fact, evidence has been gained by torture or

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[8] Transcript of Oral Argument at 83-87, *Boumediene v. Bush, et al.*, Civ. No. 04-1166 (RJL) (D.D.C. Dec. 2, 2004) (A377-81). The DTA required the Department of Defense to revise its procedures so that future CSRTs would, "to the extent practicable, assess whether any statement derived from or relating to such detainee was obtained as a result of coercion; and the probative value (if any) of any such statement." DTA § 1005(b). The prisoners with cases currently pending in federal court, however, were found to be "enemy combatants" under the prior rules. Moreover, the MCA/DTA does not require the prior CSRT determinations to meet the new standard, and the MCA explicitly states that the determination of enemy combatant status under the prior rules is final, at least for the purpose of eligibility for trial by a Military Commission. MCA § 948a(1).

[9] We note, however, that investigations by the military, international bodies, and human rights organizations revealed that abusive interrogations did occur. *See, e.g.,* Dep't of Def., *Army Regulation 15-6: Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* 63 (Aug. 2004) ("Abu Ghraib Report"), *available at* http://www.defenselink.mil/news/ Aug2004/ d20040825fay.pdf; United Nations, *Conclusions and Recommendations of the Committee against Torture: United States of America* ¶¶ 24, 26, 30 (July 25, 2006); Human Rights First, *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (Feb. 2006).

other cruel, inhuman, or degrading treatment, and to reject that evidence if so obtained. In the CSRT process, however, that inquiry did not take place.

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The publicly available record indicates the CSRT panels did little to evaluate the probity of allegedly coerced evidence, even when evidence such as medical records was readily available. Some CSRTs found the torture allegations credible enough to warrant investigation by other military authorities, but the panels nevertheless found the detainees to be enemy combatants without awaiting the outcome of the investigation. Although the Government might have adduced other, non-coerced evidence in individual cases, the CSRT neither examined allegations of torture *before* the individual was adjudicated an enemy combatant nor did it exclude such evidence from its consideration.

### 1. CSRTs referred torture allegations for investigation but did not wait for the investigation results.

Many cases involved reports of false confessions coerced by interrogators in countries where the State Department has long condemned the use of torture by state security agents.[10] For instance, the District Court recounted the torture endured by Mamdouh Habib, who was rendered by the United States to Egypt,

[10] *See, e.g.*, Dep't of State, *Country Reports on Human Rights Practices – 2005 – Egypt* (Mar. 8, 2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61687.htm.

where he alleges he was subjected to horrific abuse. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 473 (D.D.C. 2005). The United States has never denied the truth of Habib's allegations. All the Government's claims against Habib were based on "confessions" he gave to interrogators in Egypt.[11] (*See* September 9, 2004 Memo at 1-2, A20-21.) Habib's Personal Representative reported to the CSRT that his "confessions" were made "under duress" in an attempt to "tell interrogators what they wanted to hear because he was in fear." (Unclassified Summary at 1, 3, A12, A14.) Yet, the CSRT simultaneously (a) determined that the torture allegations were credible enough to warrant an investigation, and (b) found Habib to be an enemy combatant. (*Id.* at 3, A14.)

Habib's case is not unusual. Several prisoners told the CSRT they had been tortured by Pakistani security forces.[12] For example, Abd Al Nasir Khantumani and his son, Muhammad Khantumani, were arrested in Pakistan. The Pakistanis

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[11] Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 182 (New York 2006).

[12] These allegations are consistent with the State Department's findings that Pakistan tortures prisoners. *See* Dep't of State, *Country Reports on Human Rights Practices - 2005 – Pakistan* (Mar. 8, 2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61710.htm. Ironically, the 2005 report also criticizes an anti-terrorism law under which "coerced confessions are admissible in special courts." *Id.* The State Department made similar allegations in its 2004, 2003, 2002, and 2001 reports. *See, e.g.,* Dep't of State, *Country Reports on Human Rights Practices - 2004 – Pakistan* (Feb. 28, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41743.htm.

wanted them to admit they had been on a particular bus: "the Pakistanis tortured us to a point that we admitted we were on the bus." (Transcript at 4, A85.) "We tried to say no, no, no," his son, Muhammad, testified at his father's Tribunal, "but they just keep torturing us. Then they broke my nose and I said I was on the bus." (*Id.* at 7, A88.) "If you look at my nose," he said, "you can see it is broken." (*Id.*) The CSRTs passed the Khantumanis' allegations of torture up the chain of command, but found them both to be enemy combatants before any investigation was conducted. (Unclassified Summary at 3, A81, 118; Report at 1, A78, 115.)

