IN THE SUPREME COURT OF THE UNITED STATES

No. 06A797

SHARAF AL SANANI, APPLICANT

v.

GEORGE W. BUSH, ET AL.

OPPOSITION TO APPLICATION FOR INJUNCTION REQUIRING FACTUAL RETURN PENDING PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

The Solicitor General respectfully opposes the application, filed February 15, 2007, for an injunction requiring production of a factual return pending the filing of a petition for a writ of certiorari to the District of Columbia Circuit. Applicant is an enemy combatant detainee at Guantanamo, Sharaf Al Sanani (ISN No. 170) who filed a petition for a writ of habeas corpus in the district court under 28 U.S.C. 2241. On January 31, 2007, the district court administratively closed the case (and others) pending the resolution of jurisdictional issues before the District of Columbia Circuit. See Ex. 3 to Application (App.), at 5. Today, the District of Columbia Circuit issued its decision holding that the federal courts lack jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as enemy combatants at Guantanamo Bay. See Boumediene v. Bush, No. 05-5062, and Al Odah v. United States, No. 05-5064, slip op. (Feb. 20, 2007) (hereafter Al Odah) (attached). Applicant's extraordinary request for an injunction pending his filing of a petition for certiorari, which was premised on the lower courts' alleged failure to adjudicate

the Guantanamo detainee cases in timely fashion, has thus been rendered moot. At a minimum, the issuance of the D.C. Circuit's decision eliminates the alleged need for this Court to take the extraordinary step of entering the requested injunctive relief.

The court of appeals held that Congress expressly removed habeas jurisdiction over this action in October 2006 in enacting the Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA). Because there is no jurisdiction over this habeas action, applicant's request must be denied. There is also no reason for this Court to begin administering procedural aspects of habeas cases that the district court can handle should this Court ultimately hold that there is habeas jurisdiction in these circumstances. Indeed, both the district court and the court of appeals have made clear that they would address the factual return issue once the threshold jurisdictional questions in Al Odah are resolved. In sum, this Court should not depart from the normal course of proceedings to issue procedural rulings in applicant's habeas case.

Additionally, applicant's asserted basis for seeking to compel respondents to produce the classified factual return is not valid. The factual return in a habeas case is submitted to facilitate the court's review of the legality of detention under the habeas statute. Applicant, however, has filed this application not to obtain the return for that purpose, but to use it to assist him in separate administrative proceedings being conducted by the Defense Department Administrative Review Board (ARB). See App. 7. Because the courts have no authority to regulate the ARB proceedings, applicant's asserted need to have the material for the ARB is not a legitimate basis for seeking judicial action.

While Congress removed habeas jurisdiction in the MCA, it did not leave applicant without a means to challenge his detention as an enemy combatant. In December 2005,

Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, §§ 1001-1006, 119 Stat. 2680, 2739 (DTA), which confers upon the court of appeals jurisdiction to review the determination made by a Combatant Status Review Tribunal (CSRT) that applicant is an enemy combatant. Applicant has not sought relief under the DTA. If he were to do so, the CSRT record that explains the basis for applicant's detention could be made available to his counsel -- including the bulk of classified material in the record -- under the terms of an appropriate protective order entered by the court of appeals. Applicant could commence a challenge to his detention under the DTA without dismissing this habeas case, which he could pursue in the event this Court were to rule that habeas jurisdiction remains. However, by not utilizing the review scheme enacted by Congress, applicant must accept that a factual return need not be provided unless and until the threshold jurisdictional questions are resolved in his favor.

