No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SHARAF AL SANANI,

Applicant,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

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

GITANJALI S. GUITERREZ
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Telephone: (212) 614-6439
Facsimile: (212) 614-6499

ZACHARY KATZNELSON
REPRIEVE
P.O. BOX 52742
London EC4P 4WS
United Kingdom
Telephone: (020) 7353 4640
Facsimile (020) 7353 4641

A. STEPHENS CLAY
Counsel of Record
JAMES F. BOGAN III
C. ALLEN GARRETT JR.
VINAY J. JOLLY
LESLIE J. ABRAMS
MIGUEL M. DURAN
KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530
Telephone: (404) 815-6500
Facsimile: (404) 815-6555

Counsel for Petitioner

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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

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the District of Columbia Circuit:

Applicant, a detainee at Guantánamo Bay Naval Station in Cuba, hereby applies for an order requiring the production of a factual return, pursuant to 28 U.S.C. § 2243, pending the filing of, and final action on, a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

1. *Proceedings in the district court.* Applicant Sharaf Al Sanani a/k/a Sharaf Ahmad Muhammad Masud (ISN 170) ("Applicant") is one of the petitioners in *Mohammon, et al. v. Bush, et al.*, No. 05-CV-02386 (RBW) (D.D.C. filed Dec. 21, 2005), a *habeas* petition filed on behalf of more than one hundred Guantánamo detainees approximately fourteen months ago. On January 11, 2006, less than a month after the filing of the *habeas* petition, District Judge Reggie B. Walton stayed all proceedings pending decisions by the District of Columbia Circuit in *Al Odah v. United States*, No. 05-5064, and *Boumediene v. Bush*, No. 05-5062. A copy of this stay order is attached hereto as Exhibit 1. As set forth below, the *Al Odah* and *Boumediene* appeals have now been pending for nearly two years,

while the conditions at Guantánamo and of the detainees have deteriorated significantly. *See* § 2.

Other district judges have entered similar stays pending resolution of the *Al Odah* and *Boumediene* appeals but have nevertheless ordered Respondents to provide factual returns.[1] Many of these judges have emphasized that the detainees have a right to this basic factual information, regardless of the resolution of the jurisdictional issues raised by the Detainee Treatment Act ("DTA") and the Military Commissions Act ("MCA"), the statutes at issue in *Al Odah* and *Boumediene*. In *Al-Ghizzawi,* No. 05-CV-2378 (JDB), slip op., at 3-4 (D.D.C. Aug. 9, 2006), for example, the court concluded that the DTA could not justify the government's refusal to produce factual returns: "even if respondents' interpretation of the DTA's exclusive jurisdiction provision is correct ... completion of any ... judicial review [in the D.C. Circuit under the provisions of the DTA] would necessitate that petitioner's counsel have access to the CSRT records."[2]

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[1] *See, e.g., Feghoul v. Bush*, No. 06-CV-618 (RWR), slip op., at 2-3 (D.D.C. Oct. 31, 2006) ("Despite the lack of finality regarding the issues on appeal . . . it is hardly sensible to withhold or frustrate something that no one doubts is petitioner's right – a meaningful communication with counsel regarding the factual basis of petitioner's detention."); *Zadran v. Bush*, No. 05-CV-2367 (RWR) (D.D.C. July 19, 2006); *Almerfedi v. Bush*, No. 05-CV-1645 (PLF) (D.D.C. Mar. 6, 2006).

[2] *See also, e.g., Razakah v. Bush*, No. 05-CV-2370 (EGS), Mem. Op. and Order, at 2 (D.D.C. Jan. 23, 2007) (holding that factual return "'will obviously be needed regardless of the resolution of the jurisdictional question'") (quoting *Kahn v. Bush,* No. 05-CV-1001 (ESH) (D.D.C. Aug. 10, 2006); *Said v. Bush*, No. 05-CV-2384 (RWR), slip op. at 4 (D.D.C. May 23, 2006) ("Whatever forum is ultimately held to

On December 22, 2006, Applicant's counsel received an e-mail from Lt. David Cooper inviting counsel to participate in the annual Administrative Review Board ("ARB") proceedings. *See* Applicant's Motion for Factual Return (copy attached hereto as Exhibit 2), at Ex. C. The purpose of the ARB is for the military to make a recommendation as to whether an "enemy combatant" should continue to be detained, either because he is a threat to the United States or its allies or because his continued detention is needed for intelligence or other law enforcement purposes. *Id.*[3] In his e-mail, Lt. Cooper stated that any submission must be made "no later than February 23, 2007." *Id.*