The CSRT took the same action in the case of Abdul Aziz Al Khaldi, who told the CSRT he had been captured by the Afghani police. "They were threatening me and torturing me," he said. (Transcript at 9, A161.) "If I didn't say that I was from al Qaeda or Taliban I was tortured." (*Id.*) The Afghanis transferred him to Kandahar, where the beatings continued. (*Id.*) "The guy was speaking English saying, al Qaeda? Taliban? . . . Evidence of the torture is that they broke my tooth, which was fixed here [in Cuba]." (*Id.*) Al Khaldi's allegations of torture were referred for investigation (Unclassified Summary at 2, A168), but the CSRT found Al Khaldi to be an enemy combatant on the day of his CSRT hearing (Report at 1, A167).

### 2. Many CSRTs did not address evidence of torture.

A number of CSRTs simply ignored testimony that the detainee's prior statements to interrogators were the result of torture. Bisher al Rawi, for example, reported to the CSRT that he confessed "only after I was subjected to sleep deprivation and various threats were made against me" at Bagram, Afghanistan.[13] (Transcript at 24, A216.) Al Rawi, a British resident, was arrested during a business trip to Gambia and taken to Afghanistan. (*Id.*) The CSRT discussed other aspects of al Rawi's testimony, but did not address al Rawi's testimony that his confession to interrogators had been coerced. (Unclassified Summary at 3-4, A190-91.)

Similarly, Fahd Al Sharif was arrested while visiting Pakistani villages with a group of missionaries. (Transcript at 5, A314.) He told the CSRT that he confessed to interrogators at Kandahar because they beat him so severely that his wrist was broken and his eardrum punctured. (*Id.* at 2, A311.) According to the publicly available record, the CSRT did not retrieve Sharif's medical records.

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[13] Prisoners held in Afghanistan reported being subjected to prolonged isolation, sleep deprivation, environmental manipulation, hooding, and so-called "stress and duress positions" – all techniques the U.S. has admitted using. *See, e.g.,* Don Van Natta, Jr. and Ray Bonner, *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. Times at A1 (Mar. 9, 2003); Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. Times at A1 (May 20, 2005); Abu Ghraib Report 63; Human Rights Watch, *Enduring Freedom: Abuses by U.S. Forces in Afghanistan* at 37-40 (Mar. 2004), *available at* http://hrw.org/reports/2004/afghanistan0304.

Similarly, the public record indicates no investigation of Mohammed Souleimani Laalami's testimony that he confessed to training at the al-Farouq training camp only to end the beatings by his captors. "I did say these things," he told the panel, "but I said them when I was captured and being beaten and threatened with death. . . . I told the Red Cross in Kandahar, I and others were being beaten and admitted to things that were not true. . . . I was beaten until I said they were true." (Transcript at 1, A322.)

These accounts are not unique. When the CSRT accused Mohammed Haidel of receiving artillery training in Afghanistan, for instance, Haidel explained that an interrogator in Kandahar "hit my arm and told me I received training in mortars." (Transcript at 1, A325.) When Haidel denied the allegation, the beating intensified. "As he was hitting me, I kept telling him, no I didn't receive training." (*Id.*) Throughout this interrogation, Haidel was kneeling on the ground with his hands lashed behind his back. (*Id.*) He began to bleed from his head. "I was crying and finally I told him I did receive the training. . . . I was in a lot of pain, so I said I had the training." (*Id.*) "At that point," Haidel said, "if he had asked me if I was Usama Bin Ladin, I would have said yes." (*Id.*)

Samuer Abdenour explained to the CSRT that in Kandahar he had admitted to advance knowledge of the 9/11 attacks because interrogators refused to tend his wounded leg: "They just wanted anything. Any information. I just told them

anything; whatever they wanted to hear because I wanted them to treat my leg. I saw other people whose legs had to be cut off [as a result of injuries]. I did not want my leg to be cut off." (Transcript at 4, A331.) The CSRT found Abdenour to be an enemy combatant.[14] The publicly available record does not indicate that the CSRT sought to review any potentially relevant medical or other records.