ARGUMENT

Applicant seeks an injunction pending certiorari. Applicant has plainly failed to meet the stringent standard for the issuance of such extraordinary relief by a single Justice. The "All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue such an injunction." Brown v. Gilmore, 122 S. Ct. 1, 2 (2001) (Rehnquist, J., in chambers). Such relief "is to be used 'sparingly and only in the most critical and exigent circumstances.'" Ibid. (quoting Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313, (1986) (Scalia, J., in chambers) and Fishman v. Schaffer, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)). "Such an injunction is appropriate only if 'the legal rights at issue are "indisputably clear."'" Ibid. Applicant has no right to compel the production of a factual return, much less one that is "indisputably clear." This Court

should not order the production of the factual return for several reasons. First, as the court of appeals held today, the federal courts lack subject matter jurisdiction. See Al Odah, slip. op. 9-13 (holding that the MCA strips the federal courts of jurisdiction over habeas petitions filed by alien detainees at Guantanamo Bay); id. at 13-24 (holding that the MCA is not an unconstitutional suspension of the writ). The district court's lack of jurisdiction means that applicant cannot prevail in establishing an entitlement to a factual return under 28 U.S.C. 2243. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("Without jurisdiction [a] court cannot proceed at all in any cause."); see also Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). Second, even putting to one side the lack of subject-matter jurisdiction, there is no basis for this Court to take the extraordinary step of administering procedural aspects of this or any of the other hundreds of detainee habeas actions pending in the lower courts. That is particularly true in light of the fact that the D.C. Circuit has now issued the decision the absence of which was the premise for the extraordinary relief sought by applicant.

Third, applicant's counsel may obtain access to the classified material that they seek by bringing an action under the DTA and following appropriate procedures. Applicant argues that he will ultimately prevail in obtaining either a factual return or the CSRT administrative record because even if the MCA is upheld "Applicant still would be entitled to basic information explaining his detention * * * to prepare adequately for the MCA review process." App. 10. As a practical matter, the government largely agrees: if applicant files an action under the DTA; if the court of appeals enters an appropriate protective order; and

if any other preliminary issues that could arise are resolved in applicant's favor, then counsel will be provided access to the CSRT record, including most of the classified material in the record, under the terms of the protective order that would be entered by the court of appeals.

Along these lines, in other cases filed under the DTA, the government has proposed a form of protective order tailored to review under the DTA. See, e.g., Bismullah v. Gates, No. 06-1197, Mot. for Entry of Protective Order (D.C. Cir.) (filed Aug. 25, 2006). That order provides that properly authorized and cleared counsel will be given access to the classified CSRT record. Applicant could proceed under the DTA while maintaining this action so he can press ahead with it in the event this Court were to rule that habeas jurisdiction still exists. Applicant, however, has declined to file a review petition under the DTA, the most ready method to obtain the classified record supporting his detention.

In the court of appeals, the government has also offered to allow entry of its proposed DTA protective order on an interim basis, while disputes over its provisions are worked out in the court of appeals, to allow counsel more immediate access to the classified CSRT record. See Parhat v. Gates, No. 06-1397, Opp. to Mot. for Entry of Protective Order at 6 n.3 (D.C. Cir.) (filed Dec. 29, 2006). While applicant has declined to file an action under the DTA, the government's offer shows that it is acting in good faith and not trying to preclude counsel in this or any other case from having an opportunity to access the record. Ultimately, the government's position is simple: access to material in the CSRT record must occur under an appropriate protective order issued by a court with jurisdiction.

While the government has attempted to accommodate counsel in its proposed

protective order for DTA cases, applicant is wrong in contending that he has a right to the classified material in the record upon which his enemy combatant determination was made. As we have explained in detail in Al Odah and Boumediene and in the merits briefs in the subsequent appeal of a habeas discovery order in Al Odah, Nos. 05-5117 through 05-5127 (D.C. Cir.), providing an enemy combatant (or his lawyer) classified information is unprecedented in the history of wartime detention and has never been required under the Geneva Conventions or any other treaty; it is not required by the Due Process Clause, see Al Odah, slip op. 18-24 (detainees at Guantanamo have no Fifth Amendment rights); and it is not required by the DTA. Nor is there such a right under the governing military orders establishing the CSRTs and Administrative Review Boards.