None of the publicly-available information about Applicant, including the statement of evidence purportedly made at his Combat Status Review Tribunal (CSRT), shows that he is an "enemy combatant" or otherwise explains his detention. *See infra* § 3. Accordingly, to gather the information necessary for a meaningful ARB submission, Applicant's counsel contacted Respondents' counsel and requested the production of a full factual return. *See* Ex. 2, at Ex. E. When Respondents refused, Applicant moved for emergency relief, which was cleared for filing in the district court on January 23, 2007. *See* Ex. 2, at 1.

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be the proper one to rule on a pre-DTA habeas petition, it is hardly sensible to withhold what no one disputes petitioners will ultimately be likely to receive.").

[3] *See also* Revised Implementation of Administrative Review Board Procedures for Enemy Combatants at U.S. Naval Base at Guantanamo Bay, Cuba, at 2, *available at* http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf.

Several other detainees filed motions for factual returns, seeking emergency relief based on the February 23 ARB submission deadline. On January 31, 2007, however, Judge Walton entered an Order in all of the detainee cases before him, denying all of the pending motions (including Applicant's emergency motion) and administratively closing all of the pending cases (including *Mohammon*). *See* Order (copy attached as Exhibit 3), at 5. The stated bases for the ruling was that the MCA "raises serious questions concerning whether this Court retains jurisdiction to hear the above caption cases"; that these "questions" are pending resolution in the *Al Odah* and *Boumediene* appeals; and that the district court lacks the "authority to take any action in these cases" until after the D.C. Circuit rules. *Id.*

2. *Proceedings in the court of appeals.* The *Al Odah* and *Boumediene* appeals have been pending for nearly two years. No ruling has issued in these cases despite the fact that the decisions giving rise to the appeals were issued twenty-four months ago; that oral argument was heard eighteen months ago; that this Court clearly ruled that the DTA did not apply to pending actions in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), six months ago; and that Congress enacted the MCA four months ago.[4]

[4] *See Al Odah v. United States*, Case Nos. 05-5064, *et al.*, Guantánamo Detainees' Motion to Expedite Issuance of Decision on the Merits and to Lift the Stay (D.C. Cir. filed Feb. 2, 2007) ("Motion to Expedite") (copy attached hereto as Exhibit 4).

During this extraordinary delay, the conditions at Guantánamo Bay have deteriorated markedly. As described in a declaration of counsel filed below, the new Camp 6, opened last December, cages detainees in small, concrete cells for at least 22 hours per day, deprived of virtually all human contact. With rare exceptions, they cannot see, hear, or touch another human being. In some cells, the lights never dim. Only once per day are prisoners taken from their cells – often in the middle of the night – and removed to a small pen with a patch of sky two stories above. Prisoners may pass days without a glimpse of natural light. *See* January 20, 2007 Declaration of Sabin Willett, attached to Motion to Expedite (Exhibit 4 hereto).

The emotional and mental states of the detainees have declined rapidly. The extreme psychological and emotional consequences of prolonged isolation, including insomnia, confusion, hallucinations, anxiety, depression, self-mutilation, and insanity, are well-documented. *See, e.g.,* Peter S. Smith, *The Effects of Solitary Confinement on Prison Inmates*, 34 Crime & Just. 441, 452 (Spring 2006). This Court has held that such conditions constitute cruel and unusual punishment. *See Robinson v. California*, 370 U.S. 660, 675 (1962). Such conditions would not be tolerated for prisoners of war under either the Geneva Convention or Army regulations, or even for convicted criminals in federal prison.[5]

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[5] *See* Geneva Convention III Relative to the Treatment of Prisoners of War, arts. 38 & 71, 6 U.S.T. 2062 (Aug. 12, 1949); Army Regulation 190-8 §§ 3-2, 3-4, 3-5, 4-1; 28 C.F.R. §§ 544.31, 544.32, and 544.80.

