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No-_____

IN THE SUPREME COURT OF THE UNITED STATES

In re Abdul Hamid A1-Ghizzawi,

Petitioner.

PETITION FOR ORIGINAL
WRIT OF HABEAS CORPUS

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PARTIES TO THE PROCEEDING

Petitioner here and in the United States District Court for the District of Columbia is Abdul Hamid Al-Ghizzawi , Internment Serial Number (“ISN”) 654. Respondents here and in the District Court, or their successors, are George W. Bush, President; Robert M. Gates, Secretary of Defense; Rear Admiral Harry B. Harris, Commander, Joint Task Force-GTMO; and Colonel Wade F. Davis (United States Army), Commander, Joint Detention Operations Group.

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JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1651(a), 2241(a), 2241 (b) and 2242, and Article[s] I and III of the U.S. Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S Const. art. I, § 9, cl. 2 provides:

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.

U.S. Const. art. I, § 9, cl. 3 provides:

“No bill of attainder or ex post facto Law shall be passed.”

Section 2241 of Title 28, United States Code, as amended by the Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2636 (2006), is reproduced at Tab 9 of the Appendix.

Section 1005(e) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §1005(e), 119 Stat. 2680 (2005), is reproduced at Tab 10 of the Appendix.

PRELIMINARY STATEMENT

Abdul Hamid Al-Ghizzawi has been held for almost six years at Guantánamo Bay, Cuba after being apprehended by bounty hunters in Afghanistan where he was a shopkeeper living with his Afghani wife and infant child. Petitioner Al-Ghizzawi, like Mr. Ali (*In re Ali*, ---S.Ct.---, 2007 WL 1802098, 75 USLW 3694 (U.S. Jun 25, 2007) (NO. 06-1194), was subject to two Combatant Status Review Tribunals (“CSRT’s). However Mr. Al-Ghizzawi’s case also brings forth the extraordinary additional fact that a member of his first CSRT panel, the panel that found Mr. Al-Ghizzawi to *not* be an enemy combatant included panel member Lt. Col. Stephan Abraham. Lt. Col; Abraham provided an affidavit to this Court in June 2007 in that Petitioner’s successful Motion to Reconsider the denial of Certiorari in *Boumediene v. Bush*, ---S.Ct.---, 2007 WL 1854132, 75 USLW 3705, 75 USLW 3707 (U.S. Jun 29, 2007) (NO. 06-1195). In his affidavit Lt. Col. Abraham described not only the failed CSRT process and the pressure put on the CSRT panels to find the prisoners “enemy combatants” but he also described in detail the only panel that he sat on (panel 23) and the paucity of evidence against that detainee, Mr. Al-Ghizzawi, petitioner herein.

Mr. Al-Ghizzawi asks this Court to step in and provide guidance to the lower courts in this astonishing failure of process and to provide a bright line to guide both the lower courts and the executive. Only then will this ongoing procedural morass involving the Guantánamo detainees come to an end. Habeas

Corpus is, at its core, the most basic process under our Constitution, but for the men at Guantánamo that process has completely melted down, to the point of being nonexistent. The lower courts continue to be confused about their role in the Guantanamo detentions and are hesitant to act because they lack the clarity as to the type of process that is required to move these cases forward. By choosing the extraordinary example of the plight of Mr. Al-Ghizzawi this Court can confirm that there is a bottom line constitutional limit and at the same time guide the lower courts, not only as to the fact that they *must* move on to the merits of these habeas petitions, but how to do it. This is exactly the situation under which both certiorari and the original writ were designed.

STATEMENT OF THE CASE

Petitioner Abdul Hamid Al-Ghizzawi is a prisoner incarcerated at the United States Naval Station at Guantánamo Bay, Cuba since early 2002. Petitioner is a citizen of Libya who was living in Afghanistan when abducted by bounty hunters, sold to the United States military and then imprisoned at Guantánamo. He has been under Respondents' exclusive custody and control since that time. Petitioner's jailers refer to him, and to all other inmates at Guantánamo, by a number, not a name. Mr. Al-Ghizzawi's number is 654.