Nonetheless, as we explained, the government has made clear its willingness to take extraordinary and unprecedented steps to allow robust participation by counsel in DTA proceedings. See, e.g., Bismullah, Mot. for Entry of Protective Order (filed Aug. 25, 2006). We anticipate that if applicant chooses to seek review under the DTA, his counsel will obtain whatever access is provided by an appropriate protective order. The availability of the information applicant seeks under alternative procedures he has chosen not to follow is hardly a justification for asking this Court to take the extraordinary step of undoing the lower courts' case management orders and compelling respondents to produce a factual return in this action, especially when the federal courts lack jurisdiction.

Finally, while applicant also contends that he needs immediate access to the CSRT record in order to prepare for the Department of Defense's Administrative Review Board (ARB) proceeding, App. at 7, that contention lacks merit and provides no basis for the entry of injunctive relief by this Court. Because Congress has not subjected the ARB

proceedings to judicial review, and because the ARBs do not decide whether a detainee is an enemy combatant, the federal courts have no legitimate basis for regulating them.

A DTA action challenges the "validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A). A habeas action challenges the legality of detention. See 28 U.S.C. 2241. The CSRT record or habeas factual return is filed with the court and, where appropriate, provided to counsel to assist the parties and the court in resolving that case. See 28 U.S.C. 2243 (providing for production of "return certifying the true cause of the detention" so that court may "hear and determine the facts, and dispose of the matter as law and justice require"); DTA § 1005(e)(2)(A) (court authorized to review the "validity of any final decision of a CSRT"); see also Fed. R. App. P. 16(a) (addressing the scope of the "record on review * * * of an agency order"). Nothing in the DTA or the habeas statute requires the government to produce the record (or a factual return) for reasons unrelated to the litigation in which the record or return is under review.

The ARB proceedings have no bearing on applicant's legal challenge because they are not conducted to determine the legality of applicant's detention, and the ARB does not itself have authority to rule on his designation as an enemy combatant. Instead, the ARB evaluates whether it is in the interest of the United States to continue to detain an enemy combatant whose detention has already been determined by the Department of Defense to be proper. See ARB Mem. § 1. (July 14, 2006) <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>. An ARB decision is an exercise of military discretion based on factors such as "whether the enemy combatant represents a continuing threat to the U.S. or its allies" and "whether

there are other factors that could form the basis for continued detention." ARB Mem. § 1. If the ARB process results in a finding of eligibility for transfer from Guantanamo, the United States will pursue options for release or transfer to other countries. Such a finding does not mean, however, that the detainee is not an enemy combatant or that the continued detention of the detainee as an enemy combatant is in any way improper.[1] Moreover, there is no constitutional, statutory, or law-of-war right to periodic reconsideration of enemy combatant status or to access to classified information in connection with any such reconsideration afforded as a matter of executive grace.

The military's notice that applicant's counsel may submit information for use in the ARB proceedings (see App. 3) reflects no more than that the military believes that habeas counsel might have or might wish to submit information relevant to the factors to be considered in the proceedings. It does not in any way render the ARB proceedings ancillary to the habeas litigation or grant habeas counsel a right to obtain information pertaining to or for use in ARB proceedings. Granting applicant's request would burden the government with potentially having to provide factual returns for all detainees who are represented by counsel and have upcoming ARB proceedings, even though the ARB process is unrelated to the habeas proceedings and the federal courts lack jurisdiction over them.

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[1]While the ARB does not reconsider a detainee's enemy combatant status, new information submitted during an ARB that relates to a detainee's enemy combatant status will be brought to the attention of the Deputy Secretary of Defense. See ARB Mem., Enc. 13. The Deputy Secretary may then determine that a new CSRT should be convened.

CONCLUSION

For the foregoing reasons, this Court should deny the application for an injunction requiring factual return pending a petition for a writ of certiorari.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
Counsel of Record

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