

Paul Winke—Boumediene

In June of 2008, the Supreme Court reaffirmed that the historic writ of habeas corpus was available to those imprisoned in Guantánamo in the landmark opinion *Boumediene v. Bush* (a case that was briefed and argued by my law firm). Shortly after the announcement of that decision, Judge Richard J. Leon, the federal district judge who had presided over our case since the fall of 2004, set an aggressive schedule: he intended to have all twenty-four open habeas cases on his docket decided by Christmas. As our case was the oldest of his Guantánamo cases by far, our clients were given the first hearing. That hearing commenced shortly after Election Day and concluded eight days later. I traveled to Guantánamo with an interpreter in advance of the hearing to be with our clients as they listened in to the opening statements of the hearing, and to prepare them for possible testimony before Judge Leon.

Our firm represents six men—Mustafa Ait Idir, Mohamed Nechla, Hadj Boudella, Lakhdar Boumediene, Saber Lahmar and Belkacem Bensayah—who were arrested by federal police in Bosnia in October 2001 on suspicion of participating in a plot to bomb the U.S. embassy in Sarajevo. All six men were born in Algeria, but by 2001, each was living, working and raising families in Bosnia. Although the Bosnian authorities firmly cleared the six men of the unfounded charges against them following a three-month investigation (during which time they were detained in a Bosnian jail), they were effectively kidnapped by the U.S. government upon their release by Bosnian authorities in January 2002, and they were among the earliest arrivals at the U.S. Detention Center in Guantánamo Bay, Cuba. We filed petitions for habeas corpus for the six men in the summer of 2004, seeking what we finally got more than four long years later, in early November 2008—their day in court.

I traveled with an interpreter on Election Day 2008 on a military flight that flew directly to Guantánamo from St. Andrew's Air Force Base in Maryland. We were required to check in at 4:00 am even though the flight didn't leave until 8:00 am. The luxurious accommodations on board the cargo plane included "net seating" (essentially seat belts strung in criss-cross fashion), a latrine for males and a "honey pot" (don't ask) for females.

I spent Election Day organizing my notes. In the evening I walked to the Clipper Club, a nearby bar, with some other lawyers who had come from Oregon to visit their clients, and we watched the election returns roll in on CNN. But we were all in bed by the time the election of Barack Obama—who had promised to close Guantánamo—was called at 11:00 pm.

During the client meetings the next day, I explained to the men how the habeas hearing would proceed in Washington, D.C.: both we and the government would have the opportunity to make an opening statement that would be open to the public, but then the remainder of the hearing would be closed so that the judge could discuss the classified evidence that was put forward by the government to justify holding the men and our responses to it. The responses of the men varied: some believed that this would be the first chance to show the judge how flimsy the case against them was, while others believed that the judge had already written his opinion siding with the government, and it was sitting in his desk drawer, ready to be pulled out after the judge made a show of listening to our arguments.

Following the initial round of meetings with our clients, the next day was spent meeting with the three men who were most likely to testify—Mohamed, Hadj and Mustafa. Before coming, I had prepared a set of questions for each man. There would be no surprises in any of the testimony—we had submitted multi-page affidavits for all six men that recited the essential facts of

their lives, from their time in Algeria to the various countries through which they traveled before ending up in Bosnia, and ending with categorical denials that any of them had any affiliation with, or even any sympathy for, al Qaeda or the Taliban. Strictly speaking, the testimony of the men was not necessary given that Judge Leon had ruled that hearsay may be permitted and the government had no objection to the admission of their affidavits. We believed that it would be important, however, for one or more men to look the judge in the eye (via an unprecedented video linkage), and state that he did not do anything the government accused him of, and that he condemned terrorism as an affront to Islam.

I was escorted to the first meeting in a location I had never been to previously. According to the men, it was a room where they met with their interrogators. Unlike any other room I had seen, this was furnished with more than the bare necessities, even if those were fake plants, hideous paintings and a threadbare couch. The room also contained a small television with a DVD player, perhaps as some kind of reward for cooperative detainees. (Of course, it was also equipped with video surveillance, cleverly hidden between the fake wood paneling on the walls.) Clearly, the military was treating the hearings differently from ordinary client visits.