Mr. Al-Ghizzawi is now in his mid to late forties and had been living in Afghanistan for approximately 10 years (since shortly after the Russians left the country) prior to his being abducted by Afghani tribesmen and turned over first

to the Northern Alliance and then to the US forces in the late fall of 2001, in return for a cash bounty. Mr. Al-Ghizzawi is married to an Afghani woman and has a young daughter who was only a few months old when he was abducted. He and his wife owned and ran a small shop in Jalalabad where they sold honey and spices and later expanded to include a bakery. In the fall of 2001 when the United States military began bombing areas close to their city, Mr. Al-Chizzawi took his wife and five month old baby and fled their home and shop in Jalalabad, seeking safety in a rural area where his in-laws lived.

Not long after Mr. Al-Ghizzawi and his family arrived at his in-laws (approximately December of 2001) armed men came to the home and told the family to turn over “the Arab” (Al-Ghizzawi). Mr. Al-Ghizzawi cooperated with the bounty hunters to avoid any harm to his family. Mr. Al-Ghizzawi was first turned over to the Northern Alliance, then, in turn, sold to the US forces in return for a bounty under a U.S. program that provided large bounties in return for “terrorist and murderers.” (A001) Mr. Al-Ghizzawi is neither a terrorist nor a murderer but was instead the victim of greed in an impoverished nation. He has been held at Guantánamo since the spring of 2002 simply on the basis of being an Arab man in the wrong place at the wrong time, when the United States military indiscriminately provided a financial incentive to round up such men. Since his detention at Guantánamo, Mr. Al-Ghizzawi’s health has steadily deteriorated. Mr. Al-Ghizzawi suffers from both hepatitis B and tuberculosis and has not

been treated for either condition while being held at Guantánamo despite repeated requests for medical help. Counsel for Al-Ghizzawi had sought his medical records and medical treatment for his life threatening illnesses, but the District Court has, thus far declined to grant the requested relief. An appeal on these issues has been pending in the DC Circuit since November 28, 2006 (06-5394) No action has been taken by the Circuit Court on that appeal. To this day, Mr. Al-Ghizzawi has not been treated for these life threatening diseases.¹

Respondent convened two Combat Status Review Tribunals (CSRTs) as to Mr. Al-Ghizzawi, the first time classifying him as a **non-enemy combatant**. (A128-30, 132-34, 138-39)(Full Factual return at A121-A274) As further explained below, after the *first* Combatant Status Review Tribunal (“CSRT”) determined on November 23rd 2004 that Al-Ghizzawi was *not* properly classified as an “enemy combatant,” Matthew Waxman, the Assistant Secretary of Defense for Detainee Affairs, ordered the Panel to try again, evidently until the panel achieved the desired result, i.e. a finding that Al-Ghizzawi *was* an enemy combatant. (A116-17) Accordingly, in January 2005, a second CSRT panel determined on the identical evidence found insufficient by the first CSRT panel, that Mr. Al-Ghizzawi *was* properly classified as an ‘enemy combatant.’ (A129,131, 135-37) Mr. Al-Ghizzawi is now in his sixth year of incarceration at Guantánamo.

¹ In an abundance of caution Mr. Al-Chizzawi also filed a petition for habeas and a DTA Petition under the *purported* habeas “substitute” provided in the DTA in the Circuit Court— *Al-Ghizzirwi v. Gates*, No. 07-1089 (D.C. Cir. filed April 10, 2007). No action has been taken by the Appellate court on that petition even though its Senate sponsors insisted that it was an appropriate substitute for habeas corpus.