### 3. A few CSRTs cross-examined detainees to distance U.S. forces from the alleged torture.

On occasion, CSRTs probed the torture allegations, but to demonstrate that U.S. forces did not participate in the torture, not to determine whether the "confession" was reliable or the product of coercion. For example, Abdul Rahim Ginco told the CSRT that he had been tortured by both the Taliban and forces allied with Americans. (Transcript at 11, 13, A352, A354.) The Taliban had accused Ginco of being an American spy, and imprisoned him from May 2000 until January 2002. (*Id.* at 3, 6-7, A344, A347-48.) Upon release from the Taliban prison, Ginco and a friend told an Australian reporter that they "wanted to be witnesses against al Qaida and Taliban . . . to the Americans." (*Id.* at 6, 8, A347, A349.) Two days later, U.S. forces arrested Ginco and held him in Kandahar. (*Id.*) Ginco told the CSRT the interrogators at Kandahar "kept pushing me, they

[14] *See* Annual Review Board Transcript for Detainee ISN #659 at 1, *available at* http://www.dod.mil/pubs/foi/detainees/csrt/ARB_Transcript_Set_8_20751-21016.pdf. (indicating enemy combatant status).

beat and tortured me. . . . Military intelligence, they told me to say I'm al Qaida, so, I told them, ok, I'm al Qaida." (*Id.* at 13, A354.) In finding Ginco to be an enemy combatant, the CSRT apparently relied not only on Ginco's coerced confessions to U.S. interrogators, but also a false videotaped confession that Ginco made after weeks of torture by the Taliban and high-level Al Qaeda members. (*Id.* at 3, 10-11, A344, A351-52.) The CSRT had asked Ginco only about torture by the Taliban: "So it was the Taliban prison people who forced you to do this [videotape]?" (*Id.* at 11, A352.)[15]

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In each of these cases, the prisoner reported to the CSRT that he had "confessed" only to stop the torture. But because the CSRTs relied on secret evidence, it is impossible to know how many times a CSRT found a prisoner to be an enemy combatant based on a false accusation by one prisoner who was tortured to incriminate another. For instance, the Department of Defense has reported that interrogation of Guantánamo detainee Mohammed al Qahtani produced "detailed information about 30 of Osama Bin Laden's bodyguards who are also held at

[15] *See also* Transcript of Obaidullah at 5, A360 (CSRT asked detainee whether he had "told a consistent story since" arriving in Cuba, but did not inquire into alleged torture in Afghanistan leading to false confession).

Guantanamo."[16] According to the publicly released portion of his Department of Defense interrogation log,[17] al Qahtani was interrogated at Guantánamo for about 20 hours per day for seven weeks, during which period he was kept in isolation, intimidated with military dogs, sexually humiliated, and subjected to sleep and sensory deprivation.[18]

Under standard CSRT procedures, the 30 men whom al Qahtani implicated would never be told who had accused them of being Osama Bin Laden's bodyguards or under what circumstances, and al Qahtani's coerced accusations would be presumed accurate. This Court cannot know how many other prisoners remain at Guantánamo based on accusations produced by similar interrogation techniques.[19]

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[16] Dep't of Def., News Release (June 12, 2005), *available at* http://www.defenselink.mil/releases/2005/nr20050612-3661.html.

[17] Dep't of Def., *Interrogation Log, Detainee 063* (Nov. 23, 2002 to Jan. 11, 2003), *available at* www.time.com/time/2006/log/log.pdf.

[18] *Id.* at 27 (At one point al Qahtani's heart rate slowed to 35 beats per minute).

[19] *See*, *e.g.*, FBI email from (name redacted) to (name redacted) (Aug. 2, 2004), *available at* http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf (describing detainees chained to floor for 18-24 hours, subjected to extreme temperatures, sleep deprivation, and threatened with dogs); FBI email from (name redacted) to Gary Bald, Frankie Battle, and Arthur Cummings (Dec. 5, 2003), *available at* http://www.aclu.org/torturefoia/released/FBI. 121504.3977.pdf; Dep't of Def., *Army Regulation 15-6: Investigation Into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba, Detention Facility, Executive Summary* (June 9 2005), *available at* http://www.defenselink.mil/news/Jul2005/d20050714 report.pdf; Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y.

Furthermore, even when prisoners suspected that the allegations against them came from another detainee's torture, it was impossible for them to prove it. For example, Ibrahim Zeidan told his CSRT that he believed another person – Anwar Abu Faris – had made false statements about Zeidan receiving training in Afghanistan because Faris had been rendered to Jordan and tortured.[20] (Transcript at 3, 6, A369, A372.)

