

pending petition for certiorari before judgment in *Hamdan v. Rumsfeld*, No. 06-1169, and an original habeas petition in *In re Ali*, No. 06-1194. In the alternative, Petitioners ask that the Court either transfer this case to the D.C. Circuit Court of Appeals subject to the September 15, 2005 Protective Order (“the Protective Order”), or stay the dismissal of this case for sixty days to permit the Petitioners to file DTA petitions and to obtain a new protective order from the D.C. Circuit. Respondents oppose this motion.

A. Reconsideration is Appropriate Where The Court Did Not Have An Opportunity to Consider Meritorious Arguments Prior to Dismissal and Where Dismissal Results in Manifest Injustice.

Petitioners seek reconsideration of this Court’s April 5, 2007 *sua sponte* dismissal of their habeas action pursuant to Federal Rule of Civil Procedure 59(e). District courts have “considerable discretion in ruling on a Rule 59(e) motion.” *Piper v. Dep’t of Justice*, 312 F. Supp. 2d 17, 20 (D.D.C. 2004) (citing *Rann v. Chao*, 209 F. Supp. 2d 75, 78 (D.D.C. 2002)). Reconsideration is appropriate in situations such as an “intervening change of controlling law, the availability of new evidence, or the need to correct clear error or manifest injustice.” *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057-58 (D.C. Cir. 1998) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam) (internal citation omitted)); see also *Klayman v. Judicial Watch*, No. 06-670, 2007 LEXIS 24548, at *12-13 (D.D.C. Apr. 3, 2007) (granting motion because

reconsideration was in the interest of justice, even though counsel could have presented prevailing argument in initial round of briefing).

Because this Court issued its dismissal *sua sponte*, Petitioners did not have an opportunity to present, and this Court did not have an opportunity to consider, the arguments set forth in this motion regarding the propriety of staying Petitioners' habeas action pending the completion of DTA proceedings and the filing of a renewed petition for certiorari to review the Court of Appeals' jurisdictional ruling in *Boumediene I*. Thus, this is not a case in which the losing party is using the motion for reconsideration as an instrument to re-argue theories or assert new arguments that could have been raised prior to final judgment, *Taylor v. Dep't of Justice*, 268 F. Supp. 2d 34, 35 (D.D.C. 2003), but rather demonstrates the very circumstances in which reconsideration is most appropriate.

As discussed below, there is ample basis for this Court to grant Petitioners' request to reinstate, and then stay, their habeas action. The dismissal of this habeas action is not only premature under the circumstances of this case and the unsettled nature of the jurisdictional questions at issue here, but also results in manifest injustice in that if the dismissal is left in place, Petitioners may be left unable to pursue habeas relief even if it is ultimately determined that this Court has jurisdiction to hear their claim.

B. The Court Should Stay the Habeas Petitions Pending Exhaustion of All Potential Remedies, while Holding This Case In Abeyance.

The Court should exercise its discretionary authority to stay the dismissal of the pending habeas petitions in this case, and to hold these proceedings in abeyance until Petitioners have exhausted their remedies under the DTA. This stay should be maintained pending the Supreme Court's review of the jurisdictional issues presented in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) ("*Boumediene I*") or in the alternative the Supreme Court's resolution of similar issues in *Hamdan v. Rumsfeld*, No. 06-1169 and/or the original habeas petition in *In re Ali*, No. 06-1194.

"District courts . . . ordinarily have authority to issue stays, see *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), where such a stay would be a proper exercise of discretion, see *Clinton v. Jones*, 520 U.S. 681, 706 (1997)." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). Staying this action to allow Petitioners to exhaust their 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. As the Supreme Court has held, 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 by staying the action and allowing exhaustion of remedies in the state

courts rather than dismissing the petition. *Rhines*, 544 U.S. at 277-78. The same rule applies here—the unexhausted DTA claims and the pending Supreme Court decisions make a stay-and-abey order proper in this circumstance.

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 *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 fitting here, given the directly analogous circumstances surrounding this case.

On February 20, 2007, in *Boumediene I*, a divided panel of the D.C. Circuit Court of Appeals ruled that the Military Commissions Act of 2006 (“MCA”), Pub. L. No. 109-366, 120 Stat. 2600, had stripped federal courts of jurisdiction over habeas actions brought by foreign nationals.

Boumediene I, 476 F.3d at 988.¹ Following the *Boumediene I* ruling, a certiorari petition was filed in the Supreme Court. The Supreme Court denied the petition; but three Justices dissented from its denial. See *Boumediene v. Bush*, Nos. 06-1195 & 06-1196, 2007 WL 957363 (U.S. Apr. 2, 2007) (“*Boumediene II*”), stating that the jurisdictional and constitutional questions raised by the petitioners “deserve this Court’s immediate attention.” *Id.* at *1 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting). Justices Stevens and Kennedy, however, concluded that, despite “the obvious importance of the issues raised in these cases,” it was “appropriate to deny these petitions at this time” so as to require the petitioners to exhaust their remedies under the DTA. *Id.* at 1478. (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari).