Mr. Al-Ghizzawi has now learned that “Panel 23,” the Panel that heard his *first* CSRT, was the panel that included Stephen Abraham, the Lieutenant Colonel in the United States Army Reserve who recently submitted an affidavit regarding the CSRT process that directly contradicts the contentions made in the government’s affidavit of Rear Admiral (retired) James M. McGarrah. Lt. Col. Abraham’s affidavit was filed in the successful motion to re-hear the denial of cert. in *Boumediene v. Bush*, --- S.Ct.---, 2007 WL 1854132, 75 USLW 3705, 75 USLW 3707 (U.S. Jun 29, 2007) (NO. 06-1195). (A 275-81). As Lieutenant Colonel Abraham declared in his affidavit, “On one occasion, I was assigned to a CSRT panel with two other officers, an Air Force Colonel and an Air Force Major, the latter understood by me to be a judge advocate. We reviewed the evidence presented to us regarding the recommended status of a detainee. *All of us found the information presented to lack substance.*” (A280 ¶ 21 *emphasis added*) Lt. Col. Abraham went on to state “On the basis of the paucity and weakness of the information provided both during and after the CSRT hearing, *we determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant*” (Id. at ¶23, *emphasis supplied*). According to Lt. Col. Abraham’s sworn testimony, Panel 23 was expressly ordered to reopen the hearing but the panel refused to reverse its determination that the prisoner was not properly an enemy combatant (and therefore could not be classified as an enemy) because there was absolutely no evidence to support a conclusion that the prisoner was

an enemy combatant. (Id at ¶23) That prisoner was Mr. Al-Ghizzawi. (A128)

Al-Ghizzawi was one of the more than 30 detainees who were originally found not to be an enemy combatant in the CSRT process.² Declaring that Panel 23's CSRT's determination as to Petitioner was in error, Deputy Assistant Secretary Waxman directed that Al-Ghizzawi's (and other detainees) classification be reconsidered. (A 116-17) In response – and, Petitioner submits, contrary to CSRT procedures for non-enemy combatant designations and now confirmed by the Affidavit of Lt. Col. Stephen Abraham (see, e.g., Wolfowitz Memo A004) – the authorities undertook an “inculplery search “for information that would justify the continued holding of Mr. Al-Ghizzawi(A118-120.). On January 18, 2005, the military officer charged with conducting that search, submitted the results of his search (Id.). On January 21, 2005, a new CSRT Panel (32) was convened for the express purpose of reassessing Petitioner's non-enemy combatant status (A126) until it came to the conclusion desired by the Pentagon, and sometime thereafter redesignated Mr. A1-Ghizzawi as an “enemy combatant”, again, even though the panel had *no new evidence* (A121-A274).

In an email chain (which included mention of Mr. Al-Ghizzawi's non enemy combatant status) culminating in a message to the Chair of the newly convened CSRT Panel 32, the following text appeared:

² The pressure put on original panels to find prisoners to be enemy combatants, as sworn to by Lt. Col. Abraham, should put all panels' findings into question.

* Please note that I did everything I could to ensure this was new evidence, but in fact the reconciliation the various exhibits on the G drive with the DAB folders and my inculplery search may have duplicated some of the references.

* Inconsistencies will not cast a favorable light on the CSRT process or the work done by OARDEC. This does not justify making a change in and or (sic) itself but is a filter by which to lookBy properly classifying them as EC, then there is an opportunity to (1) further exploit them here in [G] TMO and (2) when they are transferred to a third country, it will be controlled transfer in status..”

(A119-20).

Within weeks of Mr. Al-Ghizzawi’s first CSRT determination, the second tribunal panel, number 32³, which acceded to the Pentagon’s desired outcome, was formed in Washington, DC without Petitioner’s presence or knowledge and a new personal representative that had never met with Petitioner was assigned as his personal representative.⁴ Although Panel 32 claimed it reviewed “new” evidence in overturning panel 23’s determination, a review of the classified CSRT confirms that there was, in fact, no new evidence. On the basis of what the panel **claimed** was new evidence (which the government has also “classified” as secret so that counsel cannot release the information publicly), that second tribunal unsurprisingly declared Mr. Al-Ghizzawi to be an enemy combatant. As this Court can see there was nothing new for the second tribunal and the pages that

³ This same Panel 32 was used in **at least** one other do-over CSRT. *In re Ali*. (*In re Ali*, — S.Ct. - --, 2007 WL 1802098, 75 USLW 3694 (U.S. Jun 25, 2007) (NO. 06-1194)

purportedly refer to that evidence should not have been classified.

