

Speaking on Guantánamo¹

Since 2003, I have given my “Guantánamo Talk” at various conferences and lectures in a variety of venues, including law schools, churches, centers, and even on the Hill, well over twenty-five times, maybe more. Over the years, I’ve added to the discussion new legal developments and recently-learned facts. I’ve changed the focus to fit the topic of the particular conference or to highlight current news, such as the hunger strikes. But, the story has never changed, just as the lives of the Guantánamo detainees have never really changed.² After countless district court opinions, three Supreme Court decisions, two congressional acts, hundreds of local, national, and international news articles, editorials and op-eds, numerous marches, demonstrations, protests and press conferences big and small, and three deaths, the detainees, as I say with dramatic emphasis during “The Talk,” are in almost the exact same situation they were in five years ago. Nor will their lives change any time soon.

Before everything began, I had been at Shearman & Sterling for almost three years, yet it had seemed so much longer. I blame it on the 2,800-plus billable hours a year I was cranking out. But, reinsurance was interesting, wasn't it? Moons before my reinsurance life, I tended bars in nightclubs and hadn't even been sure I would go to college, much less law school. And then there I was, practicing international litigation in one of the biggest, most reputable law firms in the nation. My life had changed.

On the morning of September 11, 2001, I was sitting in a conference room at the Waldorf-Astoria in New York City, waiting to examine an expert witness in a forty million dollar reinsurance arbitration. Instead, we watched from the safety of a luxury hotel the Twin Towers

¹ I want to thank my research assistant, Khandine Bennett, for her invaluable comments and edits and her constant enthusiasm for and support for the Guantánamo cause.

² The individuals imprisoned at Guantánamo eventually became commonly known and referred to both in litigation and in the public realm as the “Guantánamo Detainees.”

collapse on TV, knowing that as people jumped to their death on the small screen, they were jumping in real life—to their death—just a few miles down Broadway. Months later, I was reminded that minutes after the second tower went down our co-counsel from another law firm blurted out, “One or two occurrences?” I can only speculate that what caused others in the room to cry and gasp in shock caused him to completely disconnect from reality and focus on what he could comprehend. On the other hand, he is an important reinsurance partner in a big law firm where important matters are discussed at all times, in all places.

That afternoon I walked out to the quiet streets of midtown Manhattan, which were devoid of traffic and sparsely littered with people in panic and disbelief and filled with fear. Everyone was speaking in quiet voices but the fear was full volume.³ I felt full of fear too. Within days, I was on the Acela going home to Washington, D.C. And, within weeks and with little effort, I moved from fear to a low level of uneasiness, to getting on with my life and my busy corporate litigation practice at Shearman. Things went on as they should in the firm’s beautiful downtown offices on Pennsylvania Avenue. Long and expensive hours were billed to big clients, conference calls were had, and junior associates worked all weekend to write me memos on personal jurisdiction and other matters similarly interesting and important. That was to be expected of a law firm such as Shearman & Sterling LLP, which ranks among the “major top-ten” law firms in the nation. It has fourteen offices worldwide and its clients are Fortune 500 companies and the like.

Outside our office, the United States invaded Afghanistan in October 2002. I was busy defending OPEC in an antitrust suit and representing Mexican tomato farmers in negotiations with the Department of Commerce; I was not paying much attention to the news. Frankly, I did not really know how the war in Afghanistan was progressing or think too much about the enemy

³ It would be cliché to say that the streets of Manhattan were “strangely silent.” Of course the silence was strange. But it was the first time I had faced the “quiet” of a bustling city and it was not only strange, it was blatant, jarring and deeply unsettling.

forces. I did not pay attention to where they were held; it certainly never occurred to me that they would be taken outside Afghanistan. And, too the degree I consciously acknowledged that “enemy forces” were actually individuals, I never thought too much about how they were being treated. After all, they were, we were told, “vicious killers,”⁴ “the worst of a very bad lot . . . devoted to killing millions of Americans”⁵ and would “gnaw through hydraulic cable.”⁶ We were told they were captured on the battlefield in Afghanistan and taken to Guantánamo and that because they were all terrorists they did not deserve the protections of the Geneva Conventions.⁷ I did not necessarily buy into that theory, but as a lawyer—who by profession is obligated to follow the law—I am ashamed to say that I did not think much about it even when I began reading the news. I did not question or analyze or consider why no law applied. I was just too busy with my big firm job where life goes by very fast unless you look up. And, 9/11 had happened, as we all told ourselves back then.

