RHODE ISLAND BAR MEETING – JUNE 19TH

INTRODUCTION

As a part time resident of Little Compton, I am particularly pleased to be here today to discuss some of my experiences over the last ten years as co-lead counsel for six men living peacefully in the tiny Central European country of Bosnia and Herzegovina on September 11, 2001 but indefinitely imprisoned in Guantanamo Bay Prison in Cuba beginning in January 2002. This morning I will highlight some of the ethical, legal, political, diplomatic, logistical, national security and public relations challenges involved in this decade long representation.

When I was asked to give this presentation several months ago, none of us foresaw how particularly topical it would become in light of the late May 2014 exchange of Sgt. Bowe Bergdahl for five alleged senior Taliban detainees at GTMO and the arrest last Sunday June 15 of the alleged mastermind of the 2012 Benghazi attacks. These events reignited the smoldering political controversy over whether to try accused terrorists in US federal civilian courts for statutory crimes or instead in GTMO before military commissions for violation of the Laws of War. Twelve years and counting after GTMO was established by the Bush Administration, its presence continues to loom far larger in our political consciousness and debates than is arguably justified by the 149 prisoners it still holds.

Our own representation involved a team of WilmerHale lawyers in extended habeas proceedings in the Federal District Court in Washington, DC; two appeals and three arguments in the District of Columbia Court of Appeals; a successful Supreme Court certiorari appeal (*Boumediene v.Bush*, 553 US 723 2008) followed by the first ever habeas trial involving GTMO detainees in early November of 2008- beginning only two days after Barack Obama was elected. We also filed a separate suit in the European Court of Human Rights against Bosnia; brought a FOIA suit in Federal Court in Boston against the U.S. Government seeking case-related documents; made multiple trips to Bosnia to meet with officials of its badly fractured and ethnically divided government and to do factual investigations; offered Congressional testimony and did informal Congressional lobbying; testified before the European Union Parliament in Brussels; met with officials of European countries to find countries willing to resettle our clients; and, made about 35 trips to GTMO to meet with the clients.

This long and challenging representation ultimately resulted in the release of our six clients, five by federal court habeas grant after the first ever GTMO habeas trial in November 2008 and the sixth through administrative clearance by the Obama administration. These releases took place from 2008 to 2013. The six men are now living - four with their wives and children - in Bosnia, France and Algeria. They have

received no financial recompense for their ordeal in GTMO and likely never will. Their names are Mustafa Ait-Idir; Bensayah Belkacem; Lakhdar Boumediene; Hadj Boudella; Saber Lahmar; and, Mohamed Nechla. Mr. Boumediene was the named lead plaintiff in our habeas suit.

Because this representation took place over ten years, I prepared a Chronology of Key Events in the case for your reference. It is in your Conference materials in Supplemental Appendix Section 6 as well as on your flash drive.

Before I address some of the highlights of this representation, let me provide some brief personal context.

In June 2004 I had been practicing complex civil litigation at Wilmer Hale in Boston - and its predecessor Hale and Dorr - since 1968. I had tried many civil cases and argued many appeals (including a state loyalty oath challenge before the Supreme Court when I was 29 and making my first appellate argument) but what little I knew about habeas corpus was what I remembered from law school and from a brief historical refresher course that Chief Justice Rehnquist provided in a Law Day speech to the Boson Bar Association in 1997. In that speech, the Chief Justice gave a dry and wholly historical view of habeas corpus. He emphasized the handful of times in our Nation's history when habeas had been suspended by Presidential fiat, including during the Civil War in parts of the continental US and during WW II in Hawaii. His speech suggested that except for last ditch appeals of state court criminal

convictions - appeals increasingly disfavored by the Supreme Court in recent years - this bed rock principle of Anglo Saxon jurisprudence would likely have limited application and utility for the foreseeable future.

I had largely forgotten until the Rehnquist talk that the Founders considered habeas corpus to be such a fundamental touchstone of personal liberty in light of their dismal experiences as distant Colonial subjects that in 1787 they enshrined it in the body of the Constitution in Article I, Section 9, Clause 2. They made habeas corpus a strict limitation on the authority of Congress to imprison anyone arbitrarily: "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." These twenty six words codified as the molten core of the Constitution bedrock English common law protections dating back hundreds of years precluding arbitrary and indefinite detention. This short section came to be known as the Suspension Clause.

It was with this limited knowledge of habeas corpus that I opened my email one June day in 2004 to read an open message from one of my partners asking if any litigation lawyer wanted to represent six men from Algerian who had been forcibly "rendered" by our government from a peaceful ally, Bosnia and Herzegovina, in mid January 2002 to the new US prison at the long-standing American Naval Base at Guantanamo Bay, Cuba.