Within days of the district court's Order, Applicant and several other detainees filed notices of appeal to the court of appeals, as well as motions for emergency relief pursuant to Fed. R. App. 8(a).[6] In response to the first-filed emergency motion (submitted by detainee Maher El Falesteny), the court of appeals ordered expedited briefing, to close by February 8, 2007. That day, Respondents filed a supplemental brief stating that, in fact, Mr. El Falesteny had been cleared for transfer, and thus his ARB proceeding – the basis for the emergency motion – would not take place.[7]

Respondents' last-minute attempt to "moot" Mr. El Falesteny's legal challenge was not necessary, however, because the court of appeals had no intention of acting on that challenge. Specifically, on February 9, the court of appeals issued a brief *per curiam* decision (copy attached as Exhibit 7), providing in pertinent part:

> **ORDERED**, on the courts's [sic] own motion, that these cases be held in abeyance and consideration of the motion for injunction be deferred pending further order of the court, in light of the possibility that the pending decisions in No. 05-5064, Al Odah v. United States, and No. 05-5062, Boumediene v. Bush, will affect the disposition of these cases.

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[6] A copy of Applicants "Emergency Motion Pursuant to Rule 8 for Immediate Injunction Pending Appeal," without exhibits, is attached hereto as Exhibit 5.

[7] A copy of Respondents' "Supplement to Opposition to Emergency Motion for Immediate Injunction Pending Appeal and Motion for Leave to File Supplement" is attached hereto as Exhibit 6.

Thus, as with the district court, the court of appeals refused to rule on the emergency motions due to the mere possibility that the other appeals might influence the resolution of these cases.

3. Applicant's right to a factual return. Pursuant to 28 U.S.C. § 2243, the district court is to enter an order to show cause "forthwith" after a *habeas* petition is filed, after which the respondent has "three days" to provide a factual return. In this case, despite the fact that the *habeas* petition has been pending for almost fourteen months, and despite the fact that Applicant has been detained for nearly five years, Respondents have produced no information explaining his detention.

Applicant has a compelling need for this information for his 2007 ARB submission – his only government-authorized opportunity ***this year*** to challenge his continued detention. The CSRT summary of the evidence against Applicant provides no factual basis for his incarceration, omitting entirely any entry under paragraph 3(b), the paragraph where his alleged "hostile acts" against the United States or its coalition partners should be specified.[8] Applicant is not even alleged to have been a "Fighter for" or "Member of" al Qaeda, the Taliban, or any other terrorist organization. Instead, as with 60% of the detainees, Petitioner is alleged

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[8] *See* Ex. 2, at Ex. A; *see also* Mark Denbeaux, et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* (Feb. 8, 2006) ("Seton Hall Report on Detainees") (explaining that many CSRT summaries of evidence identify no hostile acts whatsoever), *available at* http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

merely to have been "associated with" al Qaeda, an incredibly broad designation capable of reaching the most attenuated of relationships. *See* Seton Hall Report on Detainees, at 9.

Regarding Applicant's alleged "association with" al Qaeda, the only specific allegations about that are that he

(a) "left Sana'a, Yemem [sic], and traveled to Kandahar, Afghanistan" in June of 2001;

(b) spent two months in Afghanistan for "religious training";

(c) traveled to Kabul, Afghanistan and Jalalabad, Afghanistan in September of 2001; and

(d) "fled Jalalabad" in December of 2001, where he allegedly "surrendered to the Pakastani [sic] Army."

See Ex. 2, at Ex. A. Thus, Applicant is alleged to have been in Afghanistan for several months in 2001;[9] to have "fled" the country in December of 2001; and to have "surrendered" to Pakistani authorities then. Not a single criminal act is alleged, much less any hostile act directed at the United States or its allies.

[9] As this Court already has held, mere presence in a country in which combat operations are occurring is not a sufficient basis for concluding that a party was "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," as required under the judicially-reviewed definition of "enemy combatant." *Hamdi v. Rumsfeld*, 542 U.S. 507, 526-527 (2004).

The "Summarized Detainee Statement" for ISN 170 (Ex. 2, at Ex. B), which purportedly reflects statements made on Applicant's behalf (counsel has not been able to confirm its authenticity), also is publicly available.[10] According to this document, Applicant asserted that he is "not associated with" al Qaeda and responded to every one of the "allegations" against him, acknowledging that he

(a) went to Kandahar for "religious purposes to visit";

(b) spent two months in Kandahar "in one place";

(c) went to "Kabul" for the purpose of observing "how they did Islamic practices in different places in Afghanistan," only to leave and go to Jalalabad because "the Afghans were trying to kill Arabs at the market" in Kabul; and

(d) traveled with a group to Pakistan, where he "surrendered to the Pakistani forces so they would take me to the Yemeni Embassy in Pakistan."