*Amici* are not aware of a single CSRT that permitted the prisoner to develop an evidentiary record regarding statements allegedly obtained by torture. Yet, according to the Government, the MCA/DTA does not allow this Court to consider facts outside the CSRT record bearing on the grounds for detention, even if those facts would show that the prisoner is detained based on a false confession obtained through torture. *Amici* cannot know if the torture allegations are true, but the reviewing court will likewise not be able to make that determination.

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TIMES (Nov. 30, 2004), *available at* http://www.nytimes.com/ 2004/11/30/politics/ 30gitmo.html?ex=1259470800&en=825f1aa04c65241f&ei =5088&partner=rssnyt.

[20] The State Department has reported on confessions obtained by torture in Jordanian prisons. Dep't of State, *Country Reports on Human Rights Practices – 2005 – Jordan* (Mar. 8, 2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/ 2005/61691.htm.

## B. The Fifth Amendment and the Common Law Prohibit Detention Based on Evidence Procured by Torture.

### 1. The Due Process Clause

"What has distinguished our ancestors? – That they would not admit of tortures, or cruel and barbarous punishment."[21] Patrick Henry's words expressed the Founding Fathers' deep abhorrence of torture, which they viewed as a tool of royal despotism. This abhorrence is embedded in our Constitution. The Supreme Court has consistently held that the Due Process Clause of the Fifth Amendment prohibits the government from depriving a person of his liberty based on statements obtained by torture. *See*, *e.g.*, *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *Rochin v. California*, 342 U.S. 165, 173-74 (1951). Indeed, the most fundamental purpose of the Due Process Clause is to "give protection against torture, physical or mental" to all persons subject to government power. *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), *overruled on other grounds by, Benton v. Maryland*, 395 U.S. 784 (1979); *see also Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (plurality); *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998).

Not only is evidence derived from torture inherently unreliable,[22] but allowing detentions based on such evidence corrupts the judicial process. An

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[21] 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447 (1836).

[22] *See, e.g., Jackson v. Denno*, 378 U.S. 368, 385-86 (1964).

unwavering stand against the use of this evidence is therefore essential. For that reason, federal courts have long held that "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned . . . ." *Miller*, 474 U.S. at 109. Beatings and other forms of physical and psychological torture are interrogation methods that are "revolting to the sense of justice." *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). Coerced confessions "offend the community's sense of fair play and decency. . . . [T]o sanction [such] brutal conduct . . . would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." *Rochin*, 342 U.S. at 173-74.

**2. The Common Law**

The common law similarly condemns torture and the use of its fruits. At a minimum, the Suspension Clause protects habeas as it existed at common law. *See*, *e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (citing *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996) and stating "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789'"). "It has always been the boast of Englishmen that torture was forbidden by the Common Law of the land."[23]

[23] Leonard A. Parry, *The History of Torture in England* 1 (1933).

Blackstone, for instance, derided the rack as "an engine of state, not of law."[24] Coke was likewise unequivocal in condemning torture, declaring without reservation that "there is no law to warrant tortures" in England.[25]

By the time the common law was developed in the colonies, and long before the Constitution was adopted, torture was a discarded relic of a repudiated past. *See A(FC) v. Secretary of State for the Home Department*, [2005] UKHL 71 (H.K. Dec. 8, 2005) ¶¶10-17 (holding common law forbids reliance on evidence gained via torture even where detaining power didn't conduct the torture). In 1628, King Charles asked the common law judges whether John Felton, assassin of the Duke of Buckingham, "might not be racked" to make him identify his accomplices and "whether there were any law against it."[26] The judges answered unanimously that the common law would not tolerate a prisoner's detention or prosecution based on

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[24] 4 William Blackstone, *Commentaries on the Laws of England* at 320-21 (1st ed. 1803).

[25] Edward Coke, *The Third Part of the Institutes of the Laws of England* 35 (W. Clarke & Sons 1817) (1644); *see also* David Hope, *Torture*, 53 Int'l & Comp. L.Q. 807, 811 (2004) ("the use of torture was not permitted in any of the common law courts in England as part of the ordinary course of the administration of justice.").

[26] Proceedings Against John Felton, 3 Howell's St. Tr. 367, 371 (1628); John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancient Regime* 134 (1977).

evidence secured by torture.[27] As noted above, the framers of the Constitution shared the English common law's abhorrence for evidence obtained by torture.[28]

### C. The Government's Reading of the MCA/DTA Would Allow Indefinite Imprisonment Based On Evidence Secured By Torture, in Violation of the Constitution and the Common Law.