Less than six months after 9/11, Tom Wilner, a partner at Shearman, my mentor, colleague, and good friend, received a call, an inquiry from abroad: Would we take on a matter regarding Kuwaiti citizens who had gone abroad to do humanitarian work and who now *might be* in the custody of the United States? The project was investigatory in nature: talk to some friends at the DOJ, maybe file a FOIA request,⁸ track the Kuwaiti do-gooders down, and then just give the

⁴ Secretary of Defense Donald Rumsfeld (January 27, 2002) *available at* http://www.defenselink.mil/news/Jan2002/n01272002_200201271.html.

⁵ Vice President Dick Cheney Fox News Sunday (January 27, 2002) *available at* <http://www.foxnews.com/story/0,2933,44079,00.html>.

⁶ Richard Myers, General, Joint Chiefs Chairman (January 11, 2002) *available at* <http://transcripts.cnn.com/TRANSCRIPTS/0201/11/se.02.html>.

⁷ White House Memorandum, “Humane Treatment of al Qaeda and Taliban Detainees” (Feb. 7, 2002) *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>

⁸ A Freedom of Information Act (“FOIA”) Request allows “any person . . . including U.S. citizens, foreign nationals, organizations, associations and universities” to request from any Executive Branch department, agency, office or federal corporation information relating to all “agency records” such as documents, photographs, email and electronic documents, etc. that are in the possession and control of the agency. National security and confidential business information are two of a few exceptions.

information to their families so they could connect. Done. Maybe continue to represent them if there were a need. What that “need” might be was very unclear at the time. Indeed at that time, it wasn’t at all clear that they were at Guantanamo or even in Afghanistan. And it certainly wasn’t readily apparent that the project would be so difficult, almost insurmountable.

In keeping with big firm tradition, we decided that, before committing to the project fully, we would fly to Kuwait to do due diligence, to meet the Kuwaiti families and the Kuwaiti attorney involved. Neil Koslowe, a counsel and colleague at Shearman, a steady lawyer with good sense and years of DOJ experience, had joined the project and stayed in D.C. to work his government contacts. I was apprehensive about traveling to Kuwait, not because I am afraid to travel or because I have little sense of adventure. I had backpacked through Southeast Asia, lived in Africa, and spent more than the requisite amount of time in Europe living off of bread and wine. And, as a lawyer with international clients, I had traveled throughout the country—New York, Kansas City, San Diego—and across the globe—London, Vienna, Mexico City, Bermuda, Caracas. I had done my best to find something interesting about all of those places despite the fourteen-hour days I often worked on such trips. But, I had lived in the Middle East before. I knew what was in store for me, or at least I thought I knew.

When I was twelve, we moved from the only home I’d ever known, in Alaska, to Saudi Arabia where my dad began a new job working as a pilot for the Arabian-American oil company, Aramco. At that age, Saudi Arabia seemed so brutal. Brutally hot, stark, and boring, brutally restrictive, brutal to women. Even as Americans, we females were told what jobs we could take (none, except teaching and nursing), when and where we could drive, how we could dress, how much makeup to wear, and with whom we could socialize. And, these restrictions applied on the American compound! The culture, religion, language, people, and land were so vastly different

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from anything I had ever experienced. And I could not get past those differences to see anything interesting. I was more than happy to leave home at fourteen to go away to school.

So, I braced myself for the Middle East. I hadn't been back since I left over twenty years ago. Though the temperature was in the 80s and 90s, I had brought long sleeves, long skirts, a suit two sizes too big, and head scarves. I wondered how much I would be allowed to contribute to the discussion; whether I would even be allowed to talk. For the first time in a long while, I felt completely unsure of myself, how I would approach the situation, how I would react. Would I be the necessarily accepting pre-teen as I had been in Saudi or would my thirty-something feminist proclivities prevail, come hell or high water?

