FROM THE GRANT OF CERTIORARI TO THE DECISION IN *BOUMEDIENE/AL ODAH*

The Supreme Court's June 29, 2007 decision to grant certiorari in the *Boumediene* and *Al-Odah* cases changed everything. It put us back in court, and effectively put an end to our efforts to find a legislative solution.

Legislative Effort

After the Supreme Court had initially denied certiorari in April 2007, we turned our efforts to Congress. With new Democratic majorities in the House and the Senate, we staged a massive lobbying effort in May 2007 with habeas lawyers coming from across the country to push for legislation restoring habeas. The efforts bore fruit, but fell short. Fifty-six senators—four short of the sixty required to overcome a Republican filibuster—voted for the Leahy-Specter legislation to restore habeas. Unable to overcome a filibuster for full habeas restoration, Senator Levin was working on compromise legislation that would basically improve the CSRT process for the detainees.

In the House, we faced different obstacles. The House Democrats faced no threat of a filibuster as did their Senate colleagues. With a majority, they could pass legislation on their own. But the House committee with jurisdiction, the Armed Services Committee, is traditionally conservative with many "blue-dog" members. Ike Skelton, the Chairman of the Committee, believed he lacked the votes within the Committee for complete restoration of habeas and was also seeking compromise legislation that would fall short of full habeas review for the detainees.

When the Supreme Court reversed itself and granted certiorari, it became clear that our best hope was with the Court and that compromise legislation could only hurt. Agnieszka Fryszman and I, along with representatives of several NGOs including the ACLU, CCR and the Constitution Project, met with the senior House staff members from the Speaker's office, the Majority Leader's office, and the Armed Services and Judiciary Committees. We delivered a clear message: no compromise legislation. We indicated that we believed we would win before the Supreme Court and that the passage of compromise legislation by Congress would jeopardize that result by leading the Court to defer or delay. We said that it was fine if Congress could restore habeas fully, but anything less would only be harmful. The staff members agreed to put a stop to the legislative efforts.

Agnieszka and I also met with Senator Levin's staff and delivered the same message. They also agreed to put a stop to the legislative efforts.

We then turned our attention to the preparation of the briefs for the Supreme Court.

The Arguments to the Court

To win the case, we had to convince the Court on two issues: (1) that the Guantánamo detainees had a constitutionally protected right to habeas corpus (or, more precisely, that the Suspension Clause in Article I, Section 9 of the Constitution applied to the detainees at Guantánamo); and (2) that the review process provided under the Detainee Treatment Act (DTA) was not an adequate and effective substitute for habeas corpus.

The second issue really posed the greatest risk. Justices Kennedy and Stevens had originally voted to deny certiorari so that the DTA review process could be pursued. Although Kennedy had clearly joined in the June vote to grant certiorari, it was by no means certain that he was convinced that the DTA review process was inadequate. His opinions in other cases showed that he was likely to dig deeply into the process to decide the issue. We could not rely on rhetoric but had to demonstrate through a detailed, "down and dirty" analysis what habeas would require and why the substitute provided under the DTA was an inadequate substitute. Preparing that part of the brief required the greatest time and effort, and a number of lawyers, most importantly, Baher Azmy, Gita Gutierrez and Neil Koslowe, contributed enormously.

The greatest strategic challenge, however, was structuring the first part of the brief dealing with the constitutional rights of the detainees. Disagreements over how to structure that argument —basically, whether to push the Court for a broad or narrow ruling—ended up splitting the lawyers in the *Al Odah* group of cases.

The cases, of course, involved only detainees held at Guantánamo. We believed there was a very good chance, based on the earlier decision in *Rasul*, that the majority of the Court would find that the Constitution protected the fundamental right to habeas at least at Guantánamo that, as Justice Kennedy had said in his concurrence in *Rasul*, was for all practical purposes American territory. However, if the Court decided the case on the basis that Guantánamo was uniquely like American territory, it would leave open the question whether prisoners held elsewhere had the right to habeas corpus or, indeed, to any constitutional protections. The government was already holding prisoners at Bagram and other black sites. Given the Bush administration's past performance, we believed there was also a risk that, if the Court held that constitutional protections extended to Guantánamo, the government might simply transfer the Guantánamo prisoners elsewhere and claim that they, as well as any other prisoners held outside the United States and Guantánamo, lacked legal rights or access to the courts. A number of us felt it was essential therefore to try to obtain an opinion from the Court that would at least offer the possibility of court review and constitutional protections to prisoners held elsewhere.