What scattered knowledge I had about Bosnia boiled down to this: First, that the assassination of the Austrian Crown Prince, Franz Ferdinand, in Bosnia's capital, Sarajevo, on June 28, 1914, was generally as having set off the powder keg that launched WWI. Second, more recently, that the terrible ethnic conflict in Bosnia from 1992 to 1995 was concluded in a peace settlement forced on the warring factions at Dayton, Ohio by the Clinton Administration, following the world-wide revulsion at the Serbian ethnic cleansing of thousands of Bosnian Muslim men and boys at Srebrenica in 1995. Third, that in 2001-2002 when the events in our case unfolded, Bosnia was over 1000 miles from the nearest U.S. battlefield in Afghanistan. This third point became quite significant to our representation and a theme of our arguments.

Significantly as well, I did not know that President Bush in his January 2002 State of the Union address had publicly taken credit for the seizure and imprisonment of these six men as one success of his post-9/11 War on Terror initiative. Referring then to the men who were now about to become our clients, he said: "[Last fall], Our soldiers, working with the Bosnian government, seized terrorists who were plotting to bomb our Embassy." With these few, seemingly definitive words, he put the full force of the American Presidency behind the continued indefinite detention of these six men. Imagine trying to roll that enormous political boulder back up the habeas mountain. We quickly came to see what task that would be.

After little more than a few moments' reflection, and with absolutely no sense of the decade long legal odyssey the firm and I were embarking upon, I concluded that this was one of those existential moments for which I knew I had gone to law school. I quickly enlisted a like-minded partner, Rob Kirsch (a specialist in environmental law and so equally ignorant of habeas corpus) as co-lead partner and in the next thirty-six hours we sought and obtained formal Firm approval for this highly complex, politically charged pro bono representation. Up to mid-May 2014, this representation has consumed over 60,000 hours in WilmerHale professional time charges; $27M dollars in donated billable time; the talents of several dozens of lawyers; and, $2.5M in out of pocket costs.

Less than three weeks after responding to that internal email inquiry, and with WilmerHale formal pro bono approval qualified only by the reasonable caution that "no Associate should ever be left unsupervised to run around Guantanamo", we filed a Federal habeas corpus petition in Washington for six men we had never met, never talked with and by whom we had not yet been retained, as we had no way to communicate with them. The Federal judge we randomly drew, Richard J. Leon, had fittingly been appointed by President George W. Bush on September 10, 2001. Of local note, he had been born in Massachusetts and educated at Holy Cross and Suffolk Law School.

Our first practical and ethical problem was how to be formally retained by clients who were being held in strict confinement in the World's most secure military prison established in late 2001 on the south east coast of Cuba. Their wives in Bosnia had been our only client contacts and they mainly by email. Judge Leon made clear that the wives' retention of us was not going to be legally sufficient. We responded that until we met with the men in GTMO, there was no other way to obtain even provisional retention. We prevailed on that argument, obtained the expedited "secret" level federal security clearances needed to meet with men then labeled the "Worst of the Worst" by our Government (or more formally, as 'unlawful enemy combatants" and therefore outside most international legal protections such as the Geneva Conventions), and worked with a judge and Government lawyers to hammer out the pages of ground rules required before we could fly to Cuba to meet our clients. This accomplished, in early December 2004, we finally flew four hours to GTMO from Ft. Lauderdale on the not-so-aptly named Air Sunshine in an aging, 16 seat, DC-3 two engine prop plane with no toilets and lousy air/conditioning- a travel mode definitely not recommended for those over sixty!

On arrival, after undergoing strict security at the airport, and spending the night at a military motel on the leeward side of Guantanamo Bay, we took the 8 AM ferry across the Bay to the naval base and prison complex on the windward side to meet our six clients.

This was anything but a routine client meeting in every respect. We were among the first habeas counsel to arrive in GTMO and aside from the International Red Cross, the first faces other than military guards or interrogators our new clients had seen in almost three years.

We knew from press accounts that our clients were likely to have been badly abused physically and psychologically in ways that some human rights groups were already labeling torture. (The infamous Justice Department 2002 "Torture Memos" had become the subject of great controversy by this time.) We soon discovered that our new clients had been subjected for some time to several of these odious practices whose disclosure shocked and appalled many American citizens and millions more in countries around the World.