Before I could begin to prep the men, however, they had many questions, the first of which was: how soon will the newly-elected Barack Obama close down Guantánamo? I could only repeat his campaign promise to shut down the prison (a promise that had also been made by John McCain, even if he also condemned *Boumediene v. Bush* as “one of the worst decisions in the history of this country”). The next set of questions repeated a theme we had heard from the men for several years: is the hearing before Judge Leon a farce, or can we really expect justice to be done? And, as always, the answer was not completely satisfying: all of the lawyers representing the men have faith in the American legal system, a faith that we do not expect our clients to share

fully, but in particular cases each judge will feel a strong pull to err on the side of deferring to the Bush administration's view of our men, lest that judge be responsible for letting a terrorist go. Given how both we and our clients see the case, we did not believe that the right decision would be a difficult call at all, but Judge Leon would necessarily have to take into account the fact that the military has declared for years that all six men are simply too dangerous to release. In addition, and much to our dismay, the judge would also have to contend with a cache of evidence that had been provided only to the judge and not to us as counsel for the men. Although it was not clear then whether the judge would deal with it, I explained to the men that this secret evidence might also play a role in the outcome of the case, however unfair that might seem. (The judge ultimately decided, in a special session involving only him and the government lawyers and excluding us, that he would not consider it.)

All three men were able to put their skepticism aside and to work with me on answering the questions for their testimony precisely and clearly. Just as when I had worked with them to draft affidavits several months earlier, I was impressed with each man's care for detail, even for dates and locations that had nothing to do with the government's case against them. Each one understood his duty to tell the truth, and patiently worked with me to present truthful answers in the most direct and persuasive way possible. It was a productive session, and I left confident that any of the three men would make an effective witness, both for themselves and as a representative of all of our clients.

The next day was a disaster, but it was not until the end of the day that we realized as much. Opening arguments were scheduled in Washington, D.C., and Judge Leon ordered the government to make it possible for all six men to listen to the proceedings as they were happening. (As they were not testifying that day, the connection would only allow the men to listen, and not to

speak.) The interpreter and I arrived more than two hours before proceedings were to begin in D.C. and also before any of the men had arrived. This was also a first; I had never seen the men brought in while shackled. Every prior client visit started with the lawyers being brought into a room where a single prisoner sat behind a table, having already had his handcuffs and foot shackles removed, save for a single “soft shackle” connecting one ankle to a ring bolt in the floor by a chain about one foot long.

The opening of the hearing marked the first time that five of our clients had been in the same room together since they arrived in Guantánamo in January 2002.¹ For those five, the mere fact of reunion was a happy occasion. The room was filled with energetic conversation in Arabic, and I asked the interpreter to fill me on the general gist of the conversation, but otherwise not to interrupt the lively discussion. In the meantime, soldiers set up a telephone on a coffee table in the middle of the room. We were told that the opening statements would be heard through this telephone, but that we would not be heard in the courtroom, per the judge’s request.

Lakhdar Boumediene, in particular, had not seen any of the other four men since he began a hunger strike on Christmas Day, 2006. He was isolated from the general population and housed with the other hunger strikers, and a tube was—and at this writing still is—put down his throat on a daily basis in a process known as enteral feeding. Unlike other hunger strikers, Lakhdar does not attempt to interfere with the feeding or make the process more difficult for those performing the feeding, but he has made it clear that he is being fed against his will. As a result of nearly two years of tube feeding, Lakhdar appeared gaunt, his eyes deep set, and his skin ashen. Nevertheless,

¹ The sixth, Saber Lahmar, had been isolated from the others for several years. The military has never adequately explained why Saber was isolated, but we suspect that Saber is suspected of somehow influencing other prisoners. See Melissa Hoffer, “Trapped at Guantanamo,” *Boston Globe*, January 11, 2007; Tim Golden, “Hunger Strike Breaks Out at Guantánamo,” *New York Times*, April 8, 2007.

he was still capable of deploying his lacerating wit and intense anger at the manifest injustice of his situation.