No habeas court would ever rely on evidence obtained by torture, whether its review were grounded in the common law or the Fifth Amendment. Instead, when presented with allegations that evidence had been so obtained, a habeas court would ensure a searching inquiry. We do not understand Congress to have suspended the writ. *See* U.S. Const. art. I, § 9, cl. 2 (limiting Congress's power to suspend the writ to cases of invasion or rebellion). Absent a suspension, therefore, the constitutional question is simply whether allegations of torture under the MCA and DTA are handled in a fashion equivalent to that under the common law or the Constitution. *See, e.g.*, *Swain v. Pressley*, 430 U.S. 372, 384 (1977) (absent suspension, Congress cannot divest federal courts of habeas jurisdiction without providing an adequate and effective substitute "commensurate" with the scope of

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[27] Lawrence Herman, *The Unexpected Relationship between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 Ohio St. L.J. 101, 134 (1992) (citing Proceedings Against John Felton, 3 Howell's St. Tr. 367, 371 (1628)); *see also* Hope, *supra*, at 812; Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. Pa. J. Const. L. 278, 311 n.17 (2003).

[28] *See, e.g.*, *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940); 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447 (1836).

habeas). Regrettably, the CSRTs did not subject allegations of torture and other abuse to the same searching inquiry as would a habeas court. The MCA, therefore, is unconstitutional, at least in its treatment of such allegations.

Section 7 of the MCA purports to strip the federal courts of jurisdiction to hear habeas corpus claims by aliens whom the Executive has designated enemy combatants and to relegate such persons to the limited judicial review the DTA specifies. Under the DTA, the Court is limited to considering whether the CSRT followed its own "standards and procedures" in determining enemy combatant status and, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures . . . is consistent with the Constitution and the laws of the United States." DTA § 1005(e)(2)(C).

The Executive Branch interprets the first clause to prevent this Court from considering any evidence not presented to and considered by the CSRT. According to the Government, "the DTA does not authorize the submission of new evidence to this Court relating to the detainee's status as an enemy combatant."[29] Moreover, the Government claims the Tribunal's evidentiary record "is entitled to

[29] Resp'ts' Resp. in Opp'n to Mot. to Compel at 19, *Bismullah v. Rumsfeld*, No. 06-1197 (D.C. Cir., Aug. 21, 2006).

the strongest sort of presumption of regularity."[30] The Government would apparently relegate this Court to undertaking the most cursory review into whether the CSRT followed its own rules, beginning with a presumption that it did. If the Court adopted this interpretation, it – like the CSRT – would be forced to accept evidence obtained under torture, a result abhorrent to this Nation's judicial and legal principles.

The Government maintains that the second clause has no effect because the Constitution and laws of the United States do not apply to this Court's review of CSRT determinations. If this were correct, then MCA/DTA effectively would bar this Court from examining whether evidence presented to the CSRT had been obtained by torture or other illegal coercion, and if so, whether there remained a sufficient basis in law or fact to justify detention. Accordingly, the Government's interpretation would mean that the MCA/DTA fails to provide an adequate or effective substitute for habeas in violation of the Suspension Clause.

## CONCLUSION

The Executive's interpretation of the MCA/DTA threatens to force the federal judiciary to sanction indefinite detention based on evidence secured by torture. This prospect raises grave constitutional concerns and jeopardizes the

[30] *Id.*; *see also id.* at 14 ("In sum, the DTA does not provide for evaluating evidence outside of the record reviewing [sic] a CSRT's factual conclusion of evidentiary sufficiency.").

integrity of the Judiciary. This Court should not be made to accept evidence wrung from the prisoner by the simple expedient of brute force.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Federal Rules of Appellate Procedure 29(c)(5) and 32(a)(7)(C), and Circuit Rule 32(a)(7)C), that the foregoing Brief of *Amici Curiae* Retired Federal Jurists complies with the type-volume limitations set forth in Circuit Rule 32(a)(7)(B) and the Court's Order of October, 18, 2006.

This brief is in 14-point, proportionally spaced Times-New Roman Type, and the number of words in this brief, according to the word-processing system utilized in preparing it, is 4,881.

Dated: November 1, 2006

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## CERTIFICATE OF SERVICE

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