When we met for the first time with each client in an interview cell in Camp Echo within the larger Camp Delta, each sat at a low table facing us with both hands and feet shackled. A guard asked us if we were willing to have one hand unshackled. I said that as far as I was concerned they could be completely unshackled but this never happened on any visit. We brought, as had been suggested, Middle Eastern pastries, black coffee from McDonald's and lots of sugar. The men were grateful but understandably much more interested in what we had to say than what we brought them to eat.

In our haste to visit our new clients, we had hired the first security-cleared Arabic translator we could locate. We felt very pleased with this

solution until mid-way through the meetings when one of our new clients who spoke passable English told us in a quiet aside that our translator had been in Guantanamo previously working with military interrogators who had harshly interrogated the men. He asked sharply why any of them should trust any of us in those circumstances. We quickly explained what had happened but our shaky credibility took a needless hit.

Our credibility took an immediate second hit when another client unexpectedly asked me to sign my name on a blank piece of paper he brought to our meeting. When I did, he immediately turned the paper over to show me that I had just signed back of the letter of introduction I had recently sent to him. He asked why the two signatures differed so much? I explained with some chagrin that it was my letter but that it had been signed with my name by a colleague because I was out of the office. The client had given me a long hard look but he did continue with the meeting.

In January 2005, Judge Leon granted the Government's Motion to Dismiss our suit, relying primarily on Supreme Court decisions denying denial habeas petitions filed by German and Japanese military prisoners- foreign nationals- in WW II who were tried in military courts while being held outside the United States. We appealed, initiating a process that involved four separate briefings and two full arguments in the

District of Columbia Court of Appeals. That Court finally affirmed Judge Leon's dismissal 2-1 in early 2007.

In the meantime we hired an investigator/translator in Bosnia and made trips there to interview Government officials and others, uncover more facts, and talk with our clients' wives. We got nowhere initially with the Bosnian officials we met. They seemed equally terrified of offending the U.S. Government and of admitting their own complicity in the illegal renditions of our clients to GTMO. On one particularly memorable occasion, our Bosnian investigator ill-advisedly took me to a smoky, dingy, Sarajevo bar to meet a husky, veteran Bosnian Serb cop involved in the clients' 2001 investigations and arrests. He was only too eager to confirm his role in having our Muslim clients arrested and shipped to GTMO. It was quite a relief to escape his earfuls of angry and menacing tirades justifying what he had done.

Our investigation established, as we had read in Fall 2001 press accounts, that the men had been arrested by the Bosnians at the demand of the US, which stated publicly that the six men were plotting to blow up the US Embassy in Sarajevo in the aftermath of 9/11. When the Bosnians asked to see the evidence to support these arrests, the US told them bluntly that if they wanted US peacekeeping forces to remain Bosnia, they had to do as they were told. The Bosnians capitulated and did what they were told in October 2001, just as they did in January 2002 despite an order from their courts - backed by an order from the

US conceived Bosnian Human Rights Chamber Court[1] - that the men be released rather than be turned over to US peacekeeping troops resident in Bosnia and forcibly sent to Cuba.

These U.S. actions were all taken under authority conferred by Congress on September 18, 2001 in its nearly unanimous passage of the Authorization for Use of Military Force. The Joint Resolution on its face arguably conferred remarkably broad authority on President Bush and now on President Obama:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Oceans of print have been spent discussing just how broad this authority was intended to be and is but that is largely a subject for another speech. I will only note here that only this week President Obama asserted that the AUMF gave him the authority he needs to reinsert American troops into Iraq in the wake of the ISIS incursion.

[1] Ironically, the US itself had insisted at the Fall 1995 Dayton Peace Conference that such a court be created and staffed with noted European judges as well as Bosnian jurists in order to speak with final authority on human rights issues in Bosnia.

I want to show you now a short television clip shot in Sarajevo on January 16, 2001 as our clients were about to be released from jail but instead taken into custody again. The later court room scene is of our client Mr. Belkacem in court proceedings in Bosnia sometime after his October 2001 arrest. [Link].

With the six clients in Guantanamo, their wives were suddenly thrust into unaccustomed roles for Muslim wives: acting as the heads of their families. Most quietly filled these unexpected roles while another gave newspaper interviews demanding Bosnian Government help and dressed her kids in orange prison jump suits to demonstrate in front of the Bosnian Parliament for their dad's release. The wives' contact with their husbands was limited to occasional letters back and forth - letters which were often held up for months or even years without explanation by the Defense Department. The wives were often left with some confusion by our explanations of the US justice system, of the various possible outcomes of the habeas suit and about our many other related activities. Given the multiples variables and uncertainties we were ourselves daily confronting in this representation, this was entirely understandable.

