

## Mark Fleming Inset for Denbeaux/Hafetz Book

On February 20, 2007, I was working out of the Washington, D.C. office of my law firm, WilmerHale. There was a Supreme Court argument the next day in a case involving our client AT&T, and I was helping Seth Waxman, the chair of our Appellate and Supreme Court Litigation practice group, prepare for it. In the midst of preparation, I started getting emails announcing that the U.S. Court of Appeals for the D.C. Circuit would be issuing its decision in *Boumediene v. Bush*, the case in which we represent six Algerian-Bosnian nationals detained at Guantánamo Bay since 2002.

The case had been before the D.C. Circuit for nearly two years. The D.C. Circuit had received five rounds of briefs and heard two oral arguments. Congress had passed two laws attempting to strip the federal courts' power to hear habeas corpus cases from Guantánamo prisoners. Now, finally, we were getting a decision.

Shortly after 10 a.m., we learned that the D.C. Circuit had ruled against us by a two to one vote, holding that the Military Commissions Act of 2006 validly stripped jurisdiction to hear our case. There was only one question in our minds: how quickly could we get before the Supreme Court?

On February 21, as we drove to the Supreme Court building for the AT&T oral argument, Seth commented that if we wanted the Court to hear and decide the Guantánamo case before the summer recess in June 2007, we would have to “walk the walk” ourselves and get our papers on file very quickly. The team was hard at work on our papers before we even got back from Court.

Within thirteen days of the D.C. Circuit's decision, we had filed a complete request for the Supreme Court to take the case (called a Petition for Certiorari or “cert”)—a process that is normally allotted at least ninety days. We also moved to expedite it, hoping that the Court would order accelerated briefing and oral argument in time for a decision before the summer.

On April 2, 2007, the Court stunned us by refusing to take the case. In a very unusual move, five Justices issued statements explaining their positions. Justices Stevens and Kennedy said that they wanted to wait to see how the new procedures under Congress's Detainee Treatment Act (DTA)—a very limited procedure that we argued was not a constitutionally adequate substitute for habeas corpus—would play out. Three others, Justices Souter, Ginsburg, and Breyer, dissented outright, saying the Court should have taken the case.

As April wore on, the broader habeas counsel group started considering the possibility of asking the Supreme Court to reconsider. One major reason was the government's position that, because the habeas cases were technically over, we had no right to continue to communicate with or visit our clients at Guantánamo. The government also argued that all of the classified information that we accumulated during our three years as counsel to Guantánamo prisoners—including notes of our interviews with our clients—would have to be destroyed. Another reason was that Lieutenant Colonel Stephen Abraham, a reserve officer who had actually participated in the military Combatant Status Review Tribunals (CSRTs) that the government was arguing made habeas corpus unnecessary, had given a powerful statement exposing the unfairness of those proceedings.

In late April 2007, we started preparing a petition for rehearing, the document that asks the Supreme Court to change its earlier refusal to take the case. We did not ask the Court to take the case right away; we simply asked the Court to keep the case open, so that our files would not be destroyed and so that we could resume the case once the DTA process had run its course.

Our first step was to file a motion with Chief Justice Roberts, who is responsible for cases originating from Washington, D.C., asking for an extension in the time to file the rehearing petition and for an order keeping the case open. On April 26, 2007, the Chief Justice denied our application, taking the rare step of issuing an opinion in chambers in which he wrote (among other things) that the arguments we had raised “can hardly provide a basis for believing this Court would reverse course and grant certiorari.”

The next day we filed our petition for rehearing. We recognized it was a very, very long shot. There are varying estimates of the number of times the Supreme Court has decided to take a case after first refusing it, but all agree it is a very low number.

On June 29 the last day before the Supreme Court’s summer recess, the Court announced that it was not only keeping our case open, but was granting cert and taking the case immediately. The Court did not explain why it had changed its mind. This began yet another intense period of time, as we at WilmerHale, other detainee counsel, and several supporting friends of the court put together our written briefs explaining why our clients had a right to a fair habeas corpus hearing in federal court.

On December 5, 2007, Seth Waxman and I, and numerous others, rode to the Supreme Court building again. Scores of people were lined up in bone-chilling temperatures and snow, attempting to get in to hear the argument. Some had been there overnight, giving the whole event the feel of a rock concert. Seth gave one of the finest arguments I have ever heard. And on June 12, 2008, the Supreme Court reversed the D.C. Circuit and ordered the case back to the district court for prompt hearings into the legality of our clients’ imprisonment. *Boumediene* is the first time in American history that the Supreme Court has invalidated an Act of Congress as an unconstitutional suspension of habeas corpus.

When I met Lakhdar Boumediene at Guantánamo in April 2008, shortly before the Court’s decision, I told him that his name was very well known in America. He smiled politely, but we both knew that even a victory in the Supreme Court would leave much unresolved, and he was not going home anytime soon. As I write this, Mr. Boumediene and our other clients are still held at Guantánamo as prisoners of the United States.

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