Reflections on My Involvement With the Guantanamo Bay Litigation

By David A. Grossman

Prior to attending my first Constitutional Law class in law school, my professor asked all students enrolled in the class to read the U.S. Constitution and prepare a one-page response. One of the specific provisions of the Constitution that attracted my attention was Article I, section 9, clause 2, which reads, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." I observed that this clause seemed to be a particularly revealing example of how the Constitution reflects the concerns that were at the forefront of the minds of its authors. Little did I know then that several years later I would be involved in litigation testing the very meaning of the Writ of Habeas Corpus and its central place in our government.

I began working on the Guantánamo litigation shortly after the Supreme Court issued its opinion in *Rasul v. Bush*.[1] The administration had just released the order establishing the Combatant Status Review Tribunals (CSRT) and setting forth the CSRT procedures. Working with and benefiting from the contributions of colleagues at the Center for Constitutional Rights and at Mayer Brown LLP, where I was then an associate, I prepared a document identifying the deficiencies in the CSRTs. The problems that we listed made their way into numerous legal briefs and talking points for members of Congress and the general public. Unsurprisingly, nearly four years later, the Supreme Court identified those same deficiencies in its opinion in *Boumediene v. Bush*.[2] The Court, I believe, agreed with our analysis not because it was especially prescient or

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[1] In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court held that federal courts have federal statutory jurisdiction to consider petitions for writs of habeas corpus filed on behalf of alleged enemy combatants being imprisoned at Guantánamo Bay. *Id*. at 473. Congress subsequently amended that statute, ultimately eliminating the statutory authority for federal court jurisdiction over the Guantánamo prisoners' habeas petitions.

[2] In *Boumediene v. Bush*, -- U.S. --, 128 S. Ct. 2229 (2008), the Court held that the Constitution's guarantee of the "Privilege of the Writ of Habeas Corpus" extends to all alleged

insightful, but because it was so firmly rooted in the fundamental concepts necessary for the rule of law to exist, principles that led the delegates to the Constitutional Convention to insist upon safeguarding individual liberty by preserving the writ of *habeas corpus* in the Constitution.

Identifying the deficiencies in the CSRT proceedings launched my involvement in the Guantánamo litigation. The work was very demanding, yet incredibly energizing at the same time. I remember contributing to briefs that insisted upon the right of prisoners to have access to counsel, which Judge Kollar-Kotelly recognized.[3] Building upon that victory, I helped draft a complaint filed on behalf of all unnamed prisoners who had yet to file habeas petitions challenging their detention.[4] Later, I recall having a "eureka" moment late one evening when I located cases that supported arguments for obtaining the freedom for Uighur prisoners whom the Administration's own flawed CSRTs procedures determined to be non-enemy combatants.

For me, the Guantánamo litigation was about more than legal principles. It was also about people. Throughout my activities, I had the privilege of working with extraordinary colleagues who continually inspired me. But most importantly, all of our activities focused upon vindicating the rights of the men being imprisoned at Guantánamo. Although I never traveled to Guantánamo, I had the privilege of meeting with Maha Habib, the wife of Mamdouh Habib, an Australian man who was released from Guantánamo in January of 2005. Maha flew to Chicago with her Australian attorney, where we met with her over the course of four days. One of the most memorable events of that week occurred when I drove Maha and her Australian attorney to an Indian restaurant on Devon Avenue, in Chicago, where we had dinner. We chose Devon Avenue

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enemy combatants being imprisoned at Guantánamo, and that the statutory procedures enacted by Congress, which limited judicial review to determining whether the CSRTs followed their own standards and procedures and to whether those rules were lawful, were an inadequate substitute for the writ of habeas corpus, thus violating the Suspension Clause of the U.S. Constitution. *Id*. at 2240.

[3] *See Al Odah v. United States*, 346 F. Supp. 2d 1 (D.D.C. 2004).

[4] *See John Does 1-570 v. Bush*, Civ. No. 05-313 (D.D.C. Feb. 10, 2005).

because of the many Indian and Pakistani restaurants in that neighborhood, thus ensuring the availability of halal food. On one level, our conversations were no different than countless conversations I have had with first-time visitors to Chicago. For example, we explained that Devon Avenue was once a thriving Jewish neighborhood, but after the Jewish stores moved further west, Indian and Pakistani merchants and restaurant owners arrived. The cross-cultural dialogue made things unusual, but did not create any insurmountable bridges. Yet the reality of the situation was always present, filling that evening, and indeed that entire week, with a seriousness and sadness that we could never completely escape.

Returning to the Constitution, and to the considerations motivating the delegates to the Constitutional Convention, I believe that the Guantánamo litigation represents the active civil society that the Constitution was designed to protect and foster. I consider myself very fortunate to have been able to do this work and thereby make a small contribution to ensuring that the United States' ideals survive and that the rule of law prevails.

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