Our first meeting was in a conference room in the Kuwaiti City Sheraton, the same hotel that had been devastated by Iraqi soldiers in the Gulf War in the early 1990s. Tom and I were met by the Kuwaiti Lawyer, an American lawyer, and Mr. Khalid al Odah, father of one of the missing Kuwaiti individuals and former Kuwaiti Air Force pilot who had flown with Americans in the first Gulf War. Khalid had fought alongside American soldiers, and when our tanks rolled in to Kuwait City signaling the country's liberation, his son, Fawzi—now in his sixth year of detention at Guantánamo—ran to greet them, waiving an American flag. We walked in to that conference room, one female lawyer in a very baggy business suit and four men years my senior. The families were there, seated around a large conference table. By “families,” I mean fathers and brothers, ranging in age from twenty-five to seventy-five. There was not a female among the eighteen or so individuals who were wearing the traditional floor-length white thobe and Saudi headdress—a ghutra and tahiya. Think Omar Shariff and “Lawrence of Arabia.” I felt very American and very female.

Introductions and niceties took up most of the morning. By the afternoon, we had learned some general information, that the missing Kuwaitis had gone abroad to do humanitarian work (dig wells, teach the Koran, help refugees), had gotten caught up in the conflict and now were most likely in Guantánamo, which I had only recently discovered was an American military base in Cuba. On the flight to Kuwait, I had brought a binder of background materials to read: the Geneva Conventions, statements from Amnesty International and Human Rights Watch, and newspaper articles on the war in Afghanistan, the Guantánamo detention center, and the administration's position on the terrorists or "unlawful enemy combatants" as they were being called. Though some articles touched upon it, there really wasn't that much information on Guantánamo and the individuals that were being transferred there. At that time (April 2002), it was all so confidential, a very big secret. I don't think the United States ever had "ghost detainees" until after 9/11. Other countries had ghost detainees, but not us. Yet, the Guantánamo Detainees were about as ghost as you could get. In 2002, the Administration wasn't talking and the public wasn't asking; it knew nothing and it didn't want to know. It was becoming clear that the Kuwaitis had gotten lost in that big secret and that our job was to find them.

We spent the next two days meeting with the families. Actually, I—the American female—met with the families—the Muslim men—one by one, essentially doing intake. Who is missing? What is your relationship? Why did he travel abroad and where to? When did you last hear from him? Most families had put together a packet of information on their missing person: personal stats, such as date of birth, wife,⁹ children, job, copies of certificates of charitable works from the past, and other miscellaneous information. Some even had copies of letters from their missing loved one that appeared to have been transmitted through the Red Cross from

⁹ "Wife," singular. While I knew from my experiences that many Saudis had multiple wives, my Kuwaiti clients only had one wife each, which Tom Wilner teasingly told Mr. Al Odah was a real lost opportunity.

Guantánamo. The families had found each other somehow through the community and joined together to try to find their sons and brothers. Many of the Kuwaiti men could speak English and for those who didn't, either Khalid or another relative translated.

At the beginning of the intake, the father or brother, as it was in most cases, was very shy with me and looked at the translator when speaking. They would not look at me even when I was speaking. I was not surprised. Living in Saudi had given me insight into a very conservative approach to Islam. I did not think that Kuwait was as strict as Saudi Arabia, but I was intent on erring on the conservative side. So I tried to be shy and non-challenging. I didn't look them in the eye; I didn't try to force them to look at me. Instead, I spoke quietly, in sing song, asking gentle questions and looking at the far wall or at my notepad. But, soon the emotion of speaking about the missing son or brother overwhelmed them and by the end, the intake became a conversation between two people, both concerned with the same thing—a human being. In the end, those Muslim men looked me in the eye as they spoke, with tremors in their voices. I do not pretend to have been affected in any way similar to the family member whose son or brother was missing. But, it was that missing life that bound us at least in that moment, and it did not matter that we were separated by a panoply of factors—gender, history, culture, geography—to name a few. It was simply about a person, which was a marked contrast to a majority of the work I had been doing at Shearman.

While in Kuwait, we also met with the people in the Foreign Ministry who were exceptionally helpful, sharing with us a fax from the US Embassy in Kuwait—received recently—indicating in the briefest of words that six of the missing Kuwaiti citizens were in Guantánamo.