To complicate both our explanations and our representation further, while our Circuit Court appeal from Judge Leon's dismissal was pending, Congress twice passed laws to strip the Federal Courts of habeas jurisdiction over Guantanamo detainees. On each occasion, as

well as after two intervening Supreme Court decisions, we were required to re-brief the appeal, which I argued twice.

In early 2007, a senior level Defense Department official named Charles "Cully" Stimson went on a radio talk show to discuss Guantanamo detainee issues. On being asked a leading and loaded question -- what he thought about eleven specifically identified large law firms - including ours - then representing men in Guantanamo, he replied: "I think quite honestly when corporate CEOs see that those firms are representing the very terrorists that hit their bottom line in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms.

Stimson's remarks were widely publicized and we held our collective breath at WilmerHale waiting to see what reactions any of our other clients would have. As far as I know, there were only two communications, both from General Counsel of large clients. Both counsel said in substance that "we didn't know you were doing this, but as far as we are concerned, if you are tough enough to take on the Bush Administration on this issue, you are certainly tough enough to represent us on any issue." Notably, as well, many bar organizations criticized these remarks as fundamentally mischaracterizing the American justice system and Stimson resigned shortly afterward.

One of the most painful events experienced in this case occurred during the two years we were waiting for a final decision by the CADC

on the Motion to Dismiss. We learned that one client's young child had a congenital heart defect. The doctors in Bosnia determined that the necessary operation was beyond their expertise. We arranged through our Berlin office for an operation at a specialized clinic in Germany. Tragically, the young child died four days before the scheduled operation and two days before my next visit to Guantanamo. The Defense Department agreed in this case to give me accelerated access to the client immediately following my arrival. As soon as I walked into the interview cell, our client saw my face and knew what had happened. We talked about this tragedy for a while before we both concluded that we needed to focus on his legal case even in this extraordinary moment of personal loss. And we did.

Following our 2-1 Circuit Court loss in February 2007, we immediately filed a certiorari petition with the Supreme Court seeking review. It was swiftly denied but with several dissents as well as an unusual Statement of Explanation by Justices Kennedy and Stevens suggesting they would view the appeal differently if the administrative review process Congress had enacted as a substitute for habeas proved seriously deficient in affording due process to Guantanamo detainees. Encouraged, we filed an immediate Motion for Re-Hearing of our just denied certiorari petition, even though no such Motion had been granted in fifty years. In that Re-Hearing Motion, we included new facts just available showing that the administrative review process at Guantanamo

that Congress had created to replace judicial habeas corpus review was utterly lacking in even the rudiments of due process. While that Motion for Re-hearing was being considered, one client sent us a remarkable letter. He wrote how much the men appreciated our advocacy, commitment and unshaken belief in the ultimate fairness of the American justice system. But, he added, the six clients had lived in other parts of the world and had learned that the ruler who appoints the judge invariably gets the outcome that he wants. The clients believed that this would inevitably be the case for them with the Supreme Court.

It was therefore with particular pleasure that we made a special phone call late in June 2007 to inform the clients that the Supreme Court remarkably had just granted the Re-Hearing Petition and had set their appeal down for argument in early December 2007.

The Supreme Court argument was brilliantly presented by our partner Seth Waxman[2] and went as well as it could have, we thought.[3] We were guardedly optimistic that we would have Justice Kennedy as the fifth vote we assumed we would need to prevail. When June 2008 came, we had our 5-4 vindication in a decision written by Justice Kennedy that for the first time in the history of the Republic struck down an Act of Congress as an unconstitutional suspension of the Habeas

[2] Seth had already argued dozens of cases before the Supreme Court both as a private attorney and as the Solicitor General of the United States under President Bill Clinton. He devoted hundreds of hours in 2008 to prepare for this historic argument and was a critical legal strategist for our team.

[3] Among others in the rapt audience for the argument were Senators Edward Kennedy and Lindsey Graham who I chatted with when I noticed them sitting and talking animatedly- separated only by Victoria Kennedy- though their positions on many Guantanamo issues differed markedly.

Clause. The Court ruled that habeas corpus did extend to the men in Guantanamo because of unique circumstances involving its status. It ordered that habeas trials begin as soon as possible in the District Courts.

Judge Leon promptly called us in and said that he was making trial of this case his top priority for the Fall of 2008 as "my bosses have told me that I was wrong." He told us to forget about weekends and vacations. He said he felt that these men and other detainees had waited too long to be heard in court about their freedom.