On the occasion of the meeting of the five men, however, Lakhdar enjoyed the company of his fellow Bosnian-Algerians and eagerly traded news with them. As lunchtime rolled around (with no indication that the court proceedings would begin anytime soon), the other four men urged Lakhdar to eat something. Lakhdar was initially hesitant, but gave in on one condition: that his lawyers publicize the fact that he is eating (for at least one day) in celebration of the election of Barack Obama, and “the end of racism.” I agreed to the condition, as I was eager to see Lakhdar eat. When the interpreter brought lunch back from the Guantánamo Bay Subway, Lakhdar ate half of a tuna sub, and the other four men were heartened by Lakhdar’s having eaten with them. Lakhdar later confided to me that he had eaten in front of the other men so as not to spoil the festive day, but that he really was in no mood to celebrate. He also revealed that the ingestion of solid food after not eating for so long has sickened him, causing vomiting and stomach pain.

As the afternoon wore on, even as the five men were still glad to be sitting in comfortable chairs and conversing with one another, there was no indication that the proceedings were about to begin. I asked the soldier who was patiently waiting with the receiver to his ear what was happening, and he told me that there must be something going on in court that the men were not entitled to hear. He also told me that someone at the court asked him periodically if he was still on the line, and he told them that he was. It is only in the late afternoon, when someone at the court informed the soldier that today’s court session was at an end and thanked him for his patience, that we realized that we had somehow missed the entire session. When I explained this to the five men, their first thought is that their inability to hear was a deliberate ploy on the part of the military. I promised the men I would look into what happened.

I was unable, however, to get any information from the soldiers before being driven to the ferry that returned me to sleeping quarters for habeas counsel. While waiting for the ferry, however, my habeas escort told me that she has been ordered by Commander Martin, the head of the Staff Judge Advocate's office, to bring me to his office. There I found out not only that several hours of opening statements were taking place while the telephone line to the court was apparently open, but that we heard none of it—and Judge Leon was very unhappy with what had transpired and wanted a full accounting in the morning. Each of the soldiers on the telephone line are required to submit affidavits explaining what happened. When one of the lawyers from my team called in to Commander Martin's office, I explained the day's events from my perspective, so that he could share my account with the judge. We then learned that an audio recording of the entire proceeding had been made, and that the Department of Justice was making plans to fly the recordings down to Guantánamo the next day, as Federal Express doesn't stop in Guantánamo.

When the recordings arrived in the early afternoon the next day, the five men were again assembled in the same interrogation room. (Because there is only one tape, Saber heard the tapes in the evening.) In the room with us was a lawyer from the other side, an Assistant United States Attorney from northern Florida who was detailed to Washington, D.C. to assist with the backlog of habeas cases following the *Boumediene* decision, and who personally flew the tapes down to Guantánamo to play for the men. Given that it was his task to advocate that all six men are enemy combatants, I was surprised at how gracious the five were towards him, offering him both chocolate and one of the pillows from their couch for him to use on his metal folding chair.

The tape began with prefatory comments from Judge Leon. An Arab translator in the courtroom was heard on the tape, but he had trouble keeping up with the judge. Following the judge was Nicholas Oldham, the DOJ attorney who was lead counsel for the government on the

case since it was remanded to Judge Leon. Oldham began with an extended riff on September 11, an event unconnected to the allegations against any of the men. He said nothing specific about the men, but stated that “[w]hat matters is that the United States had reliable information, credible intelligence that these Petitioners planned to travel to the field of battle.” When these remarks were translated, one of the five voiced his disapproval, and another stood and asked the guards to take him out, saying he had heard enough. After some cajoling from the other men, he was persuaded to stay by the other men, especially as they had yet to hear from Steve Oleskey, the lawyer from our firm who has met with the men over a dozen times in the last four years. Steve’s opening statement was more specific, and included a thumbnail biography of each man, in addition to cataloging the absence of credible evidence against any of them. His opening was well received by the men. After the tape was finished, several of the men made a point of thanking the DOJ lawyer who brought the tapes for his efforts. Listening to the tapes in the evening, Saber was similarly appreciative.