The United States offered no explanation of how they got there or why they were there.¹⁰ The Kuwait government had no additional information to tell us.

Additionally, we spent one afternoon visiting a couple of well-known Kuwaiti relief organizations to find out more information about the kind of charity work they did and their volunteers, where they sent them and for how long. In those meetings, I wore a head scarf and sat in the corner, not speaking, only listening unobtrusively, making sure to not look the men in the eye and certainly not shake their hands. I had been gently warned beforehand by Khalid Al Odah that those organizations were “very conservative” and it was best if I “stayed in the background” and let the men (Khalid, Tom and the other two men in our party) do the talking. Somewhat to my own surprise and certainly to the surprise of Tom Wilner, I accepted that role easily. In sharp contrast, at work I was certainly not known for my deference to partners or for shying away from confrontation. Khalid later told me he had never seen me so demure. And he had only known me two days.

We learned that Kuwaitis are taught at a very young age to give to charity, to donate both their money and time. It is not unusual for a Kuwaiti citizen to spend half of his vacation time in a location overseas doing charitable works. Indeed, Kuwait often led the region in the amount of aid donated to poor countries.¹¹ The fact that the Kuwait individuals had been abroad doing humanitarian work was not unbelievable then, nor was it inconceivable to me that many of them had gone to conflict areas. This issue was to arise again and again when people asked me with suspicion just exactly what were they doing in the Afghanistan/Pakistan region if they were not in

¹⁰ Several months later, the US Embassy sent notice to the Kuwait Foreign Ministry that another three Kuwaiti citizens were at Guantánamo. There were 12 Kuwaitis in total detained at Guantánamo. The US never specifically verified the detention of the remaining three Kuwaitis.

¹¹ Prior to the first Gulf War, “in per capita terms, Kuwait’s aid program was one of the most generous in the world,” http://www.photius.com/countries/kuwait/economy/kuwait_economy_foreign_aid_and_trad~258.html and its foreign assistance considerably high in terms of a percentage of Kuwait's GNP. Kuwait Fund for Arab Economic Development, <http://www.kuwait-fund.org/e/index.asp>.

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fact joining the Taliban or al Qaeda. Wasn't that the only reason one would go to a war zone? Many Americans didn't believe that the Kuwaitis or any other Guantánamo detainee had gone to a conflict area to help others. Had 9/11 simply made people suspicious of Arab Muslims? While many people in America had indeed become suspicious of Arab Muslims, all Muslims, and "brown people" by and large, I think the suspicion was caused rather by our lack of experience of the world. Generally speaking, Americans do not travel overseas, they do not travel overseas to volunteer, and they certainly do not travel overseas to conflict zones to volunteer. Many Americans simply cannot understand why anybody would travel to a conflict zone unless they were fighting in the conflict. To my disappointment, good friends of mine were among those who had this reaction. I had to remind them of my own history, that I had done something similar but with considerably less charitable intent.

I moved to Angola in 1985 to join my then boyfriend with little in my head but adventure. He was posted there as an aid worker with UNICEF; I was just there, an American, age eighteen, living in Luanda in the middle of a raging civil war fueled by the Cold War. There were 22,000 Soviet and Cuban soldiers toting machine guns in the capital city. Not too far beyond the fifty kilometer "safe zone" were the rebel forces, led by Jonas Savimbi and funded by the United States. Bread, electricity, and running water were daily concerns for everyone. What was I doing in the middle of a war zone? I had no diplomatic status. I could have easily been picked up and detained merely because I was an American.

When we returned to Washington, D.C., Neil filled us in; he had been busy. He had made several informal attempts to get information from the DOJ. Years of service in there, however, apparently were not enough to get anything other than unreturned phone messages or a change in the conversation. He was told that the administration and the DOD were handling "it;" he was told

we should leave “it” alone. Neil also inquired into making FOIA requests, that is, requests for documents containing basic information, such as where were the Kuwaiti citizens and in whose custody or control were they. Five years ago, we still thought all we had to do was find out what agency and which officials were in charge, put the Kuwait families in touch with the right officials, and they would then be able to make contact with their “missing” son or brother. They might be locked up but we never imagined that they would be locked up *incommunicado*, without access to a lawyer. I mean, it was America for god’s sake. Five years ago, a prisoner didn’t vanish into U.S. custody unless a mistake had been made. But the response to Neil’s casual inquiries—he hadn’t even filed an official FOIA request—was: “Guantanamo? Don’t bother asking, you won’t get anything. Nothing’s coming out.”