Boumediene I is awaiting the mandate of the Court of Appeals; although the government has moved to dismiss that case.² It is the intention of the petitioners in *Boumediene I* to oppose the government’s motion to dismiss, and to ask the Court of Appeals to hold in abeyance the District Court cases. The *Boumediene I* petitioners expect to file a renewed petition of certiorari seeking a review of the jurisdictional ruling in *Boumediene I*.

¹ This Court anticipated the Court of Appeals’ jurisdictional ruling in *Hamdan v. Rumsfeld*, Civil Action No. 04-1519 (JR) (D.D.C. Dec. 13, 2006).

² The petitioners in *Boumediene I* have already moved the Court of Appeals for a stay of the mandate, and the mandate did not in fact issue on the date prescribed by rule. The *Boumediene I* petitioners have also lodged a stay motion with Chief Justice Roberts under 28 U.S.C. § 1651 and 2101(f).

In addition to *Boumediene I*, two other petitions currently pending in the Supreme Court contain jurisdictional issues directly relating to the Court of Appeals' MCA holdings. The first, in *Hamdan v. Rumsfeld*, No. 06-1169, seeks the review of this Court's December 13, 2006 ruling on the MCA jurisdictional issue. The second, the original habeas petition in *In re Ali*, No. 06-1194, directly challenges the Court of Appeals' jurisdictional holding under the MCA. The Supreme Court is likely to consider both cases in April or May 2007.

Based on the denial of certiorari in *Boumediene I*, five Justices have made it clear that, upon the petitioners' exhaustion of their DTA remedies, the Supreme Court will give serious consideration to a renewed certiorari petition seeking review of the jurisdictional issues addressed by the Court of Appeals in *Boumediene I*. A majority of the Supreme Court, therefore, has left open the possibility that the Court of Appeals' holding in *Boumediene I* is erroneous, and that the appropriate course may be to permit the petitioners' habeas actions to proceed in the district courts at some later date.

Under these circumstances, it is premature for this Court to dismiss Petitioners' case for lack of jurisdiction, where staying this action will allow Petitioners the opportunity to exhaust their DTA claims in the Court of Appeals. Certainly, the Petitioners cannot be accused of "dilatatory" tactics, where they have never had the opportunity to address the merits of their cases. Moreover, given that the government

specifically created a *new* procedure while this litigation was pending, in an effort to deprive Petitioners of their habeas rights, Petitioners certainly have good cause for not exhausting those remedies before their suit was filed. *See Rhines*, 544 U.S. at 277 (noting that the court should stay a case where the petitioner has good cause for his failure to exhaust and has not engaged in dilatory litigation tactics).

The need to stay these cases applies with particular force here, where this case and the Protective Order entered in it provide the only basis upon which the government has permitted the Petitioners to even speak with their counsel, or has permitted counsel to review even minimal documents relating to the Petitioners and the alleged claims against them. Staying this case and holding it in abeyance will permit Petitioners to pursue their DTA remedies with some ability to at least speak to their lawyers and continue to review the documents that have been produced, under the existing protective order. It will also save Petitioners from the uncertainty of attempting to “resurrect” a dismissed habeas claim following exhaustion of their DTA remedies. Petitioners are concerned, for example, that if their habeas petitions are not reinstated, Respondents will argue in later court hearings that Petitioners may only seek review of the Court of Appeals’ DTA determination. Under the DTA, Petitioners can challenge only specified aspects of final decisions of the Combatant Status Review Tribunals (“CSRTs”), in a manner that falls far short of fundamental principles of due process.

With the aforementioned facts, the dismissal of these cases for lack of jurisdiction would be premature. The Court should stay these actions pending (1) the filing of DTA petitions and (2) resolution by the Supreme Court of the jurisdictional holdings in *Boumediene I*, or resolution of the jurisdictional issues in *Hamdan* or *Ali*.

C. In the Alternative, the Court Should Transfer the Petitions to the D.C. Circuit Court of Appeals For Consideration Under The DTA Or Stay Its Dismissal For Sixty Days To Permit The Petitioners To File Directly In The Circuit Court While Seeking A New Protective Order.

For all of the reasons stated above, the best course is to stay this case and hold it in abeyance pending exhaustion of Petitioners' remedies under the DTA, and the Supreme Court's determination of the adequacy of those remedies. At a minimum, however, Petitioners ask the Court to reconsider and to modify its dismissal of this case so as to protect the Petitioners' ability to have access to their counsel while pursuing a DTA petition. If the Court is not inclined to stay this case, the Petitioners therefore request that the Court either (1) transfer these actions to the D.C. Circuit Court of Appeals while maintaining the Protective Order granted by the Court on September 16, 2005, or (2) stay the dismissal of this case for a brief, sixty day period to permit the Petitioners to file DTA petitions in the D.C. Circuit and seek a new protective order.