Subsequent meetings were devoted to refining the direct examination questions for the men most likely to testify, and to ensuring that testimony was both truthful and helpful. But in the background, the question for which the men wanted an answer was: how long will President-elect Obama take to close Guantánamo? The topic was clearly the buzz in all of the camps. At night, back in my room, I searched the Internet for any official pronouncements, all of which were circumspect and would provide no great comfort to the men. There were rumors right after the election of swift action and a special court to try detainees, which would undoubtedly circulate through the camps the next day, but Obama’s transition team made clear in an official statement that there is “no truth to reports that a decision has been made about how and where to try the

detainees, and there is no process in place to make that decision until his national security and legal teams are assembled.”

On Sunday evening, Doug Curtis, another lawyer from our team, arrived in Guantánamo. Doug had been scheduled to arrive on Saturday, but was delayed by Hurricane Paloma, which was passing through central Cuba about 120 miles to the west of the base.

The next day, Doug and I met with Hadj, Mustafa, and Mohamed, our three likely witnesses. In anticipation of the possibility that any of them might testify, I brought down shirts and ties for the men to wear while on camera before the judge. We spent part of our prep time trying on the shirts and ties. My colleague, Doug Curtis, reported on that day in an email to our team:

As part of the preparation for our clients' possible testimony, Ally and Josh [Allyson Portney and Joshua Jacobson, two other attorneys on the team] took responsibility for buying some dress shirts and ties, based on guessed sizes, so our guys wouldn't have to appear before the judge in GTMO prison garb. The good news is that the sizing turned out to be right, and they looked great. The even better news was that the simple act of trying on these shirts in preparation for their testimony was itself a strangely moving and uplifting experience. As the men took the new shirts from us and fumbled to unbutton them so they could try them on, they commented awkwardly -- and self-consciously, and jokingly -- that it had been seven years since they had used buttons, and they were a bit rusty. And then as they put the shirts on, they suddenly transformed from prisoners at Guantánamo to the men we saw in pictures before they were arrested. It was a brief but striking transformation -- and it struck us all that we were looking at their future selves, outside GTMO.

By Wednesday the 12th, our team decided collectively that we would put on only two witnesses—Hadj and Mustafa. Mustafa had the distinct advantage of being able to testify in English, which allowed a directness not possible with translated testimony, while Hadj was the last

of the six men arrested, and his decision to travel to the Sarajevo police station voluntarily with the knowledge that his three friends (Lakhdar, Mohamed and Mustafa) had been brought in for questioning was powerful evidence of his innocence.

The video link for the testimony was set up in a particularly ugly and apparently abandoned building. We experimented with the spare fluorescent lighting to avoid portraying our witnesses in ominous shadow, but were considerably constrained by our surroundings. Mustafa was scheduled to testify in the morning, but technical glitches consumed the first half of the day. Judge Leon, frustrated with his inability to hear anything from Guantánamo, adjourned the proceedings until the afternoon.

Shortly after 2:00 pm, Mustafa's testimony finally began. We could see the courtroom through a small monitor, no more than twelve inches diagonally. During Mustafa's direct examination—with Doug asking Mustafa questions while sitting beside him—we could see Judge Leon. Later, when Mustafa was cross-examined by the DOJ lawyer, that lawyer and his podium were visible. In addition, Rob Kirsch—another lawyer from our team who had been part of every visit to the six men since our representation—was visible in the lower right of the screen. His presence on-screen was, I presumed, a deliberate strategy to show a friendly face even as Mustafa faced hostile questioning.

Mustafa's testimony, which was considered classified by default but has since been deemed unclassified, was a straightforward recounting of the facts of his life: growing up in Algeria, working for various charities in Croatia and Bosnia in the 1990s, marrying and having children, and coaching karate. He also made sure to emphasize that he had no part in any terrorist activities and that he condemned the terrorist activities of al Qaeda as opposed to the peaceful

teachings of Islam. Mustafa also vouched for his three friends, and testified that he had no contact with the other two Bosnian-Algerians, Belkacem and Saber, until they were all brought to Guantánamo together. The cross-examination by the DOJ lawyer was brief, and consisted largely in attempting to find inconsistencies in the written declaration that Mustafa had submitted earlier. Because that lawyer did not even attempt to contest Mustafa's lack of involvement in terrorist activities, the cross-examination was, in my view, ineffective.