Additionally, Neil had learned that a suit had been brought on behalf of the individuals at Guantánamo by a coalition of clergy, lawyers and law professors. The case was dismissed quickly for lack of standing as the petitioners had no connection to the detainees, and the case was never appealed.¹² More significant were habeas petitions that had been filed by the Center for Constitutional Rights (CCR) and Joe Margulies on behalf of two British citizens and two Australian citizens on February 19, 2002.¹³ Neil reported that this litigation was still pending.

After a brief internal discussion, we decided that we had no choice but to file suit on behalf of the Kuwaiti citizens. The issues—arbitrary detention being the primary one—were going to go before a court in the *Rasul* case regardless and a judge would make a decision. We wanted to get

¹² *Coalition of Clergy v. Bush*. The case was filed on January 20, 2002 and dismissed on February 21, 2002. The petitioners were Marion R. Yagman, Carol A. Watson, Lawrence W. Schilling, Joseph Reichmann, George Regas, Kenneth B. Noble, Arthur L. Margolis, Hugh R. Manes, Steven Jacobs, Allen Freehling, Ramsey Clark, Erwin Chemerinsky, Kathryn S. Bloomfield, Robert A. Berger, and Haim Dov Beliak. Judge Matz held that the petitioners lacked standing as next friend to file petition for writ of habeas corpus on behalf of detainees; the District Court lacked jurisdiction to issue writ; and the detainees had no right to a writ of habeas corpus.

¹³ *Rasul v. Bush*. Petitioners were Shafiq Rasul, Asif Iqbal, David Hicks, Skina Bibi (mother of Rasul), as Next Friend of Shaiq Rasul, Mohammed Iqbal (father of Iqbal) as Next Friend, and Terry Hicks (father of Hicks) as Next Friend.

in the fray and have the chance to have our say on the issues. While perhaps arrogant to believe that we could contribute something of value to the litigation, it would have been dilatory to remain mere observers. On the other hand, we were getting some pushback from the firm. Our colleagues at Shearman were split on whether we should even be representing individuals at Guantánamo. In the end, Tom convinced our colleagues—as he would adeptly go on to convince many more people—that we were both right and righteous to stand up for what we believed were fundamental principles of American justice.

In an attempt to appear to the court more modest and less like we were demanding release, we chose not to file a *habeas corpus* petition, which essentially requires the government to come forward and justify the detention or release the prisoner. Rather, we filed a traditional complaint, which merely “complains” that the entity being sued is doing something against the law. Our complaint alleged that the Kuwaiti citizens were being detained unlawfully and that they were entitled to due process and access to counsel and their families.¹⁴ We believed that we were requesting the most minimal of rights. Of course, we understood there was a ‘war’ in Afghanistan. We knew that the Administration was not giving individuals allegedly “captured on the battlefield” prisoner of war rights, but we assumed that they had *some* rights, at least those we consider the most fundamental. In the complaint, we were deliberate in our words, trying not to reach too far. We didn’t have an organizational position to maintain; we were not Amnesty International or Human Rights First. We had a client to represent. And, we were lawyering in a large conservative international law firm that didn’t even want us to sue President Bush, as if he might take personal affront. In a compromise, we listed the United States as the first defendant so that the case would be known as *Al Odah v. United States*, rather than *Al Odah v. Bush*. Once filed in the District

¹⁴ Though styled as a “complaint,” we did cite a violation of the habeas statute, among other statutes. We later filed habeas petitions on behalf of each Kuwaiti citizen detained at Guantánamo.

Court for the District of Columbia, our case was joined¹⁵ with *Rasul v. Bush*, and thereafter the two captions were often used interchangeably, much to the firm's chagrin.

