

[ORAL ARGUMENT HELD SEPTEMBER 8, 2005]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAKHDAR BOUMEDIENE, et al.)

Appellants,)

v.)

Nos. 05-5062, 05-5063

GEORGE W. BUSH, et al.)

Appellees.)

**APPELLANTS' MOTION TO DEFER FILING OF SUPPLEMENTAL
BRIEFS OR, IN THE ALTERNATIVE, TO APPROVE PROPOSED
BRIEFING SCHEDULE**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Appellants Lakhdar Boumediene, et al.¹ respectfully move that this Court defer the filing of supplemental briefs addressing the effect of section 1005 of the Department of Defense Appropriations Act of 2006, Pub. L. No. 109-148 ("section 1005") on these appeals pending the Supreme Court's consideration of similar issues in *Hamdan v. Rumsfeld*, No. 05-184. In the alternative, Appellants move that the Court approve a proposed briefing schedule permitting the filing of an opening brief by Appellees, a response by Appellants, and a reply by Appellees. In support of this motion, Appellants state as follows:

¹ This motion is made solely on behalf of the Appellants in *Boumediene, et al. v. Bush, et al.*, Nos. 05-5062, 05-5063.

1. On January 3, 2006, the Appellees filed a letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure informing the Court of the enactment of section 1005. In their letter, Appellees stated that they “anticipate[d] filing with the Court no later than the week of January 9, 2006, a motion to govern further proceedings in these cases in light of the new legislation.” Appellees also filed similar letters in other cases currently pending in the District Court that involve petitions for habeas corpus by persons imprisoned at Guantánamo Bay, Cuba.

2. On January 4, 2006, this Court, on its own motion, ordered the parties to file, no later than January 18, 2006, supplemental briefs addressing the effect of section 1005.

3. The *Hamdan* case, currently pending in the Supreme Court, involves a Guantánamo detainee scheduled for trial before a military commission established by the President to try aliens held at Guantánamo Bay. Hamdan brought a habeas action challenging the military commission established by the President, and the District Court ruled in Hamdan’s favor. 344 F. Supp. 2d 152 (D.D.C. 2004). On July 15, 2005, this Court reversed the District Court’s ruling. 415 F.3d 333 (D.C. Cir. 2005). On November 7, 2005, the Supreme Court granted Hamdan’s petition for certiorari, and on January 6, 2006, supported by numerous *amici*, Hamdan filed his merits brief. The government is due to file its merits brief on February 10, 2006.

4. Hamdan's merits brief called the Supreme Court's attention to section 1005 as presenting a potential jurisdictional issue,² and four *amicus* briefs filed in his support demonstrate why section 1005 does not strip the federal courts of jurisdiction to decide habeas petitions filed prior to the enactment of section 1005.³ Because Section 1005(e) arguably goes to jurisdiction, the Supreme Court is highly likely to consider its bearing on the case. *See, e.g., Demore v. Kim*, 538 U.S. 510, 516 (2003) (deciding a jurisdictional issue raised for the first time by an *amicus curiae* in the Supreme Court); *Christianson v. Colt Indus. Operating Corp.*, 484 U.S. 985 (1987) (mem.) (directing parties to brief and argue a jurisdictional question); *Eisen v. Carlisle & Jacquelin*, 414 U.S. 908 (1973) (mem.) (same).

5. Although the underlying habeas claims raised in *Hamdan* differ from those raised by Appellants in this case—Hamdan challenges the competence of the military commission to try him, whereas Appellants challenge their detention without charge in violation of the Constitution, laws, and treaties of the United States and their common law habeas rights—the effect of section 1005 on the

² *See* Brief for Petitioner Salim Ahmed Hamdan at 1 (filed Jan. 6, 2006).

³ *See* Brief for the Center for National Security Studies and the Constitution Project as Amicus Curiae Supporting Petitioner (filed Jan. 6, 2006); Brief *Amici Curiae* of More Than 300 Detainees Incarcerated at U.S. Naval Station, Guantanamo Bay, Cuba, and Their Family Members, In Support of Petitioner and In Support of Jurisdiction (filed Jan. 6, 2006); *Amicus Curiae* Brief of Arthur R. Miller in Support of Petitioner (filed Jan. 6, 2006); Brief of *Amici Curiae* Norman Dorsen, Frank Michelman, Burt Neuborne, Judith Resnik, and David Shapiro in Support of Petitioner (filed Jan. 6, 2006).

federal courts' habeas jurisdiction arises in both *Hamdan* and this case. The Supreme Court's disposition in *Hamdan* is highly likely to control the effect of section 1005 on these appeals.⁴

6. In view of these overlapping issues, briefing and consideration of the effect of section 1005 on these appeals is premature and would be wasted effort if done in advance of the Supreme Court's decision in *Hamdan*. Any arguments of the parties, and any decision by this Court, would have to be reconsidered and revised in light of what the Supreme Court does in *Hamdan*.