In other words, although it is traditional for lawyers to seek the narrowest ruling from the Court—that is, not to push the Court further than necessary to win the case—we believed this case was different and that there was a need to push the Court beyond the facts of the particular cases.

To do so, we believed it was necessary to attack the central premise of the argument that the government had made since it had established the Guantánamo prison site—that there were strict territorial limits on the reach of the Constitution to aliens. Taking on that argument would effectively require us to overturn the language Chief Justice Rehnquist had used in his four-person majority opinion in the *Verdugo-Urquidez* case. Rehnquist had gone out of his way in that opinion

to emphatically reject the application of the Fifth Amendment to aliens outside sovereign U.S. territory. He also explicitly interpreted the Court's earlier decision in *Reid v. Covert*, applying constitutional provisions overseas, as limited only to U.S. citizens and not aliens.

Understandably, it seemed to some of our colleagues like a very tall order to take on that doctrine. As mentioned, though, we believed it was necessary to offer the possibility of protection for prisoners who were or might be held outside Guantánamo. We also believed that the case offered an opportunity to push for a broader ruling. The Court's decision to reverse itself and grant certiorari had required the vote of five justices, a majority of the Court. It seemed very likely that a majority of the Court believed that the Guantánamo detainees had a constitutionally protected right to habeas corpus. We believed there was little risk that they would go back on that view if we pushed more broadly; the justices could always limit the ruling to Guantánamo if they wanted, but there was no reason for us not to try for more.

A careful review of Justice Kennedy's opinions also convinced us that we had a real chance for a broader ruling. In his concurring opinion in *Rasul*, Kennedy had concentrated on Guantánamo as essentially American territory. But other, broader themes emerged from his opinions over the years, most importantly, a consistent abhorrence of rigid, categorical rules and a faith in judicial review embodied in the principle of separation of powers and the ability of judges to act flexibly in dispensing justice. Although he had joined in Rehnquist's opinion in *Verdugo*, he wrote a concurring opinion that adopted what has been called a "global due process" approach, under which the application of constitutional provisions abroad depended not on rigid rules but on the "particular circumstances" and "practical necessities." That was the rationale we wanted the Court to adopt.

We wrote the brief with that as our goal. We emphasized that the government was seeking to establish a categorical rule that would allow the executive branch to disregard any constitutional restraint on its actions in dealing with aliens abroad; such a rule would allow the executive branch to manipulate the courts' jurisdiction and avoid the law and court review simply by stepping across a geographical line; by doing so, the executive could preclude the court from reviewing its actions in times of either peace or war, no matter how egregious those actions were; such a rigid rule would violate the essential purposes of habeas corpus and the separation of powers (in that regard, we did not want to engage in a detailed review of the reach of habeas to aliens abroad at common law, but rather to emphasize the central purpose of habeas and to emphasize that the government's actions clearly violated that purpose).

As mentioned, some of our colleagues were concerned with the broad thrust of the brief and, just four days before the briefs were due to be filed, two of the fourteen law firms representing the *Al Odah* group of petitioners decided to break off and file a separate brief with a narrower focus.

On June 12, 2008, the Court issued its decision. The majority opinion was written by Justice Kennedy, and was largely what we had hoped for. The *Boumediene/Al Odah* opinion effectively wipes out Rehnquist's opinion in *Verdugo* as a statement of the law. It explicitly rejects the government's claim that, "as applied to non-citizens, the Constitution necessarily stops where *de jure* sovereignty ends." It rejects any "rigid and abstract rule for determining where constitutional guarantees extend," and emphasizes instead that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."

The *Boumediene/Al Odah* decision restores the right of habeas corpus for the prisoners at Guantánamo. It does not make clear the exact extent to which constitutional protections will apply to prisoners held elsewhere in the future. It does make clear, however, that the government can no longer simply step across a geographic line and argue that, by doing so, it has escaped the law.