Not surprisingly, the government responded to both the *al Odah* complaint and the *Rasul habeas* petitions with a motion to dismiss. More surprising to us was the government's primary reasoning. It was not that we were in a war and there was a need for unrestrained executive command authority; this theory was certainly put forth and the 9/11 catastrophe played out in the brief to emotionally appeal to the judge. The government's primary argument was that, regardless of whether there was an ongoing war, the courts did not have the jurisdiction or the authority to even hear the claims of the Guantánamo detainees *solely* because they were foreign citizens and Guantánamo was not in the sovereign territory of the United States, despite the fact that it has exclusive control and jurisdiction over the military base there. We were taken aback by this stark position. In our reply, we decried the government's expansive grasp of power, emphasizing that under such a theory the United States could pick up a citizen off the streets of Rome, detain him, torture him, and summarily execute him and the US courts would have no authority to hear his claims. Notwithstanding what we thought was a compelling analogy, the court dismissed the cases.

From where we stand today, we now know that was exactly what the government was doing: picking up people all over the globe, off the streets of Rome or Bosnia or the Serbian-Macedonian border, detaining them, interrogating and torturing them without reference to the law or pursuant to court authority. Five years ago, the idea was inconceivable, outrageous, and deplorable. Now people wearing nice suits debate this in public *fora*. The idea that the government could openly do that at Guantánamo to individuals without court oversight and

¹⁵ Though *Rasul* was filed in February and *al Odah* in May, the court looked at them together, held one oral argument and dismissed the two cases in one decision.

applicable law even in the close wake of a military invasion was equally outrageous to us. It turned out, a majority of the public didn't think it was so outrageous and agreed with the government that courts should have no say and the detainees no rights. At the time, I was, perhaps naively, amazed at people's reaction. So often I would say, "You just can't detain people without rights or some law applying," or "It's simply wrong, unjust; it's un-American." One person responded to my incredulity by stating, "Sure we can, we detained people during World War II." Even reminding my guest that we, in fact, look back at the internment of Japanese Americans as a grave mistake did not sway him. Thankfully, I didn't think much of this person; otherwise, I would have been disgusted. Lawyers I knew, good lawyers at top law firms, people that I think highly of both professionally and personally, couldn't believe that I was even working on the case. How could I represent terrorists? How could I believe that the Kuwaitis were on a humanitarian mission? How could I forget that 3,000 people died in 9/11?¹⁶ Wait a second. How could they forget that they were lawyers? Lawyers believe in the law, we believe in the Rule of Law. That's what defines our profession. Apparently, many lawyers didn't believe in the Rule of Law at the time, or at least believed that it only applied to people less controversial. We later found out that the plea of the Kuwaiti families had been turned down by no less than nine or ten top D.C. law firms. Those firms would regret this decision two years later when we won before the Supreme Court in *Rasul v. Bush*. Once the high court held that the detainees had *habeas* rights, those top law firms lined up to represent a Guantánamo detainee.

¹⁶ In fairness, I should note that my friends who held this position did not disclaim me as a friend. They had certainly seen me do and say things in law school that they themselves never would have done or said and that did not affect our friendship, rather I think they respected me for it. Regarding Guantánamo, my friends who disagreed with me early on eventually changed stance, some on account of *Rasul*, and others due to the passage of time. It became clear that the administration wasn't just taking time to sort things out but rather, as a matter of policy, it would apply no law nor give the detainees any rights, and people, who had previously supported the Executive, became uneasy with the indefiniteness of the situation.

That time period before *Rasul* was decided is one of my prouder moments in my law career thus far. You know you're making an impression when you get hate mail, and we received our share of it: "You should be locked up in Guantánamo with the terrorists." Before *Rasul*, other than our Shearman team, death-penalty lawyer Joe Margulies, and the CCR folks,¹⁷ not too many people would touch Guantánamo. Not other law firms, not even the media who told us confidentially that if they asked questions about Guantánamo at White House press conferences, they would be blacklisted. So much for the Fourth Branch.¹⁸