7. This Court has deferred consideration of cases when "an obviously relevant case was pending before the Supreme Court." *Am. Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 147 (D.C. Cir. 1977). *See, e.g., Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1171 (D.C. Cir. 1984) (noting that "this Court directed that supplementary briefing and oral argument be deferred pending the disposition of the Supreme Court"); *United States v. Fennell*, 53 F.3d 1296, 1304 (D.C. Cir. 1995) (deferring consideration of a petition for

⁴ Appellees appear to share the view that section 1005 must be addressed in *Hamdan*, as demonstrated by the fact that Appellees also filed a Notice of Supplemental Authority regarding the new legislation in that case, although it was inadvertently filed in the district court. *See* Notice of Correction, *Hamdan v. Rumsfeld*, Civil Action No. 04-CV-1519(JR) (D.D.C.) (filed Jan. 10, 2006) (Dkt. 68).

rehearing pending decision by the Supreme Court). The Court should do the same here.

8. In the alternative, should this Court decide that supplemental briefing should go forward at this time, Appellants respectfully ask this Court to approve a responsive briefing schedule pursuant to which Appellees would first file an opening brief on or before January 18, 2006, Appellants in the two consolidated appeals would each file a brief in response on or before January 25, 2006, and Appellees would file a consolidated reply brief on or before February 1, 2006.⁵ Section 1005 raises important and complex issues, and responsive briefing would assist this Court in its consideration of the effect of section 1005 on these appeals.

9. Appellants' counsel conferred with Robert M. Loeb, Esq., counsel for Appellees, with regard to the substance of this motion and provided a copy of this motion to Mr. Loeb prior to filing it with the Court. Mr. Loeb advised Appellants' counsel that Appellees oppose Appellants' motion to defer the filing of supplemental briefs and intend to file a written opposition, but that Appellees do not oppose the responsive briefing schedule Appellants propose.

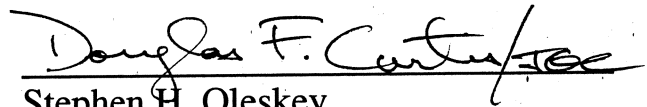
⁵ This schedule assumes the Court will decide before January 18, 2006, that supplemental briefing should go forward. If that decision is made later, the proposed schedule should be adjusted accordingly.

CONCLUSION

For the foregoing reasons, Appellees' motion to defer supplemental briefing pending the Supreme Court's disposition of *Hamdan* should be granted. In the alternative, this Court should modify its order dated January 4, 2006, to provide that Appellees shall file an opening brief on or before January 18, 2006, Appellants in the two consolidated appeals shall each file a brief in response on or before January 25, 2006, and Appellees shall file a consolidated reply brief on or before February 1, 2006.

Dated: January 10, 2006

Respectfully submitted,



Stephen H. Oleskey

Robert C. Kirsch

Wilmer Cutler Pickering Hale and Dorr LLP

60 State Street

Boston, MA 02109

Phone: (617) 526-6000

Fax: (617) 526-5000

Douglas F. Curtis

Wilmer Cutler Pickering Hale and Dorr LLP

339 Park Avenue

New York, NY 10022

Phone: (212) 230-8800

Fax: (212) 230-8888

Attorneys for Appellants Lakhdar

Boumediene, et al.

Wesley R. Powell
Hunton & Williams LLP
200 Park Avenue
New York, NY 10166
Phone: 212-309-1000
Fax: 212-309-1100


Attorneys for Appellant Ridouane Khalid

CERTIFICATE OF SERVICE

I, Russell Davis, hereby certify that, on January 10, 2006, I served a copy of this motion by first-class mail on counsel of record in this case at the following addresses:

Robert M. Loeb, Esq.
Douglas N. Letter, Esq.
Eric D. Miller, Esq.
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Counsel for Appellees

James F. Fitzpatrick, Esq.
Arnold & Porter LLP
555 12th Street, NW
Washington, DC 20004-1202
Counsel for Amicus Curiae Global Rights



Russell Davis