Hadj's testimony was necessarily halting, as both question and answer needed to be translated. Despite Hadj's low-key demeanor, he was still a highly effective witness. In addition to reciting the mundane facts of his life as an employee at a charity, Hadj told of his daughter who died in 2006 of a heart condition, and whom he had not seen since October 2001. His testimony ended, as we had planned, with his account of receiving a telephone call from the Bosnian police on a Sunday morning asking him to come in for questioning, and his taking a taxi to that police station, even though he would have had ample opportunity to flee the country once he learned that his friends had been arrested. When Hadj went to the police, he testified, "I thought it was just an ordinary thing that was happening, that [we] were just going to be questioned and then released." Instead, as Hadj concluded his testimony, October 21, 2001 was "the day I headed to the police station and never returned home." That impromptu response—not part of any prepared exchange—was so simple and so haunting that we closed our questioning there. Our clients had been able to look Judge Leon in the eye and to tell their stories openly and honestly.

Once the testimony of the detainees concluded, there was little Doug or I could add to the proceedings in Washington, where our team was preparing to make closing statements behind locked doors where classified information could be discussed. We did, however, have one more day of meetings with all six of the men, in brief, fifty-minute slots. Again, Doug captured the day

perfectly, in an email to our team that would ultimately be circulated among the more than 1,000 lawyers in our law firm:

I know that many of you are busy preparing for the last day of hearings before Judge Leon tomorrow, but I wanted to let you know about the visits that Paul and I had with our clients here today. As I think you all know, two of our clients -- Mustafa and Hadj -- testified by video yesterday, and did a great job. And then today, we were able to meet with each of our guys for an hour or so. Although I found myself thinking that our clients would somehow be above the normal concerns of testifying witnesses, both Mustafa and Hadj were very excited to have the opportunity to present their case, and then of course both of them spent the night wondering if they had done well. We were able to assure them -- both on the basis of our views, as well as the notes that had come to us from folks who had watched them from DC -- that they did a great, great job (I really thought they did spectacularly well).

In my experience, whenever we meet with all of our clients, one or another of them is inevitably having a down day or an off day -- but that was not the case today. Each of them seemed to be buoyed by the fact that their cases were progressing, and the testimony had happened yesterday. Each of them (yes, literally each one of them) asked us to pass along some of the most heart-warming (and heart-wrenching) thanks and appreciation to each and every member of the team who has been working so hard on their behalf. Even more important, each of them seemed to harbor some hope that things really might be moving in the right direction. We tried not to create false hopes, and we dispensed a healthy dose of skepticism about Judge Leon -- but even on that score, the folks who got to see Judge Leon (by video) were surprised by how fair he seemed to be, and how hard he was willing to be on the government.

Our day today was made much more special and festive thanks to Gita Gutierrez of CCR [the Center for Constitutional Rights], who had overbought some food, and offered to "make up something" for our guys. What she delivered this morning at 6:40 am was a veritable feast -- halal meat, rice, olives, baklava -- it was a spectacular spread we were able to lay out for five of our six clients (not Lakhdar, who is still on his hunger strike -- notwithstanding his willingness to eat some pizza with Paul and the rest of our clients last Friday, when they were together to listen to tapes of the openings, and in celebration of Obama's victory). I did not realize that for all the treats we've brought them over time, this traditional meal of meat on the bone, rice, and yogurt/cucumber/mint sauce is

not something they've had in many years. They were thrilled. It was a truly memorable day.

When Doug and I returned to the United States and heard reports on the closing arguments, we were buoyed by our colleagues' sense that the WilmerHale team really had made inroads in convincing Judge Leon that there was no reliable evidence against at least some of our men. That sense turned out to be correct: less than a week later, Judge Leon announced his decision (in a packed ceremonial courtroom) that five of our six clients were not enemy combatants, and he ordered the government "to take all necessary and appropriate diplomatic steps to facilitate the release" of the five men. He also took the highly unusual step of asking the government not to appeal his ruling as to the five, stating that "[s]even years of waiting for our legal system to give them an answer to a question so important, in my judgment, is more than plenty." The government took the judge's words to heart, and decided not to appeal their ordered release. In even happier news, three of the men—Mohamed, Hadj and Mustafa—arrived in Sarajevo on December 16. We continue to press the government to carry out the judge's orders and release Lakhdar and Saber and to prepare Belkacem's appeal.

New York, N.Y., February 2009