

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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HANI SALEH RASHID ABDULLAH,)	
<i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 05-00023 (RWR)
)	
GEORGE W. BUSH, <i>et al.</i> ,)	
)	
Respondents.)	
_____)	

RESPONDENTS’ EMERGENCY MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR PARTIAL STAY OF ORDER REQUIRING FURTHER REPORT

PRELIMINARY STATEMENT

On January 24, 2008, the Court ordered respondents to provide a report on certain issues relating to document preservation. The required report would include: (1) information relating to past compliance with the Court’s July 18, 2005, preservation order; (2) information about what is being done now to ensure compliance; and (3) information about certain spoliated evidence, if any. Respondents are filing contemporaneously a report that primarily sets forth the steps that both the Central Intelligence Agency (“CIA”) and Department of Defense (“DOD”) recently have taken to ensure the future preservation of information regarding detainees at Guantanamo Bay, Cuba. But because a report concerning other, backward-looking information would interfere with the Department of Justice’s pending criminal investigation, respondents respectfully request that the Court reconsider or, in the alternative, stay pending completion of that investigation those portions of its January 24, 2008 Order. Because the Order calls for the filing of a report by February 14, 2008, respondents respectfully request a ruling in advance of

that date.¹

In the circumstances of this case, the Court should exercise its authority to reconsider or stay those parts of its Order that require a report relating to the destruction of various tapes by the CIA. As set forth in the attached declaration of specially-appointed Acting United States Attorney John Durham, who is leading that investigation, gathering and reporting on such information would intrude upon, and compromise the integrity of, the criminal investigation into the very matters that triggered the Court's January 24, 2008, Order. The primary purpose of the Department of Justice investigation is to determine whether any prosecution is in order and, if it is, to press forward with that prosecution. Mr. Durham is therefore actively investigating the very same matters covered by the Court's Order.

As discussed below, it is well-established that a court should not order steps that, if taken, would unduly interfere with an ongoing criminal investigation. Here it is readily apparent that the report contemplated by the Court and the criminal investigation are targeted at the same body of information, and the sort of due diligence that necessarily would precede the drafting and filing of a report with this Court would mirror much of the work of the criminal investigation team, but without providing the protection for the results of the investigation inherent in a formal criminal probe. As Mr. Durham's declaration makes clear, engaging in such an effort for purposes of a report in this case would create serious risks to the goal of determining how and why the CIA tapes were destroyed and what the consequences of that destruction should be.

Those considerations alone warrant reconsideration or, in the alternative, a stay. But this

¹ If the Court denies reconsideration and does not grant a stay pending the completion of the criminal investigation, respondents respectfully request that the deadline for a report be extended for thirty days.

is not a case in which respondents ask the Court to reconsider the entirety of its Order, or to stay the entire case as a result of the criminal investigation. Instead, respondents are providing the Court with information that is largely prospective, focusing on the steps that both the CIA and DOD are taking to preserve relevant information. And litigation of the merits of petitioners' claims was already stayed pending resolution of *Boumediene v. Bush*, 476 F.3d 981, 986, 994 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3067, 3078 (2007), before petitioners even filed the motion that led to the January 24, 2008, Order. Because the purpose of the backward-looking portion of the Court-ordered report would be to determine whether information that might be relevant to the merits of petitioners' claims has been properly preserved, there is no compelling need at this time to require respondents to provide information that would result in interference with the pending criminal probe.

In accordance with Rule 7(m) of the Local Rules of this Court, the undersigned have conferred with counsel for petitioners who indicated that they will oppose respondents' motion.

STATEMENT OF THE CASE

Petitioners instituted this habeas proceeding to challenge their detention as enemy combatants by the United States at the Guantanamo Bay Naval Station in Cuba. On July 18, 2005, the Court entered an order imposing certain preservation obligations on respondents. The litigation of the merits of this case has been stayed pending resolution of *Boumediene v. Bush*, 476 F.3d 981, 986, 994 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3067, 3078 (2007). *See* Order of March 16, 2005 (Dkt. No. 16).

In light of the recently publicized destruction of certain tapes by the CIA, petitioners asked the Court to order the government to provide information regarding the tape destruction

and document preservation matters more generally, and to hold an evidentiary hearing on those issues. In opposing that motion, respondents explained that the sort of information-gathering exercise requested by petitioners would be inappropriate because, *inter alia*, the inquiry requested by petitioners could have created difficulties for what was then a preliminary inquiry into the tape destruction issue. That preliminary inquiry has since become a criminal investigation, as announced on January 2, 2008, and as described in greater detail in Mr. Durham's declaration. On January 24, 2008, this Court denied petitioners' motion in part and granted it in part.² That order, as indicated above, requires respondents to report on the efforts – both past and present – taken to comply with the 2005 preservation order, and also directs respondents to report on certain spoliated evidence, if any.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETION TO RECONSIDER OR TO STAY ITS ORDER, PARTICULARLY BECAUSE TO DO SO IS NECESSARY TO PROTECT THE INTEGRITY OF A CRIMINAL INVESTIGATION