At that time, the Second Branch—Congress—was completely acquiescent in the whole matter. In the first year or so after 9/11, I don't recall a single amendment or legislative proposal that was raised on the Hill, or even a formal hearing to inquire into the detentions at Guantánamo.¹⁹ Sometime in 2002, Tom and I met with staffers on the House Judiciary Committee at our request. It was my first trip to the Hill as a lawyer. I was excited, nervous and very optimistic. Oh, how naïve I was! The two staffers, both lawyers, were polite and even seemed deeply interested in what we were saying "arbitrary detentions, no charges, no hearings, no judicial oversight. . . ." They nodded and clucked. They promised to look in to it, to discuss it with Representative Sensenbrenner. We left our cards and never heard from them.²⁰

¹⁷ I can not say enough good things about Joe Margulies and the lawyers at CCR, in particular, Michael Ratner, Steven Watt and Barbara Olshanksy, who, in the early days, were the primary participants on the case. Steve eventually went on to work at the ACLU and represent Mr. Al-Masri, the German citizen who was detained by the CIA and tortured based on mistaken identity, and Michael, president of CCR, is still there fighting the good fight. Barbara has since left CCR.

¹⁸ There were a couple journalists back then who had the guts to delve beyond the Administration's statements in press conferences on Guantánamo: Pulitzer-prize winning Roy Gutman, who in July 2002 published a piece in Newsweek, tracing the path of six of the Kuwaitis from Kuwait to Guantanamo and revealing that they had been sold for bounties by Pakistani tribesmen to local authorities, and the reporters at the *Washington Post* who met with us and began to report a view contrary to the Administration's position.

¹⁹ On January 27, 2002, a group of Senators went to Guantánamo to observe interrogations, and Representative Nelson of Florida raised the idea of a bipartisan delegation.

²⁰ Senator Bingaman and his staff were the only people on the Hill who, pre-*Rasul*, sought to even inquire into the detentions at Guantánamo. In late 2002, we were approached by a brave female lawyer on his staff whose name unfortunately escapes me. She was persistent, inquisitive, objective and rightly concerned. On July 16, 2003, Senator Bingaman proposed amendment 1268 to the Department of Defense Appropriations Act, 2004 merely asking that the DOD be required to report to Congress the names of each of the detainees, their legal status, and how

The more that people reacted with approval for unrestrained Executive power, or with ambivalence at best, the more we stood up for the rule of law. Tom recently reminded me, “We were stunned by people’s reaction. They didn’t care that Guantánamo was a law-free zone. That made us fight even harder for what we believed was right.” And how can I forget what one of my law school friends said to me at a time when many others were expressing dismay over what I was doing: “Good for you. You are the man in the white suit. That is why we went to law school.”

After losing before the D.C. District Court, we appealed the dismissal to the D.C. Circuit Court together with *Rasul*. As we surmised, the panel affirmed the lower court’s ruling and dismissed our cases.²¹ We were headed for the Supreme Court. I should say, *we* thought we were going to the Supreme Court. Many others thought that while we were headed that way, we would never get there. By then, fall of 2003, Guantánamo had picked up some speed in the press and the public’s consciousness. More and more lawyers agreed with our position, or at least found the administration’s position unacceptable. And, a handful of law professors—Tony Amsterdam, Douglass Cassel, and Eric Friedman—had joined the *Rasul-Al Odah* team to provide invaluable assistance, knowledge, and morale support. Even *they* thought the Supreme Court might not take our case. But, it did. To make the oral argument, we strategically recruited John Gibbons, former Chief Justice of the Third Circuit and a Reagan appointee. While there were other lawyers better known as Supreme Court oralists, John had a powerful Republican stamp of approval, which we believed would give our case the right ethos. And the *Rasul* and *Al Odah* teams, together with the Professors, John and his crew—Gita Gutierrez and Jonathan Hafetz—spent countless hours mooting to prepare for oral argument before the Court. I sometimes had to pinch myself to make sure I wasn’t dreaming. I was barely six years out of law school and I was helping prepare for an

their situation would be handled in the future. http://www.fas.org/irp/congress/2003_cr/s071603.html.——

²¹ *Al Odah v. United States*.

oral argument before the Supreme Court on Constitutional issues, habeas corpus, and national security. I had never even been inside the Supreme Court building before the day of oral argument! Ambitious though I am, I am quite certain that when I was a second-year law student at UT law school and had just accepted a summer associate position at Shearman & Sterling, I never imagined the likes of what was in store for me.