Mr. Al-Ghizzawi did not participate in his first CSRT because the notice from the government notified Al-Ghizzawi that his participation was not mandatory and further notified him that by failing to participate he was not waiving *his right to proceed in federal court*.⁵ (A23) Al-Ghizzawi was never informed of the result of his first tribunal and was never given the opportunity to participate in the second tribunal.

Mr. Al-Ghizzawi had been desperately seeking legal counsel since early 2005 so that he could pursue his case in federal court and so that he could obtain medical treatment. (A282-85) In December 2005, upon retaining counsel, Mr. Al-Ghizzawi filed a habeas petition in the United States District Court for the District of Columbia (05-cv-2378). Two weeks after Mr. Al-Ghizzawi filed his habeas petition in the District Court, the President signed into law the Detainee Treatment Act of 2005 (“DTA”), Pub. L. No.109-148, 119 Stat. 2739 (2005). The government thereupon asserted and argued in *Boumediene* and *al Odah*, that DTA § 1005(e) deprived the Court of Appeals of jurisdiction over the pending appeals. The government’s outrageous position prompted two rounds of supplemental briefing and a second oral argument in that appeal, further extending the litigation quagmire that has plagued these cases.

⁴ In both respects this is illegal under the CSRT process.

⁵ Further, acknowledging the government’s own position at the time that the CSRTs were conducted that it was not intended as an adequate substitute for a habeas corpus petition, the notice to Al-Ghizzawi expressly advised that by failing to participate in the CSRT process, he was not waiving his right to proceed in federal court.

The District Court immediately stayed Mr. Al-Ghizzawi's case while the Court of Appeals for the District of Columbia Circuit considered the effect of the DTA in *Boumediene* and *al Odah*. From that time until the present, no further action has ever been taken on Mr. Al-Ghizzawi's habeas petition.

The more than five years' incarceration that Mr. Al-Ghizzawi and hundreds of other Guantánamo prisoners have been forced to suffer without so much as a single judicial hearing makes a mockery of habeas corpus as "an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person" *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). Mr. Al-Ghizzawi respectfully asks this Court to use his case to effectively show the lower courts and the executive that there is a bottom line constitutional limit implicated here and to provide a bright line guide as to how the courts should proceed. Unless this Court provides that guidance the legal limbo that has lasted these many years will continue indefinitely. In the alternative, Mr. Al-Ghizzawi asks this Court to direct the District Court to immediately lift its stay of his case and proceed to the merits of his petition and provide specific guidance to the Court for that relief.

"The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned." *Price v. Johnston*, 334 U.S. 266, 291 (1948)- but habeas review "must be speedy if it is to be effective." *Stack v. Boyle*, 342 U.S. 1, 4 (1952).

As these Kafkaesque proceedings drag on below, Petitioner Al-Ghizzawi

is being held in isolation in Camp 6 (since December 2006), a “super-max” style prison, at least 22 hours a day. (A 296 ¶37-38) Mr. Al-Ghizzawi has not seen or talked to his wife and young daughter in almost six years and he is rapidly losing his mind as he sits in total isolation. (A286 ¶ 55) He rarely sees direct sunlight and has no access to fresh air except those times when he is placed in an outdoor cage for “recreation time”. A299 ¶47 .During his 2 hours per day of “recreational time” (which, on alternating days, is in the middle of the night), Al-Ghizzawi is placed in a cage where he can sometimes see other prisoners but is punished if he tries to touch or greet them. A300¶52, A296¶39. There is no shade in the “recreation” cage which sits out in the blistering sun of Guantánamo. A300¶52. Mr. Al-Ghizzawi is compelled to complain to get so much as clean clothes. A296¶39. He is denied privacy when he uses the toilet; even female guards can see him. A296¶39. He is always cold in the air conditioned facility as are his food and drinks. A298¶44. He has no blanket, only a plastic cover to warm himself. A296¶39. He has no socks and the thermal shirts that are allowed to the detainees are taken away for the least infraction of the “rules”. (Mr. Al-Ghizzawi had his thermal shirt taken away when he had toilet paper in his pocket at shower time and did not exit the shower immediately upon the call of the guard) A297-8¶ 44. He eats every cold meal alone. A297 ¶40, A298 ¶44. Like all Guantánamo prisoners, he is not allowed any visitors other than occasional trips by counsel and the Red Cross, and he is not allowed to make phone calls.

