The Grant of Certiorari in *Boumediene/Al Odah*
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On February 20, 2007, the D.C. Circuit ruled (1) that the Military Commission Act (MCA) eliminated the Court's jurisdiction over pending habeas cases and (2) that the elimination of habeas did not violate the Suspension Clause of the U.S. Constitution because the Guantánamo detainees had no constitutional rights. We (on behalf of the *Al Odah* petitioners) and WilmerHale (on behalf of the *Boumediene* petitioners) promptly petitioned the Supreme Court for certiorari. On April 2, 2007, the Supreme Court denied our petitions by a vote of six to three.

Unusually, five Justices publicly opined on the decision to deny certiorari. Justices Breyer, Souter and Ginsburg joined in an opinion strongly dissenting from the denial of certiorari. Justices Stevens and Kennedy joined in an opinion concurring in the denial of certiorari, basically saying that the petitioners should first exhaust available remedies under the Detainee Treatment Act (DTA) but indicating that they would continue to pay attention to developments to see whether the DTA remedies were inadequate, whether the government unreasonably delayed the proceedings or took other actions to prejudice the position of the petitioners. Linda Greenhouse wrote in the *New York Times* that she believed that Justice Stevens had joined with Justice Kennedy in voting against the grant of certiorari basically to protect our interests—he did not want certiorari to be granted only to have Justice Kennedy then cast the decisive vote against us on the merits on exhaustion of remedy grounds.

In any event, we were extremely disappointed by the denial of the petitions for certiorari. We believed, however, that the opinions issued by the individual Justices left a small sliver of hope. Accordingly, after discussions with Seth Waxman and Paul Wolfson at Wilmer Hale, we decided to file petitions for rehearing from the denial of certiorari. We filed those petitions on April 27, 2007. Honestly, none of us at that point had much hope of prevailing, but we wanted to keep the issue open to take advantage of any possible developments that might occur. In retrospect, that was a wise decision.

The Court requested that the government respond to our petitions. The government filed its response late in the afternoon of June 19. Neil Koslowe and I quickly decided that, although the Supreme Court rules did not provide for it, we would file a reply to the government's opposition. To have any effect, we believed we had to file the reply brief almost immediately. We spoke to Seth Waxman and Paul Wolfson at Wilmer, and they decided to do the same. The briefs we ended up filing, however, were very different.

Neil and I decided to file a very short, hard-hitting brief asking the Court to reverse itself and to grant certiorari. We decided to make three points to try to demonstrate to the Court that it

was useless waiting to exhaust the alternate DTA remedy because the government had already demonstrated that the DTA remedy was inadequate: (1) the government had argued that there was no need for lawyers to have full access to their clients at Guantánamo because, unlike habeas, the DTA did not allow petitioners to present facts to the courts; (2) the government had also acknowledged that, unlike habeas, the DTA does not allow the courts to order release from imprisonment; and (3) there was also no reason for the Supreme Court to delay determining whether the detainees had constitutional rights, because the D.C. Circuit had already made a final decision on that issue.

In addition to making those three points, Neil and I decided that we would attach to our brief the declaration of Colonel Steven Abraham, which lawyers from the Pillsbury law firm had just obtained and filed in a pending DTA case. Indeed, they had just filed the declaration on June 19, the same day the government filed its response in the Supreme Court to our petitions for rehearing. David Cynamon of the Pillsbury firm explained to me in an email that the Abraham declaration "was a truly serendipitous find." Abraham is apparently the brother of an attorney in the real estate group in Pillsbury's Northern Virginia office who had seen a presentation Cynamon and others had given at the firm on the Guantánamo cases.

We had not been aware of the Abraham declaration until Pillsbury filed it in the DTA case on June 19. As mentioned, as soon as we saw it, Neil and I decided that we should refer to it in, and attach it to, our reply brief asking the Supreme Court to grant certiorari. I spoke with Seth Waxman at Wilmer about the declaration, and he said that he would also consider referring to it in his reply brief.

As an aside, Seth and his team at Wilmer could make those decisions by themselves. *Boumediene* was one case, and Wilmer was really the sole law firm involved in it. By contrast, what was known as the *Al Odah* case was really eleven separate cases combined under that one name with fifteen separate sets of lawyers and law firms. Although we were counsel of record in the *Al Odah* case, we had to act with the concurrence of the other lawyers involved. Getting that concurrence was, at times, very difficult and time consuming. We had little time, however, to file the reply brief. Neil and I decided to draft the reply brief making the points we mentioned and attaching the Abraham declaration, and then to circulate it to the other lawyers for their approval. Neil drafted the brief brilliantly, I made a few edits, and we circulated it to other counsel very early in the morning on June 22. We also sent it to the printer so that we could file it with the Court that day. All of the counsel liked the arguments made in the brief. Some, however, questioned whether we should refer to or attach the Abraham declaration. Only one raised a strong objection to doing so. The majority agreed with us that "we should go for broke" and file the declaration asking the Court outright to reverse its prior denial of certiorari. We therefore filed the reply brief in that form with the Abraham declaration on June 22.

By the way, the reply brief that Wilmer Hale filed in the *Boumediene* case took a very

different approach. In its brief, Wilmer did not ask the Court to reverse its prior decision and to grant certiorari. Rather, it asked only that the Court defer consideration of the petition for rehearing for now and hold open the possibility of considering it later. Also, the Wilmer brief did not attach or refer to Colonel Abraham's declaration.

Interestingly, a few days later, on June 26, the government sent a letter to the clerk of the Supreme Court objecting to our filing of Col. Abraham's declaration because it had not been part of the record below. The government asked the clerk to distribute the declaration by Admiral McGarrah, to which Abraham had responded in his declaration, asserting that Admiral McGarrah's declaration "would assist the Court in understanding" the CSRT process. Early the next morning, we sent a letter to the clerk in response saying that we had no objection to the filing and distribution of the McGarrah declaration and pointing out that the Abraham declaration would also "assist the Court in understanding" the CSRT process. We asked the clerk to circulate our letter to all the members of the Court.

As you know, two days later, on June 29, 2007, the Supreme Court reversed itself and granted certiorari in the cases. I understand it was the first time in fifty years that the Court had reversed itself on a decision to deny certiorari. Significantly, the Court's decision to reverse itself and grant certiorari required the votes of five justices. The fact that five justices had voted for granting certiorari raised interesting strategic issues for the way the case should be argued to the Court on the merits. The debate among the lawyers on those issues can be the subject of another email.