No. 06A797

IN THE
SUPREME COURT OF THE UNITED STATES

SHARAF AL SANANI,

Applicant,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF APPLICATION FOR INJUNCTION REQUIRING FACTUAL RETURN PENDING PETITION FOR A WRIT OF CERTIORARI

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February 21, 2007

REPLY BRIEF IN SUPPORT OF APPLICATION FOR INJUNCTION REQUIRING FACTUAL RETURN PENDING PETITION FOR A WRIT OF CERTIORARI

Applicant Sharaf Al Sanani respectfully submits this reply to the Respondents' "Opposition to Application for Injunction Requiring Factual Return Pending Petition for a Writ of Certiorari" ("Opposition" or "Opp."):

1. Respondents suggest that this Court is somehow bound by the court of appeals' decision in *Boumediene v. Bush*, No. 05-5062, and *Al Odah v. Bush*, No. 05-5064, 2007 WL 506581 (D.C. Cir. Feb. 20, 2007) ("*Al Odah*"), in which a two-judge majority upheld the jurisdiction-stripping provisions of the MCA over a vigorous dissent by Judge Rogers. This lower court decision does not control this Court's determination of its jurisdiction. *See, e.g., United States v. Mine Workers*, 330 U.S. 258, 291 (1947) (recognizing that "'this court, and this court alone'" decides its jurisdiction and can preserve the *status quo* pending that decision). Until this Court reviews this split decision and issues the final word on the MCA, and in accordance with the overwhelming equities in Applicant's favor, the *status quo* should be preserved by granting the limited relief sought in the Application.

In any event, even the majority decision in *Al Odah* refused Respondents' request to review "the merits of the detainees' designation as enemy combatants," finding that the "record does not have sufficient information to perform the review

the DTA allows." 2007 WL 506581, at *9. Judge Rogers' dissent found the DTA review procedure to be an inadequate substitute for *habeas*, urging instead that the normal "return and traverse procedures of 28 U.S.C. § 2241 *et seq.*" – requiring the government to produce "'credible evidence that the [detainee] meets the enemy-combatant criteria'" – should be utilized. *Id.* at *24 (Rogers, J., dissenting) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)).

Thus, under both of the opinions in *Al Odah*, a sufficient factual record bearing on the "merits of the detainees' designation as enemy combatants" must be developed, whether review will be pursuant to the DTA or by *habeas*. This is consistent with the decisions of numerous district court judges holding that detainees would be entitled to factual returns regardless of the outcome of *Al Odah*. Application, at 2 & nn.1-2; *see also id.* at 10. Indeed, the government "largely agrees" that Applicant would be entitled to the factual return, but asks that the production of information await Applicant's compliance with an elongated procedure in an as-yet-unfiled DTA action. Opp., at 5-6; *see also infra* § 3.

For purposes of the relief sought here, however, justice delayed is justice denied, because the deadline for Applicant's 2007 ARB submission is February 23, 2007. The district court and the court of appeals denied Applicant's request for emergency relief based on the continued pendency of *Al Odah*, leaving Applicant

no choice but to seek relief from this Court.[1] Now, days before the ARB deadline, only this Court has the power to prevent the lower courts' delays from substantively prejudicing Applicant.

Respondents challenge the ARB proceedings as "unrelated" to either Applicant's *habeas* action or to his putative "DTA action." *See* Opp., at 8-11. The government does not and cannot deny, however, that it has repeatedly cited the ARB proceedings as a "safety valve" ameliorating the constitutional infirmities of the DTA and MCA. *See* Application, at 10. Respondents, moreover, acknowledge that the ARB constitutes the once-a-year militarily-authorized opportunity for a detainee to seek "release or transfer" from Guantánamo. Opp., at 9-10. Respondents further concede that the purpose of the ARB is to determine whether a detainee constitutes a "continuing threat" and that "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." *Id.* at 10 & n.1.