The Supreme Court not only granted cert, on June 28, 2004, it decided the case in our favor, holding that the Guantanamo Detainees had the right to challenge the legality of their detention in U.S. courts through the writ of *habeas corpus*. We were, needless to say, jubilant and immediately started making plans to go to Guantánamo to visit clients with whom we had never met or even spoken though had been representing for the last two years. Wait. Not so fast. What was I thinking? That the government would just roll out the welcome mat to the detainees' counsel simply because the Supreme Court ruled that the detainees had habeas rights? Despite the ruling, the government refused to concede that the detainees had a right to counsel, but that out of "graciousness," it would now allow counsel down to Guantánamo to meet with clients. After months of litigating exactly how the visits and communications would proceed, taking in to consideration the protection of national security and attorney-client confidentiality, we took our first trip to Guantánamo on December 26, 2004.

Another two years have passed since that first trip; I have now been to Guantánamo over a dozen times and I'd like to think I've made a difference in the lives of the detainees. But, despite my belief in Michael Ratner's words, "Lawyers bring light to dark places," nothing has really changed for the detainees since they were first brought to Guantánamo in 2002. Sure, they don't kick the %@#\$ out of them, as one of my former Kuwaiti clients used to tell me. Rather, he went on to say, "They torture us in our hearts and minds."

Despite my best efforts and that of over 100 big-firm lawyers, solo practitioners, public defenders, and law professors, the majority of the Guantánamo detainees continue to be imprisoned indefinitely without charge, trial or a fair hearing. The Supreme Court just denied the cert petition filed in the *al Odah* and *Boumediene* litigation, letting the situation continue until some unknown future time. Thus, until that time, many of the detainees will continue to live in isolation, with little exercise or opportunity to stimulate their minds. What little regular human contact they will have will be with guards or interrogators, if they are even still being interrogated, which many are not. They will continue to have no direct contact with their families just as they've haven't had since they were locked up over five years ago.²² Most of the men believe they will never see their families again. I am not sure I disagree with them. The detainees will continue to “exist,” for you can not call what they are doing “living.” They exist in conditions far worse than those given to convicted criminals in the United States despite the fact that the majority of men at Guantánamo have never been charged with a crime or will ever see the inside of a courtroom. Even those that are charged and acquitted—highly unlikely under the recently passed Military Commissions Act—will not necessarily be released but will continue to exist at Guantanamo until the war on terror is over. As if the war on terror is a real war that could actually end. The war on terror will be over when the American public stops being terrorized by the war on terror and emerges from what Zbigniew Brezezinski recently coined a “culture of fear.”²³ In the meantime, however, human beings will continue to be warehoused in the name of safety and security. What was once unrestrained executive power now has congressional blessing, and there

²² Exceptions to this rule have been made for two detainees, who have been charged with war crimes. David Hicks has had more than one phone call with his dad in the last couple years and Omar Khadr had his first phone call with his family in March 2007 since he was brought to Guantánamo at age sixteen. He is now twenty years old and has spent roughly a quarter of his life in detention without having had a trial.

²³ Mr. Brezezinski concluded that the Administration's use of “the ‘war on terror’ as a mantra has created a culture of fear in America,” which has “effectively undermined our ability to confront the real challenges we face from fanatics who may use terrorism against us,” and done more damage than the perpetrators of 9/11 could have possibly imagined. The Washington Post, Outlook, March 25, 2007.

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does not appear to be serious political motivation to change the situation for the Guantánamo detainees. Or what little I am hearing, I have heard before.

It has been five years since I began working on the Guantánamo litigation and five and a half years since the detainees have been imprisoned at Guantánamo. I went from being a junior associate at Shearman, to senior associate, to part time so I could adjunct teach at local law schools. Now, I no longer work at Shearman; I have moved on to teach full time in the Human Rights Law Clinic at AU's Washington College of Law, representing Omar Khadr, the young Canadian citizen who is currently one among only three detainees to be charged under the MCA. He will likely be tried this summer, and if Canada doesn't step up, he will continue to exist at Guantánamo indefinitely. This fall, I will move on again and up in the ranks of law schools to teach at the University of Texas School of Law.

And, I will continue to give the Guantánamo Talk.