1. The Court Should Transfer These Cases To The D.C. Circuit Subject To The Existing Protective Order.

The Protective Order, which was uncontested at the time of entry, sets out a framework for attorney-client communications, the interruption of which would severely prejudice the DTA action, the habeas litigation, the ability of Petitioners' attorneys to function effectively, and the attorney-client relationship. The need for client consultation and the development of necessary facts is basic to the attorney-client relationship and is required by the ethical obligations to which Petitioners' counsel are subject.

In addition, the Protective Order provides the only means by which the government has been required to provide even minimal, basic information or documents to the Petitioners' counsel. That Order, however, provides that, sixty days after final resolution of this action and the termination of any appeals therefrom, all protected documents or information and any copies thereof shall be promptly destroyed. Those documents are necessary for the prosecution of a DTA action.

The government appears poised to cut off the Guantanamo detainees from their counsel at the earliest opportunity. Recently, visits to Guantanamo have been approved only under the express condition that protective order "remains extant." The Petitioners, and the undersigned counsel, seek to ensure that access to the detainees is

maintained to allow them to meaningfully prosecute the few remedies available to them.

For these reasons, even if the case is not held in abeyance, the judgment of dismissal should be modified so as to enable the Petitioners to preserve their rights under the Protective Order. Pursuant to 28 U.S.C.A. § 2241(b), this Court may my transfer Petitioners' habeas application to a Court having jurisdiction to entertain it. *See also Rumsfeld v. Padilla*, 543 U.S. 426, 442-443 (2004). Under DTA § 1005(e)(2)(A), "the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680. It, therefore, is appropriate that this Court transfer the pending habeas petitions to the D.C. Circuit, thus allowing the Petitioners to exhaust all possible remedies under the DTA. In effecting such a transfer, the Petitioners ask that the Court's Transfer Order explicitly maintain the access protocol and visitation rights outlined in the September 16, 2005 Order.

2. At A Minimum, The Court Should Stay The Dismissal Of This Case For Sixty Days To Permit Petitioners To Seek A New Protective Order In The D.C. Circuit.

In the alternative, the Petitioners ask the Court to stay its dismissal of this case for a brief sixty-day period. This brief stay would at least permit the Petitioners to file papers in the D.C. Circuit and to seek a new protective order, there. At a minimum, this brief stay is needed to protect the Petitioners' access to their counsel and to prevent manifest injustice.

CONCLUSION

For the foregoing reasons, Petitioners ask the Court to reconsider its April 7, 2007 judgment of dismissal, and to stay this action pending Petitioners exhaustion of their DTA remedies in the Court of Appeals and resolution by the Supreme Court of the MCA jurisdictional issues. If this Court declines to hold this case in abeyance, however, the Petitioners respectfully ask the Court to modify its order so as to transfer this case to the D.C. Circuit Court of Appeals, subject to the Protective Order, or to postpone the dismissal of this case for sixty days.

Dated: April 18, 2007

Respectfully submitted,

VENABLE LLP

_____/s/_____
Carol Elder Bruce,
D.C. Bar No. 202200
David G. Dickman,
D.C. Bar No. 465010
575 7th Street, NW
Washington, DC 20004
Tel: (202) 344-4000
Fax: (202) 344-8300
cebruce@venable.com
dgdickman@venable.com

_____/s/_____
Randolph S. Sergeant,
D.C. Bar No. 486063
Two Hopkins Plaza, Suite 1800
Baltimore, MD 21201
Tel: (410) 244-7400
Fax: (410) 244-7742
mymirviss@venable.com
rssergeant@venable.com

_____/s/_____
Michael W. Robinson,
D.C. Bar No. 437979
8010 Towers Crescent Drive
Suite 300
Vienna, VA 22182
Tel: (703) 760-1600
Fax: (703) 821-8949
mwrobinson@venable.com

Counsel for Petitioners

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
SHERIF EL-MASHAD, et al.,)	
)	
<i>Petitioners,</i>)	
)	Civil Action No. 05-00270 (JR)
<i>v.</i>)	
)	
GEORGE W. BUSH, et al.,)	
)	
<i>Respondents.</i>)	
_____)	

ORDER

Upon consideration of Petitioners' motion to alter or amend the judgment of dismissal and to stay this case and hold it in abeyment, the opposition thereto and the record before this court, it is on this ____ day of _____, 2007, by the United States District Court for the District of Columbia, ORDERED:

1. That Petitioners' motion be, and hereby is, GRANTED; and
2. That the judgment be, and is hereby, STRICKEN; and
3. That this case shall be STAYED and held in abeyment until further Order of this Court; and
4. That the Clerk of Court shall notify all parties of record.

Hon. James Robertson
United States District Judge