IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JARALLAH AL-MARRI, *et al.*,	*Cleared for Filing by CSO*
Petitioners,	
v.	Civil Action No. 04-CV-2035 (GK)
GEORGE W. BUSH, *et al.*	
Respondents.	

MOTION FOR A STAY-AND-ABEY ORDER

Petitioner Jarallah al-Marri ("Petitioner") respectfully requests that this Court preserve the *status quo* by continuing its stay of this habeas corpus action and holding this action in abeyance pending (1) Petitioner's exhaustion of his remedies in the Court of Appeals under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 ("DTA"), and resolution in the Supreme Court of a renewed petition for certiorari to review the Court of Appeals' jurisdictional holding in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) ("*Boumediene I*"). The DTA litigation will provide Petitioner and this Court requisite information regarding disputed jurisdictional questions pending before this Court, and may result in a remand to this Court based upon the military's lack of initial jurisdiction over Petitioner, or lead to a limited remand to this Court for resolution of controverted facts, or render moot some or all of the claims pending before this Court.[1]

[1] Respondents oppose the instant motion for a stay-and-abey order.

"District courts . . . ordinarily have authority to issue stays, where such a stay would be a proper exercise of discretion." *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (internal citations omitted). Staying this action to allow Petitioner to exhaust his DTA claims in the Court of Appeals and then seek review of that court's *Boumediene I* jurisdictional holding is consistent with Supreme Court directives concerning the proper course of action by a federal court when presented with unexhausted habeas petitions brought pursuant to 28 U.S.C. § 2254. The Supreme Court has held that where a habeas petitioner has failed to exhaust all available remedies in state court, a federal court retains discretion to keep jurisdiction over the pending habeas petition, staying the action and allowing exhaustion of remedies in the state courts rather than dismissing the petition. *Rhines*, 544 U.S. at 277.

Indeed, the Supreme Court has indicated that it would be an abuse of discretion to dismiss a petition if the "petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that [the petitioner] engaged in intentionally dilatory litigation tactics." *Id.*; *accord Pace v. DiGuglielmo*, 544 U.S. 408, 416-17 (2005); *see also, e.g., Duncan v. Walker*, 533 U.S. 167, 182 (2001) (Stevens, J., joined by Souter, J., concurring in part and concurring in the judgment) (stating that "in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious [habeas] claim and stay further proceedings pending the complete exhaustion of state remedies"). The stay-and-abey procedure approved by the Supreme Court in *Rhines* is called for under the analogous circumstances surrounding this case.

On February 20, 2007, a divided panel of the Court of Appeals ruled that the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, had stripped the federal courts of jurisdiction over habeas actions, such as this, brought by or on behalf of foreign nationals held at Guantánamo. *Boumediene I*, 476 F.3d at 988.

On March 5, 2007, the *Boumediene* petitioners filed a certiorari petition in the Supreme Court; on April 2, 2007, the Court denied the petition. Three Justices dissented from the denial of the petition, stating that the jurisdictional and constitutional questions raised by the petitioners "deserve this Court's immediate attention." *See Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (2007) ("*Boumediene II*") (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting). Two other Justices stated that, despite "the obvious importance of the issues raised in these cases," it was "appropriate to deny these petitions *at this time*" in order to require the petitioners to exhaust their DTA remedies. *Id.* at 1478 (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari) (emphasis added).

Five Justices have thus made clear that, upon a petitioner's exhaustion of his DTA remedies, the Supreme Court will at least give serious consideration to a renewed certiorari petition seeking review of the Court of Appeals' decision in *Boumediene I*. A majority of the Supreme Court, in other words, has left open the possibility that the Court of Appeals' holding in *Boumediene I* might be held erroneous and that it might therefore be appropriate to allow the habeas actions of those petitioners and others similarly situated to proceed in the district courts at some later date.

Under these circumstances, it is premature for this Court to dismiss Petitioner's case for lack of jurisdiction. Rather, in accordance with *Rhines*, this Court should continue to stay this action pending (1) timely filing by Petitioner of a DTA petition in the Court of Appeals and (2) resolution of a timely, renewed petition for certiorari in the Supreme Court challenging the Court of Appeals' jurisdictional holding in *Boumediene I*.

The requested relief will aid Petitioner in receiving a speedy review of the legal and constitutional issues presented in his habeas petition after his DTA claim is exhausted. Petitioner's habeas petition has been stayed on Respondents' motion for more than two years. Because there is a reasonable possibility that the Supreme Court will, in the not-distant future, find the jurisdictional holding in *Boumediene I* to be in error, dismissal of this case might cause unnecessary additional delay that is contrary to the nature of habeas relief. *See, e.g., Carafas v. La Vallee*, 391 U.S. 234, 238 (1968) (habeas writ, "shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person").

This course of action will not prejudice Respondents. It will, however, save Petitioner the uncertainty accompanying attempts to "resurrect" a dismissed habeas claim following exhaustion of his DTA remedies. Petitioner is concerned, for example, that if his habeas petition is dismissed, Respondents will argue in later court hearings that Petitioner may seek review only of the Court of Appeals' DTA determination. The DTA, in turn, allows challenges only to specified aspects of final decisions of the Combatant Status Review Tribunals ("CSRTs").

Under these circumstances, the most economical and efficient way to proceed is for this Court to continue its stay of this action. This Court should do so as a necessary precaution to ensure that the habeas action remains a potential remedy available to Petitioner in the event that the jurisdictional questions are ultimately resolved in his favor. *See Boumediene II*, 127 S. Ct. at 1478 (statement of Stevens, J., joined by Kennedy, J., respecting denial of certiorari) ("Were the Government to take additional steps to prejudice the position of petitioners in seeking review in this Court, 'courts of competent jurisdiction,' including this Court, 'should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised.'") (citation omitted).

It is fundamental that the courts have jurisdiction to determine their own jurisdiction. *See Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2155 (2006) (a court's "adjudicatory power is simply its authority to determine its own jurisdiction to deal further with the case"); *Ex parte Milligan*, 71 U.S. 2, 131 (1866) ("The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it."). The result of *Boumediene I* does not impede the ability of this Court to take the requested action here. The correctness of that jurisdictional holding is still in dispute and jurisdiction remains a live issue that will be resolved with finality only after Petitioner has exhausted his DTA remedies and the Supreme Court has disposed of any renewed certiorari petition challenging the Court of Appeals' MCA jurisdictional holding issued in *Boumediene I*.

CONCLUSION

For the foregoing reasons, this Court should preserve the *status quo* by continuing its stay of this habeas action and holding this action in abeyance pending Petitioner's exhaustion of his DTA remedies in the Court of Appeals and resolution by the Supreme Court of the MCA jurisdictional issue presented in *Boumediene I*.

Respectfully submitted,

Jonathan Hafetz
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6289

Lawrence S. Lustberg
GIBBONS, P.C.
One Gateway Center
Newark, NJ 07102-5310
(973) 596-4500

Mark A. Berman
HARTMANN, DOHERTY,
ROSA & BERMAN, P.C.
126 State Street
Hackensack, NJ 07601
(201) 441-9056

Counsel for Petitioner Jarallah al-Marri

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