Given the virtual absence of process and the potentially life-changing significance of the ARB, it is not asking too much for counsel to be provided with the basic information needed to contribute meaningfully to this year's ARB. From

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[1] The decision in *Al Odah* does not lift the stay automatically and oblige the court of appeals to rule on Applicant's previously-filed emergency motion. To the contrary, the stay order contemplates a thirty-day period after the "disposition" of *Al Odah* for the parties to submit "motions to govern further proceedings." *See* Application, Ex. 7.

a practical standpoint, this ARB may well constitute Applicant's last chance to get out of Guantánamo with his sanity and, potentially, his life. Whether the ARB has any validity or is simply "a matter of executive grace," Opp., at 10, basic fairness dictates that a ruling on Applicant's continued detention be informed by an analysis of the purported justification (if any) for sending him to Guantánamo in the first place.

2. Respondents argue that the Application asks the Court to engage in "administering procedural aspects of this or any of the other hundreds of detainee *habeas* actions pending in the lower courts." Opp., at 5. The Application, however, seeks modest relief: the CSRT record of a single detainee. Granting this relief – as numerous district court judges have done in other detainee cases, both before and after passage of the DTA and MCA – would in no way oblige this Court to undertake day-to-day management of the detainee docket. Moreover, the emergency basis for this specific request (the 2007 ARB submission deadline) expires on February 23, 2007, thereby ensuring that this Court will not be deluged with similar motions.

3. Respondents contend that Applicant should be relegated to "bringing an action under the DTA and following appropriate procedures." Opp., at 5. According to the government: "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." *Id.* at 6 (emphasis in original). In other words, despite the fact that Applicant already is a party to a heavily-negotiated protective order in the district court regarding classified information, and despite the fact that Applicant's counsel already has applied for and received security clearances to review that information, Applicant's access to information should await another action; another round of litigation on a protective order; and another series of "preliminary issues" to be raised by Respondents in connection with the DTA actions (actions which were not even available at the time Applicant filed his *habeas* petition).

The unusual "DTA action" to which the government refers is an original proceeding in the D.C. Circuit, in which the court of appeals reviews whether a CSRT determination was "consistent with the standards and procedures specified by the Secretary of Defense for the Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the government's evidence)." DTA § 1005(e)(2)(C) (set forth in a note to 10 U.S.C. § 801). Given Respondents' practice of litigating every procedural aspect of these cases, they can be expected to interpose numerous "preliminary issues" in

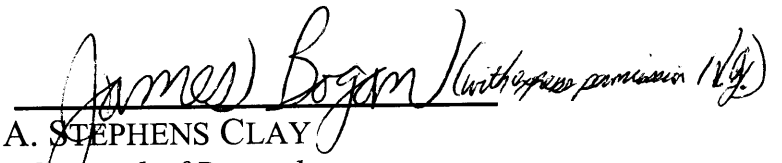
these novel proceedings. In fact, that is exactly what has happened in the DTA cases filed thus far, and there has been no meaningful progress in those cases. *See, e.g., Bismullah v. Gates*, No. 06-1197 (D.C. Cir.); *Parhat v. Gates*, No. 06-1397 (D.C. Cir.). Moreover, the DTA Actions are to be filed in a court of appeals that is not structured to function as a trial court and that already has effectively deprived Applicant and other detainees of their day in court for nearly two years.

In the meantime, Applicant will continue to suffer the unfathomable consequences of detention in Guantánamo – consequences which Respondents completely ignore in the Opposition. *Cf.* Application, at 5. Indeed, by the time the court of appeals figures out how to adjudicate a "DTA action," Applicant could very well have experienced the gravest of irreparable injuries, *i.e.*, insanity or death. Applicant is entitled to know why he was sent to Guantánamo five years ago (if any justification exists) now, when he has a chance to try for a release, not at some hypothetical future juncture in an as-yet-unfiled separate action.

CONCLUSION

The Court should grant this Application and order Respondents to provide a full factual return immediately.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on the 21st day of February, 2007, a copy of the foregoing APPLICATION FOR INJUNCTION REQUIRING FACTUAL RETURN PENDING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT was hand-delivered to the Court Security Officer, who will serve the following persons when the document has been determined unclassified:

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