A296-7 ¶39. He is not allowed access to the news and has a limited selection of books available of which he is only allowed one per week. A296¶39 As this Court recently affirmed, even convicted murderers cannot be made to endure conditions like these without first providing them the benefit of due process- *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005), let alone a man such as Mr. Al-Ghizzawi who has been charged with no wrongdoing and for whom there is absolutely no evidence that he has ever been a threat to the United States. Until this Court acts Mr. Al-Ghizzawi and the other prisoners are forced to endure conditions that are not permitted for prisoners of war under the Geneva Conventions or army regulations, for convicted criminals in federal prisons, or for caged animals under Humane Society guidelines.

SUMMARY OF ARGUMENT

Petitioner Al-Ghizzawi has been imprisoned for more than five years – without, he asserts, having been afforded due process of law or other fundamental rights – by a government that promises justice and adherence to the rule of law but has delivered him into a penal hell, as British jurist Lord Goldsmith has termed it, a legal black hole. Paralyzed by the stays imposed by the Court of Appeals, and the periodic intervention and interference of Congress, *the* lower courts are unable to provide habeas review that “must be speedy if it is to be effective.” *Stack v. Boyle*, 342 U.S. 1, 4 (1952). The lower courts are clearly in need of firm guidance in the procedural morass that has resulted in the illegal

detention of Mr. Al-Ghizzawi and hundreds of other men at Guantánamo. There must be a stopping point where the government must be forced to either charge Mr. Al-Ghizzawi or release him. This Court has the authority to redress this injustice and affront to American values, and this Court should use Mr. Al-Ghizzawi's case as a vehicle to provide a bright line guide to the lower courts, showing them how to move forward on the merits and granting some form of relief to Mr. Al-Ghizzawi and the many men at Guantánamo who are imprisoned in a gross miscarriage of justice.

ARGUMENT

I. HABEAS REVIEW “MUST BE SPEEDY IF IT IS TO BE EFFECTIVE.”

“The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless [government] action.” *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969). As the Court stated:

The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justices *within* its reach are surfaced and corrected.

Id. at 291. “Since habeas is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.” *Hensley v. Man. Court*, 411 U.S. 345, 351 (1973). See also *Peyton v. Rowe*, 391- U.S. 54, 5860

(1968).

Precisely because the use of habeas is ‘limited to cases of special urgency,’ *Hensley*, 411 U.S. at 351, and because “a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty,” *Peyton*, 391 U.S. at 63, see also *Harris*, 394 U.S. at 291 (“the office of the writ is ‘to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints”), the Court has emphasized time and again the writ’s demand for “speed, flexibility, and simplicity.” *Hensley*, 411 U.S. at 350. Especially pertinent here, the Court has made plain that “a habeas corpus proceeding must not be allowed to flounder in a ‘procedural morass.” *Harris* 394 U.S. at 291-92 (quoting *Price v. Johnston*, 334 U.S. 266, 269 (1948)). Thus far, morass, quagmire, or some similar synonym is the only possible description of proceedings that have languished for over five years, without so much as a single hearing on the merits of a single prisoner’s detention.

II. THIS COURT MAY EXERCISE ITS ORIGINAL HABEAS JURISDICTION TO END THE LEGAL LIMBO IN THE COURTS BELOW.

A. This Court Has Jurisdiction To End The Limbo Below.

This Court’s jurisdiction is sufficiently broad to remedy the injustice that has befallen Mr. A1-Ghizzawi. In *Rasul* this Court held that Petitioner and other men imprisoned at Guantánamo Bay have the right to habeas corpus. *Rasul*, 542 U.S. at 466. In addition to finding that they have that right under 28 U.S.C. §2241, *Rasul* confirmed that they were entitled to the writ under the common law, and

would have been entitled to the writ as of 1789 when the Constitution was adopted. *Id.* at 479-82. “[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789.” *INS v. St Cyr*, 533 U.S. 289, 301 (2001) (internal quotations omitted). Accordingly, Petitioner has a right to the writ “as it existed in 1789.” Even if this right exists nowhere else for Mr. Al-Ghizzawi it exists in this Court itself as of 1789 and that right is protected by the Suspension Clause.