District courts have considerable discretion to modify, set aside or stay the orders that they enter. *Scott v. District of Columbia*, 246 F.R.D. 49, 51 (D.D.C. 2007); *Keystone Tobacco Co., Inc. v. U.S. Tobacco Co.*, 217 F.R.D. 235, 237 (D.D.C. 2003). Factors taken into account in this regard are “considerations of finality, predictability and not wasting judicial resources.”

² Several other motions seeking similar relief are now pending in this Court and in the Court of Appeals. *Zalita v. Gates*, No. 07-1384 (D.C. Cir.) (filing dated January 29, 2008); *Zalita v. Bush*, 05-cv-1220 (D.D.C.) (RMU) (*see* dkt. no. 81); *Al-Marri v. Bush*, 04-cv-2035 (D.D.C.) (GK) (dkt. no. 76); *Alhami v. Bush*, 05-cv-0359 (D.D.C.) (GK) (dkt. no. 67); *Said v. Bush*, 05-2384 (D.D.C.) (RWR) (dkt. no. 83); *Al Adahi v. Bush*, No. 05-280 (GK) (dkt. no. 115). One other such motion was filed in *Abdah v. Bush*, No. 04-cv-1254 (HHK). That motion was denied on January 9, 2008 (dkt. no. 230). Judge Kennedy's order in *Abdah* was based in significant part on the fact that the Department of Justice is currently engaged in a criminal investigation relating to the CIA's tape destruction.

Scott, 246 F.R.D. at 51 (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)). Likewise, “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The law is well-established, moreover, that this discretionary authority is properly exercised when a civil action threatens to interfere with a related criminal proceeding. See *United States v. Kordel*, 397 U.S. 1, 12 n. 27 (1970) (citing cases); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980). Just last year the Supreme Court noted that “[i]f a plaintiff files a . . . claim related to rulings that will likely be made in a pending or anticipated criminal trial[], it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.” *Wallace v. Kato*, 127 S.Ct. 1091, 1098 (2007). See also *United States v. Any and All Assets of that Certain Business Known as Shane Co.*, 147 F.R.D. 99, 101 (M.D.N.C. 1993) (“[w]hen a civil proceeding may interfere with a criminal investigation, it is not uncommon that the United States will seek to stay . . . the civil action in order to protect the criminal investigation.”). In *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), the court recognized that giving priority to criminal matters over civil actions “seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.” 307 F.2d at 487.

The Court of Appeals for this Circuit identified a number of appropriate concerns that are relevant to this balancing process, and that would justify a stay, in *Dresser Indus., Inc.*, 628 F.2d at 1376. Among those considerations are the prospect that either the defense or the prosecution

might obtain discovery that would not ordinarily be available in a criminal case; the possibility that Fifth Amendment issues would be implicated; the chance that a criminal defendant's theory of defense would be revealed prematurely; or the risk that the criminal matter would be otherwise prejudiced. *Dresser Indus., Inc.*, 628 F.2d at 1376. As this court has recognized, the factors to be considered in deciding whether such a stay is warranted are whether the two matters involve related issues, whether a stay would or would not create hardship or inconvenience for the courts or the parties, and whether the duration of a stay is reasonable. *See, e.g., United States ex rel. Westrick v. Second Chance*, 2007 WL 1020808 (D.D.C. 2007). *See also St. Paul Fire and Marine Ins. v. United States*, 24 Cl.Ct. 513 (1991).

Application of these various factors to this case counsels strongly in favor of this motion. Because what was a preliminary inquiry when respondents filed their opposition to the motion for a report and hearing has now become a criminal investigation, *see* Durham Declaration ¶ 3, the facts before this Court have changed. The criminal investigation and the report required by the Court's January 24, 2008, order plainly involve issues that are intimately related, if not identical, to each other. As a result, and as described in detail in Mr. Durham's declaration, proceeding in this case would risk significant harm to the criminal investigation. Many, if not most, of the individuals who would have to be queried for purposes of a report to this Court are potential witnesses in the criminal matter. *Id.* ¶ 6. Discussing with those people some of the information that would likely have to be discussed to prepare a report to be filed in this case "would create the risk that potential witnesses in the criminal investigation would be affected by their access to statement or other witnesses, as well as access to not only their own documents and records but those of others." *Id.* ¶ 7. Similarly, it would pose a risk that potential witnesses

may intentionally or otherwise, “change what they have to say so as to conform their testimony to any such publicly disclosed information,” *id.* ¶ 8, and present still other complications for the criminal investigation. *Id.* ¶¶ 6-10. So, too, the process of preparing a report would substantially increase the likelihood of public disclosure of information that must remain confidential to protect the integrity of the criminal probe. *Id.* ¶ 8. And various issues could arise under *Garrity v. New Jersey*, 385 U.S. 493 (1967), which “held that an individual threatened with discharge from employment for exercising the privilege [against self-incrimination] had not waived it by responding to questions rather than standing on his right to remain silent.” *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984). Durham Declaration, ¶ 10 (citing *Kalkines v. United States*, 473 F.2d 1391 (Ct. Cl. 1973)).³