Ex. 2, at Ex. B. Rather than helping him go to the Yemeni Embassy, however, the Pakistani authorities "put me in jail, then transferred me to the Americans." *Id.*[11]

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[10] *See* pages 14-15 of http://www.dod.mil/pubs/foi/detainees/csrt/Set_39_2629-2646.pdf.

[11] Capture in Pakistan and "sale" to United States forces is a recurring Guantánamo theme. *See* Seton Hall Report, at 14-15. The United States government had disseminated numerous flyers in Pakistan promising significant bounties in exchange for delivering purported al Qaeda and Taliban members to American forces. *Id.* Applicant, who is epileptic, would have been a particularly vulnerable target for an opportunistic bounty hunter, because he lost his passport in the course of crossing the mountains into Pakistan. *See* Ex. 2, Ex. B (explaining that he left his passport and other belongings behind during the trip across the mountains because "I was weak and could no longer carry my bag ...").

The Statement ended with the following two sentences:

> All the rules in the United States and in the world, the person is innocent until you prove his is guilty not innocent. But, here with Americans, the Detainees are guilty until proven innocent.

Id. Applicant's statement is an apt characterization of his five-year detention.

Respondents are likely to contend that the MCA eliminates all *habeas* rights, including the basic right to a factual return. Even assuming the MCA somehow survives constitutional scrutiny (which Applicant vigorously disputes), however, Applicant still would be entitled to basic information explaining his detention, because he would be entitled to prepare adequately for the MCA review process.

Moreover, Respondents repeatedly have touted the ARB process as a "safety valve" that ameliorates the MCA's constitutional infirmities. The ARB is a complete sham, however, if Applicant and his counsel are not given notice of the purported factual basis for his detention prior to any hearing. Whatever Respondents might argue about the parameters of the detainees' due process rights, they cannot dispute the core "right to notice and an opportunity to be heard." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). It is this basic, fundamental right that Applicant invokes in seeking a factual return prior to the ARB submission deadline.

The reality is that Applicant stands at the brink of another year of detainment, a year that could see the loss of his hope, his sanity, and – as the June suicides show – his life. Despite having kept Applicant in Guantánamo for most of his adult life

(he was born in 1978), Respondents have never provided him, his counsel, or the world with any excuse for his detention. The lower courts have been complicit in this exercise in executive abuse by shamelessly abdicating their judicial responsibility while Applicant and the other detainees continue to languish.

4. There is a "reasonable probability" that four Justices will grant certiorari and a "fair prospect" that the Court will conclude upon review that the decision below was erroneous. For all of the foregoing reasons, Applicant is entitled to the relief sought by this Application, regardless of the outcome of the pending appeals in the D.C. Circuit, and regardless of the ultimate fate of the MCA. Respondents do not and cannot possibly contend that Applicant can be detained forever without any explanation and suffer a *de facto* life sentence, with no notice that he has ever committed a crime.

The lower court's efforts to duck these issues merit certiorari review and reversal. Under Justice Cardozo's landmark decision in *Landis v. North American Co.*, 299 U.S. 248, 255 (1936), a stay is justified "[o]nly in rare circumstances." Even in cases of "extraordinary public moment," a stay must not be "immoderate in extent" or "oppressive in its consequences," and the "public welfare or convenience" must be promoted. *Id.* at 256. Judicial discretion is "abused if [a] stay [is] not kept within the bounds of moderation." *Id.*

The Court followed *Landis* in *Clinton v. Jones*, 520 U.S. 681, 706 (1997), recognizing that a trial court has broad discretion to stay proceedings "incident to its power to control its own docket." This discretion is limited, however, where a party faces prejudice from a "lengthy and categorical stay." *Id.* at 707. In *Clinton*, the stay was reversed as an "abuse of discretion," where a civil plaintiff faced a "danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." *Id.* at 707-708.

The district court in *Clinton* had merely stayed the trial of a civil damages claim until after the time a sitting President left office. Here, in contrast, the courts below have stayed *habeas* cases challenging the physical detention of Applicant and hundreds of others without charge. The stay in this case already has exceeded a year, during which time Guantánamo has evolved into a modern-day concentration camp and detainee despair has manifested itself in hunger strikes and suicide. *See* Jan. 20, 2007 Willett Declaration (attached to Ex. 4). The open-ended stays entered below, shutting down the detainees' cases while the court of appeals continues its two-year sabbatical, cannot be characterized as anything less than a judicial abdication of responsibility.