Despite this Court’s holding in *Rasul* the writ of habeas corpus has not been available to the men at Guantánamo by the lower courts, apparently because of the confusion by the lower courts as to whether they must defer to congress or follow the constitution. The lower courts desperately need guidance from this Court as to whether Mr. Al-Ghizzawi and the men at Guantánamo can continue to be held without charge, and assuming not, what kind of process these men are entitled to. This court has the power to hear Mr. Al-Ghizzawi’s case and to use this case to establish a bright line rule for the processes that should be recognized. (At a minimum this Court can order that the government either charge Mr. Al-Ghizzawi, so that he can defend himself against the charge, or set him free.)

B. The Court’s Power Of Habeas Review Extends To This Case.

If this Court determines that it does not want to hear Mr. Al-Ghizzawi’s case directly Petitioner asks that this Court send his habeas petition back to the District Court with explicit instructions to hear Mr. Al-Ghizzawi’s case

immediately. “[T]hat this court is authorized to exercise appellate jurisdiction by habeas corpus directly is a position sustained by abundant authority.” *Ex parte Siebold*, 100 U.S. 371, 374 (1880). This Court’s habeas or habeas-equivalent jurisdiction stems from its jurisdiction over actions originally brought in the District Court (such as the habeas action filed by Petitioner) or the Court of Appeals (such as the DTA review and habeas action filed by Petitioner). See generally U.S. Const. art III, § 2, ci. 2; 28 U.S.C. §§ 1254 and 2241; *Siebold*, 100 U.S. at 374 -375 (“having this general power to issue the writ, the court... may issue it in the exercise of appellate jurisdiction where it has such jurisdiction”).

The District Court and the Court of Appeals have “allowed [this case] to flounder in a procedural morass.” *Harris*, 394 U.S. at 292. All the while Petitioner continues, year after year, to be unlawfully and cruelly imprisoned at Guantánamo Bay. This Court therefore has jurisdiction over this matter. This Court has jurisdiction because each lower court has failed to act; and because the exceptional circumstances of this case warrant it (see Rule 204(a)). However, if this Court declines to hear Al-Ghizzawi’s habeas petition directly and as a guide for the lower courts on how this process can and should work, one or both of the lower courts must have jurisdiction over Petitioner’s action – either the District Court under habeas, or the Court of Appeals under the DTA or habeas (but only under the DTA if its review mechanism affords the *same* relief as habeas, see *Swain v. Pressley*, 430 U & 372, 381 (1977) (habeas substitute must be “neither

inadequate nor ineffective to test the legality” of the detention)) and therefore this Court, if it declines to hear Mr. Al-Ghizzawi’s habeas petition directly, should direct either the District Court or the Circuit Court, to “relieve the prisoner from the unlawful restraint” that the paralysis of the lower courts force him to endure. *Ex parte Yerger*, 75 U.S. 85, 103 (1869).

Even if the MCA stripped this Court’s habeas powers, it is well established that every federal court “retains jurisdiction to review any underlying jurisdictional fact at issue” in determining whether those courts have jurisdiction. *Jobson v. Ashcroft*, 326 F.3d 367, 371 (2d Cir. 2003) (citing *Sui v. INS.*, 250 F.3d 105, 110 (2d Cir. 2001)). In this instance, the jurisdictional fact at issue is whether petitioner is “properly detained as an enemy combatant” by the United States. 28 U.S.C. § 2241(e)(1). In order for this Court to determine whether it has jurisdiction, it must be determined whether Petitioner is properly detained as an “enemy combatant.” “Thus, the jurisdictional inquiry merges with the question on the merits of the case” requiring this court to evaluate both of these questions, simultaneously, rather than avoid them both. *Jobson*, 326 F.3d at 371.

