No. 07-6827

IN THE SUPREME COURT OF THE UNITED STATES

IN RE ABDUL HAMID ABDUL SALAM AL-GHIZZAWI, PETITIONER

ON PETITION FOR A WRIT OF HABEAS CORPUS

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider petitioner's petition for an original writ of habeas corpus.

2. Whether, even assuming that this Court has jurisdiction to entertain the petition, petitioner has exhausted his available remedies in the court of appeals and demonstrated that "exceptional circumstances" warrant the issuance of the writ.

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MOTION TO DISMISS

The Solicitor General, on behalf of the United States, respectfully files this motion to dismiss the above-captioned matter, styled as a "Petition for Original Writ of Habeas Corpus."

STATEMENT

1. Petitioner is a Libyan citizen detained at the United States Naval Base at Guantanamo Bay, Cuba. A Combatant Status Review Tribunal (CSRT) determined that petitioner is properly classified as an enemy combatant. Factual Return to Petition for Habeas Corpus, Al-Ghizzawi v. Bush, No. 05-cv-02378 (D.D.C. filed Oct. 6, 2006), Exh. A (Factual Return).[1] The CSRT reached that

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[1] An earlier CSRT determined that petitioner was not properly designated as an enemy combatant. But a CSRT decision is not final until reviewed by a legal advisor and approved by the CSRT director, who may "approve the decision" or "return the record to the Tribunal for further proceedings." Pet. App. 4. In this case, the CSRT director returned the record for further proceedings. A second tribunal was convened on January 25, 2005, "to review

conclusion after considering evidence that petitioner "is a member of [the] Libyan Islamic Fighting Group (LIFG), which is a designated foreign terrorist organization." Factual Return, Unclassified Summary of Basis for Tribunal Decision 1. He traveled "extensively throughout North Africa and the Middle East" before being apprehended in Afghanistan by Afghan Intelligence Forces in January 2002. Ibid.

2. In December 2005, petitioner, through counsel, filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia. Al-Ghizzawi v. Bush, No. 05-cv-02378 (D.D.C.). Following the enactment of the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, the district court stayed proceedings pending resolution of related cases before the District of Columbia Circuit. Order, Al-Ghizzawi v. Bush, No. 05-cv-02378 (D.D.C. filed July 19, 2006).

On October 6, 2006, the government filed a factual return to Al-Ghizzawi's district court habeas petition. The return consisted of the final record of proceedings before the CSRT pertaining to petitioner.

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additional classified evidence, unavailable to the previous Tribunal." Factual Return, CSRT Decision Report Cover Sheet. The second tribunal concluded that petitioner was properly classified as an enemy combatant. That determination was reviewed by the legal advisor and approved by the CSRT director, and therefore constitutes the final CSRT decision.

Soon thereafter, Congress enacted the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600. Section 7(a) of the MCA amends 28 U.S.C. 2241(e) to provide:

> 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 or is awaiting such determination.

MCA § 7(a), 120 Stat. 2636.

On February 20, 2007, the District of Columbia Circuit decided Boumediene v. Bush, 476 F.3d 981, cert. granted, 127 S. Ct. 3067, 3078 (2007) (argued Dec. 5, 2007), holding that the MCA eliminates federal court jurisdiction over petitions for habeas corpus filed by aliens detained as enemy combatants at Guantanamo Bay and does not violate the Suspension Clause. Based on that decision, the government asked the district court to dismiss the habeas petition for lack of jurisdiction. Petitioner opposed dismissal. Instead, petitioner asked the district court to enter a "stay and abey" order pending exhaustion of his remedies in the District of Columbia Circuit under the DTA. Notice of Intent to File DTA Petition in the Circuit Court of Appeals and Request for Stay and Abey Order, Al-Ghizzawi v. Bush, No. 05-cv-02378 (D.C.C. filed Apr. 9, 2007) (Stay Motion). The matter remains pending before the district court.

On April 10, 2007, petitioner filed a petition for review of his CSRT proceedings with the District of Columbia Circuit under

the DTA. Al-Ghizzawi v. Gates, No. 07-1089 (D.C. Cir.). That petition remains pending in the court of appeals.

ARGUMENT

Petitioner seeks an "original" writ of habeas corpus under 28 U.S.C. 2241, but this Court lacks jurisdiction to grant the requested relief, because Section 7(a) of the MCA has removed habeas jurisdiction over any claims challenging the detention of aliens, such as petitioner, held as enemy combatants at Guantanamo Bay. MCA § 7(a), 120 Stat. 2636. Moreover, even if this Court had jurisdiction, petitioner has not demonstrated that "exceptional circumstances," Sup. Ct. R. 20.4(a), warrant the issuance of the writ. In particular, because he has not exhausted his remedies under the DTA, he has not shown that "adequate relief cannot be obtained in any other form or from any other court." Ibid. Therefore, the petition should be dismissed, and there is no need for this Court to hold the petition pending the decision in Boumediene.