Significant also is the fact that respondents are seeking reconsideration or a stay of only part of one particular order entered in this case. In *Gordon v. Fed. Deposit Ins. Corp.*, 427 F.2d 578 (D.C. Cir. 1970), the court drew a distinction between a stay of an entire civil case pending a criminal proceeding and a stay of only part of the case. The court noted that “the fact that the civil case is not stayed does not mean that discovery must proceed in the same way as ordinary civil litigation.” 427 F.2d at 580. *See also Westrick*, 2007 WL 1020808, *4 (even where stay of entire case is not appropriate, “if and when discovery becomes necessary, protective orders and other remedial measures may be taken”). The narrow reach of the vacatur or stay requested here is yet another reason, among the others addressed above and explicated more fully in the Durham declaration, that this motion should be granted.

³ As explained in the Durham declaration, the provision of the information described in the Report being filed with this motion does not implicate the concerns that require reconsideration or a stay of the January 24 Order. Durham Declaration, ¶ 11.

Whereas litigation of the merits of this case is stayed pending a decision in *Boumediene*, a stay of the reporting Order would not create any immediate hardship for petitioners and would not slow the litigation of this case on its merits. Thus, whether this Court grants reconsideration and vacatur of its reporting order, or stays it pending the criminal case, relief from the Order would be of a reasonable scope.

To be sure, in some cases courts have declined to stay a civil case pending a criminal matter where no indictment has yet issued. But the courts generally have done so when the party moving for the stay is not the government, but is rather the entity or individual under investigation in the related criminal matter. See *Westrick*⁴; *Baranski v. Fifteen Unknown Agents of ATF*, 195 F. Supp. 2d 862, 870-71 (W.D. Ky. 2002) (granting government's pre-indictment motion for stay, distinguishing cases where party under investigation is stay movant). See also *Shane Co.*, 147 F.R.D. at 102 (stay of discovery granted on government's motion even where indictment not yet issued); *Capital Engineering & Manufacturing Co., Inc.*, 695 F. Supp. 36, 41-42 (D.D.C. 1988) (same); *Larouche Campaign v. Federal Bureau of Inv.*, 106 F.R.D. 500, 501-02 (D. Mass. 1985) (same). Here, just as in *Shane*, *Capital Engineering* and *Larouche*, it is the government that is seeking a stay in order to protect the integrity of a newly-instituted criminal investigation. Indeed, even in *Shane*, where a fair amount of time had already passed since a criminal investigation had begun with no indictment having issued, the court granted the government's motion for a stay of discovery in a related civil case in order to avoid compromising the criminal case. The court in that case noted that requests for such stays by the

⁴ In *Westrick*, not only had no indictment been returned against the individuals moving for a stay, a considerable period of time had passed since the institution of the investigation in which an indictment might have issued.

government are “presumptively reasonable, nothing else appearing.” 147 F.R.D. at 101. The record in this case contains nothing to overcome that presumption. The fact that an indictment has not yet issued in the criminal investigation, which began barely a month ago, is no reason for a stay to be denied.

To require the government to take action that would compromise Mr. Durham’s newly instituted criminal investigation before it progresses farther than he has had a chance to take it in the month since it began would increase uncertainty, create the prospect of more litigation rather than less, and would undermine the public interest in law enforcement. Thus, denying the present motion would be inconsistent with the concerns articulated in cases such as *Christianson*, *Dresser*, *Campbell*, and *Westrick*. Further, it would risk interfering with a formal and ongoing effort to obtain resolution of questions regarding the very CIA tape destruction that led to this Court’s Order of January 24, 2008.

CONCLUSION

This case is not proceeding on its merits for reasons entirely separate from the considerations that resulted in the Order of January 24, 2008. As discussed above and in the declaration of John Durham, compelling reasons exist for the Court to grant this motion. For those reasons, the Court should reconsider and set aside its Order of January 24, 2008, insofar as it requires the government to provide a report that has not yet been provided. In the alternative, that portion of the Order should be stayed pending completion of the criminal investigation described in the declaration filed herewith.

Dated: February 8, 2008

Respectfully submitted,

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