In these cases, moreover, concerns about "loss of evidence" are far more direct and tangible than in *Clinton*. Having kept the justification for the detention of Applicant and others secret for years (assuming there is any justification),

Respondents already have ensured that finding and questioning witnesses or bounty-paid "informants" will be difficult if not impossible. Each day ensures that the trails of the Pakistani tribesmen responsible for selling most of the Guantánamo populace into detention will grow irretrievably cold. And the "possible death of a party" is a subject of real and constant concern among all who watch Guantánamo.

Ultimately, one is hard-pressed to imagine a stay more "immoderate in its extent" and "oppressive in its consequences." Thirty months ago, in *Rasul v. Bush*, 542 U.S. 466 (2004), this Court held that the Guantánamo detainees were entitled to seek habeas relief. Six months later, district court judges disagreed as to the scope of such relief, giving rise to the *Al Odah* and *Boumediene* appeals. While those appeals have been pending for nearly two years, the DTA has been enacted; this Court has held that it did not apply to pending cases; and the MCA has been enacted. These events triggered more briefing, and even additional oral argument, yet no decision has issued. Now a new Congress has been elected and is considering undoing the MCA, all before the court of appeals has managed to rule upon the first round of appeals in the wake of the 2004 *Rasul* decision.

Through all of these events, Applicant and the other hundred-plus petitioners in *Mohammon* have been waiting patiently for any information explaining their confinement. During this year, some detainees abruptly are released (often with no explanation for their confinement) while others are transferred to Camp 6. When

Respondents present a possibility for counsel to do something approaching productive (*i.e.*, make a submission for the 2007 ARB proceeding), they then refuse to provide the most basic information needed for meaningful participation. In the recent rulings rejecting this most basic relief, the courts below have legitimized these executive abuses, hiding behind their own failure to adjudicate the claims before them.

5. Irreparable harm will result from rejecting this application. The 2007 ARB is Applicant's one opportunity this year to convince Respondents that he no longer should be detained at Guantánamo. Applicant simply requests some explanation for why he was incarcerated in the first place, and for nearly five years. Without some additional facts, counsel will have to echo Applicant's sentiments that he is simply "guilty until proven innocent."

The loss of a meaningful opportunity to participate in the 2007 ARB amounts to irreparable harm by itself, even putting aside the threat to Applicant's emotional and physical welfare. The construction of Camp 6 is but the latest grim development. The real risks here are insanity and death.

6. The burden on Respondents. There is a *de minimus* burden on Respondents. Other district courts in these *habeas* proceedings have ordered factual returns and Respondents have easily complied. At most, they must copy Applicant's "file" or whatever other documents or materials exist that relate to him

specifically. This would not be a difficult copying job. Applicant's counsel will gladly reimburse the taxpayers of this country for any copies provided.

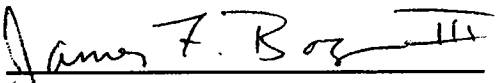
Normally, a factual return must be produced within three days. *See* 28 U.S.C. § 2243. The Court should order Respondents to produce a full factual return immediately (the ARB submission deadline is February 23, 2007).

7. The public interest. The public interest in preventing unchecked executive power dictates that Respondents provide some explanation for Applicant's detention. This Court's institutional interest in policing against judicial abdication by its lower courts mandates that indefinite stays pending appeals that have languished for two years be reviewed and set aside immediately. And the fundamental interest in the rule of law requires that our courts question the indefinite detention of a man who is not accused of doing anything wrong.

CONCLUSION

The Court should grant this Application and order Respondents to provide a full factual return by February 21, 2007.

Respectfully submitted,



A. STEPHENS CLAY
Counsel of Record
JAMES F. BOGAN III
C. ALLEN GARRETT JR.
VINAY J. JOLLY
LESLIE J. ABRAMS
MIGUEL M. DURAN
KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530
Telephone: (404) 815-6500
Facsimile: (404) 815-6555

Counsel for Petitioner

GITANJALI S. GUITERREZ
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Telephone: (212) 614-6439
Facsimile: (212) 614-6499

ZACHARY KATZNELSON
REPRIEVE
P.O. BOX 52742
London EC4P 4WS
United Kingdom
Telephone: (020) 7353 4640
Facsimile (020) 7353 4641

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