In the case of a similar jurisdiction-limiting provision, the Courts of Appeals that have considered the issue have unanimously found that a statute that specifically divests a court of jurisdiction does not prevent a court from first evaluating whether that provision applies based on the necessary jurisdictional facts. *Drakes v. Zimski* 240 F. 3d 246, 247 (3d Cir. 2001) (and cases collected therein). In *Drakes*, the Third Circuit found that the jurisdiction-stripping

provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) did not prevent the court from first identifying whether the court had jurisdiction because the questions of jurisdiction and merits were inextricably intertwined.

In *Drakes*, the jurisdictional provision of the IIRIRA provided: [N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in S [18?] U.S.C. §1182(a) (2).

240 F.3d at 247 (internal citations omitted). Here, this Court faces the MCA’s jurisdiction stripping provision, which is similar to that under the IIRIRA:

No court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant....

28 U.S.C. §2241(e)(I).

In *Drakes*, to determine whether the IIRIRA provision prevented the court from considering the petitioner’s claim, the court recognized it first had to determine whether it “had jurisdiction to determine [its] jurisdiction under §1252(a)(2)(C).” 240 F. 3d at 247. That was so even though the Board of Immigration Appeals had “ordered Brakes deported” and thus had concluded that he *had* committed the requisite criminal offense under S[18?] U.S.C. §1252(a)(2)(C) and was properly deported. The analysis here is the same. This Court cannot be blocked by the MCA’s attempted jurisdiction-stripping provision without as a threshold matter determining whether the provisions of the MCA apply to

Petitioner in the first place.

III. THE DEFINITION OF “ENEMY COMBATANT” USED IN *HAMDI* SHOULD GOVERN THE DETERMINATION OF THE LAWFULNESS OF PETITIONER’S IMPRISONMENT.

If this Court declines to hear Petitioners Habeas petition directly under 28 U.S.C. §2241(a) then Petitioner respectfully requests, pursuant to 28 U.S.C. §2241(b), that this Court immediately remand and refer Petitioner’s application to the District Court for an expedited hearing and determination as to whether Petitioner is an “enemy combatant” under the standard set forth by this Court in *Exparte Quirin*, 317 U.S. 1, 37 (1942) and *Hamdi*, 542 U.S. at 516.

At least six decades of United States and international law define an enemy combatant or “enemy belligerent” as a person who engaged in or intended to engage in hostile acts against the detaining power. As this Court has instructed:

[Persons] who associate themselves with the military arm of the enemy government [presumably including a terrorist organization], and with its aid, guidance and direction [engage in] *hostile acts*, are enemy belligerents within the meaning of the Hague Convention and the law of war.

Quinn, 317 U.S. at 37 (emphasis added). Even very recently, a plurality of the Court has applied this definition in the context of the current war on terror, finding that “one who takes up arms against the United States” is an enemy combatant. *Hamdi*, 542 U.S. at 516 (a case in which the United States itself argued that Hamdi had “engaged in an armed conflict against the United States”). The

Fourth Circuit adopted these definitions in the context of the “war on terror” in its recent opinion in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), holding that because “Padilla associated with the military arm of the enemy, and with its aid, guidance and direction entered this country bent on committing hostile acts on American soil” he “falls within *Quirin’s* definition of enemy belligerent.” 423 F.3d at 392 (emphasis added); see also *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (explaining that “[t]hose who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured”) (emphasis added, internal citations omitted).

Never before has the term enemy combatant been applied by a United States court to a person, such as Petitioner Al-Ghizzawi, who has committed no hostile act and as to whom no evidence indicates any hostile intent. In the words of the Congressional Research Service

We are unaware of any U.S. precedent confirming the constitutional power of the President to detain indefinitely a person accused of being an unlawful combatant’ due to mere membership in or association with a group that does not qualify as a legitimate belligerent, with or without the authorization of Congress.

CR5 Report for Congress, Detention of American Citizens as Enemy Combatants (Updated March 31, 2005) at 11 (emphasis added).