1. Petitioner's request that this Court issue an original writ of habeas corpus should be rejected because Section 7(a) of the MCA -- which provides that "[n]o court, justice, or judge" shall have jurisdiction to consider habeas actions brought by an alien detained as an enemy combatant -- unambiguously divests this Court of jurisdiction. In Boumediene v. Bush, No. 06-1195 (argued Dec. 5, 2007), this Court will consider whether the MCA is

constitutional. It is unnecessary to hold this petition pending the resolution of Boumediene, since relief in this case would be inappropriate regardless of how Boumediene is decided. If the MCA is constitutional, then this Court has no jurisdiction over the petition. If the MCA is unconstitutional, then this Court would retain jurisdiction, but the district court would retain jurisdiction as well, and there would be no reason petitioner could not seek relief there. In any event, apart from Congress's removal of habeas jurisdiction under the MCA, petitioner has not met this Court's demanding standards for obtaining a writ of habeas corpus. See Sup. Ct. R. 20.4(a) (noting that an original writ of habeas corpus "is rarely granted").

a. Petitioner has failed to show that the relief afforded him in the court of appeals under the DTA is inadequate. Indeed, petitioner does not cite or address the judicial review provisions of the DTA. Instead, petitioner argues (Pet. 16-18) that this Court should exercise its habeas jurisdiction because lower-court litigation is not proceeding quickly enough. Any delay, however, is the direct result of petitioner's own actions. Even though the DTA was enacted in December 2005, petitioner failed to file a DTA petition until April 2007, only a few months before filing his habeas petition with this Court.[2] Moreover, petitioner himself has

[2] In his motion to stay habeas proceedings in the district court, petitioner argued that his failure to pursue remedies under the DTA should be excused because "petitioner * * * did not

moved to stay the district court habeas proceedings pending DTA review.

Petitioner also alludes to alleged problems with the CSRT process. But those allegations can be considered by the court of appeals in the first instance in the course of the review afforded by the DTA. In particular, petitioner argues (Pet. 8-11) that his classification as an enemy combatant -- after an initial CSRT concluded that he was not an enemy combatant -- was improper because it was based on insufficient evidence. That claim can be asserted in an action brought under the DTA. See DTA § 1005(e)(2)(C)(i), 119 Stat. 2742 (court of appeals can review whether the "status determination * * * was consistent with the standards and procedures specified by the Secretary of Defense" for CSRTs, including "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence").

Petitioner suggests (Pet. 22-25) that he does not qualify as an enemy combatant under the definition set out in this Court's decisions in Ex parte Quirin, 317 U.S. 1 (1942), and Hamdi v.

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even have the potential DTA remedy prior to October 2006 because, as the Supreme Court held [in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006)], the DTA did not apply retrospectively to habeas corpus petitions filed prior to the effective date of the statute." Stay Motion 3. Petitioner misreads Hamdan, which held merely that the DTA's limitation on habeas jurisdiction did not apply retrospectively. Even before Hamdan, there was no doubt that petitioner was free to pursue his remedies under the DTA. Nevertheless, he failed to do so.

Rumsfeld, 542 U.S. 507 (2004).[3] That claim, too, may be presented to the court of appeals. See DTA § 1005(e)(2)(C)(ii), 119 Stat. 2742 (court of appeals may evaluate whether the standards used to make the enemy-combatant determination are "consistent with the Constitution and laws of the United States"). In sum, petitioner has not shown that review under the DTA is inadequate, as required by this Court's Rule 20.4(a).

b. Nor are there "exceptional circumstances" warranting this Court's exercise of "original" habeas jurisdiction. Sup. Ct. R. 20.4(a). Petitioner is situated no differently from any of the other aliens detained at Guantanamo Bay as enemy combatants, and thus must exhaust his remedies under the DTA, a fact petitioner appears to have recognized in requesting a stay in the district court for precisely that purpose. Stay Motion 2. Indeed, in his motion to stay the habeas proceedings, petitioner acknowledged that the DTA proceeding could "render moot some or all of the claims pending" before the habeas court. Ibid.

2. By asking this Court to "immediately remand and refer Petitioner's application to the District Court for an expedited

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[3] Petitioner urges (Pet. 20-21) that the question of his status as an enemy combatant is a "jurisdictional fact" that this Court may reach consistently with the MCA's withdrawal of habeas jurisdiction. The relevant "jurisdictional fact," however, is not whether petitioner is an enemy combatant, but whether he "has been determined by the United States to have been properly detained as an enemy combatant." MCA § 7(a), 120 Stat. 2636 (emphasis added). That jurisdictional fact is undisputed.

hearing and determination as to whether Petitioner is an 'enemy combatant,'" (Pet. 22), petitioner is effectively seeking mandamus relief from this Court. See 28 U.S.C. 1651(a); Will v. United States, 389 U.S. 90, 95 (1967). Given that petitioner himself has sought a stay of proceedings, the district court can hardly be faulted for the fact that an "expedited hearing" has not yet been held. In any event, petitioner's complaints about the handling of his case by the district court should be directed, in the first instance, to the court of appeals, not to this Court.

CONCLUSION

The petition for a writ of habeas corpus should be dismissed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

DECEMBER 2007