The principles of international law similarly require active hostility in order to be classified as an enemy combatant. As early as the 1700s it was well established that “as long as persons in occupied territory refrain from all

violence, and do not show an intention to use force” they are not appropriately considered enemy combatants. Wolff, *Jus Gentium Methodo Scientifica Pertractum* (Translation of the Edition of 1764 by Joseph H. Drake, Carnegie Endowment 1934) at 409410; *see also* de Vattel, *Law of Nations of the Principles of Natural Law* (Translation of the Edition of 1758 by Charles C. Fenwick, Carnegie Institution 1916) at 283 (explaining that “[p]rovided the inhabitants of [an occupied country] refrain from acts of hostility, they live in safety as if they were on friendly terms with the enemy”). “The custom of civilized nations... has therefore exempted... private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations *unless actually taken in arms, or guilty of some misconduct* in violation of the usages of war by which they forfeit their immunity.” Wheaton, *Elements of International Law* 3d Ed. (Philadelphia 1846) at 394-395 (emphasis added).

Although the laws of war allow a belligerent force to capture and detain “secret participants in hostilities such as banditti, guerillas, spies, &c” (Opinion of James Speed, 11 Op. Atty Gen. 297 (July 1865) at 6)] such enemies must be “[s]ecret, but active participants” (*Id.* at 3-4). There is no evidence that Petitioner Al-Ghizzawi ever was an active participant in hostilities against this country. As Al-Ghizzawi’s CSRT confirms “Al-Ghizzawi was a shopkeeper in Afghanistan married to an Afghani woman.” Al-Ghizzawi does not represent a threat to the United States or its interests. Not a scintilla of evidence shows that Petitioner Al-Ghizzawi acted or intended to act with hostility towards the United States or its

coalition partners.

Consistent with United States and international law, even the MCA contains a definition of enemy combatant which requires a hostile act or material support of a hostile act:

A person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its cobelligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, Al Qaeda, or associated forces).

10 U.S.C. §948a(l)(i). In addition to this definition, the MCA contains the list of crimes for which an enemy combatant can be charged and tried under that Act.

10 U.S.C. §950v (“[c]rimes triable by military commissions”). Petitioner Al-Ghizzawi maintains that his conduct fails to satisfy the criminal elements of any of these chargeable crimes.

One of the crimes listed in the MCA – “attacking civilians” – actually defines a “civilian” for purposes of the Act’s prosecution provisions as a person “*not taking active part in hostilities.*” 10 U.S.C. §950v (b)(2) (emphasis added).

This definition is consistent with international law; ironically, however, although Petitioner Al-Ghizzawi is being detained as an enemy combatant, one who attacked him on the battlefield could be prosecuted for attacking a civilian. Said differently, Petitioner Al-Ghizzawi is specifically defined as a civilian, and not as a combatant, under the MCA itself.

CONCLUSION

Based on the treatment of Petitioner Al-Ghizzawi, the government's position appears to be that it may detain anyone, *indefinitely*, based solely on unsupported and disputed allegations of "associations," even where it has never produced any evidence that the accused person ever committed a single act of hostility towards the United States or even intended to commit such an act. If the promise of the Great Writ stands for anything, it is that such a proposition cannot be correct. For the reasons stated herein this Court should hear Mr. Al-Ghizzawi's habeas petition directly and use his case as a vehicle to show the lower courts that enough is enough and that the courts must move forward *now* on these petitions and furthermore, this Court should provide the courts with guidance on how to enforce the bottom -line constitutional limits implicated herein. In the alternative, this Court should send Mr. Al-Ghizzawi's case back to the district court with clear instructions to the court on how to proceed to the merits of Mr. Al-Ghizzawi's habeas petition.

Respectfully submitted,

Attorney for Petitioner

Counsel apologizes for the unprofessional look of this petition. It was filed at the "secure facility" because of the "classified" nature of some of the material.

CERTIFICATE OF SERVICE

I, H Candace Gorman, hereby certify that on July 26th, 2007, I filed the PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS, and APPENDIX in the U. S. SUPREME COURT and that the petition and appendix were served upon the following individuals as indicated:

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