Now we needed to know what claims the Government intended to make to justify the continued indefinite detention of our clients who had by then been imprisoned for almost seven years but never charged with any offense. All we had seen to this point was a short summary of Government intelligence used in the flimsy Guantanamo administrative Combat Status Review Tribunals (often called CSRTs, for short) in the Fall of 2004 just before we arrived for our first visit. These were the hearings that had so troubled the Supreme Court majority in its June 2007 grant of our Petition for Certiorari and in its June 2008 5-4 merits decision.

In late August, the Government served us with a summary of its claims among the 680 pages of largely classified intelligence it disclosed. We had about six weeks to review and respond to this mountain of classified material. We faced some formidable obstacles. First, we were not permitted to show our clients any of the classified

material or even discuss it with them or anyone else not security cleared and with a demonstrated "Need to Know." We also could not see or make notes on the Government's filing except in one location in the Washington area-a so-called Secure Facility or "SCIF". We could not take our notes outside that location, not even to our offices. All this security process put quite a crimp in the ordinary mechanisms available for zealous legal advocacy, because we couldn't raise and discuss the Government's factual claims about our clients with them. But we did what any of you would do as advocates in such difficult circumstances. We pulled out all the stops, working 12-15 hour days seven days a week to address these new claims in other ways.

In mid October we served an over 1600 page response to the Government's 680 page habeas filing of August. Included in our response were many details about our clients' rather ordinary lives since leaving Algeria in their twenties, including their daily work in Bosnia, mainly as low level Muslim social workers; declarations about them from families, friends and professional colleague; affidavits by present or former senior Bosnian officials who attested to the extreme US pressure on Bosnia in October 2001 and January 2002, first to arrest the men and later to hand them over for rendition rather than comply with their own court's order of release; and, affidavits from four former high ranking US intelligence officials who had gone to the Secure Facility at our request to evaluate and comment on the raw, unfinished intelligence

reports on which the Government's case for continued indefinite detention now rested.

The one unclassified affidavit we filed was provided by a former CIA Station Chief in South East Asia. We prepared it to show how our clients could have been swept up in Bosnia by the War on Terror international dragnet put in place after the Authorization for Use of Military Force Resolution was so sweepingly passed on September 18, 2001. This veteran intelligence official had received a report that Osama Bin Laden had been seen in the US Military Commissary in Okinawa Japan shortly after 9/11. He had been specifically instructed by his Langley headquarters that there was zero tolerance for failure to follow up on any leads. Nonetheless, he checked to determine whether he really needed to devote scarce resources to investigating this far-fetched report. The response back from his superiors was unequivocal; "You were not listening. Zero tolerance means zero tolerance. Check out that report"

We went to trial on November 6, 2008, two days after the election of Barack Obama, who as a candidate had notably promised to close GTMO if elected.[4] Because almost all of the case rested on classified evidence, the Judge allowed me to make only a limited public opening for the benefit of the press, public and of our clients listening by phone

[4] For portions of the trial description and ensuing appeal that follow, I am indebted to an excellent summary prepared by my former partner, Mark Fleming upon which I have relied.

in Guantanamo to a translated version.[5] He then closed the court room to the public (as it had been for virtually all pre-trial proceedings up to that time) and we made additional openings to him about the classified evidence. We then proceeded to argue to him for four days, mainly from the classified evidence, about the approximately twenty factual issues he had devised as a framework to test the Government's case. The only live testimony was given by two of our clients by secure video link from GTMO to a courtroom in DC. The two men were questioned by us in GTMO on direct examination and then were cross examined by a Government attorney standing beside us in the courtroom in Washington. This was obviously quite a unique process and one that did not seem to facilitate effective cross examination.

After four days of trial evidence, the Judge indicated that he was not persuaded that the Government had met its evidentiary burden of showing by a preponderance of the credible evidence-the civil trial proof standard of 50.1 percent - that the six men were unlawful enemy combatants whose continued detention was warranted. Over our objections, the Judge then permitted the Government to offer a rebuttal case with 20 new classified documents we had never seen before and which, as the Judge later noted, "focused mainly on Mr. Bensayah" who the Government was now claiming had planned to send the other five

[5] Despite the Judge's best intentions, the open line from the Court room to our clients in Guantanamo somehow failed and they were not able to hear the opening. Judge Leon ordered the Government to forthwith fly a recording of the opening to Guantanamo and to play in the next day for the clients. This was done.

men to Afghanistan to fight the US when it invaded there. (The long-standing Embassy bombing claim had been dropped before trial, as has many other claims made in the August 680 page Government filing.) Overruling our motions that the trial be stayed to give us sufficient time to investigate these new documents in order to respond fully, the Judge concluded that we had no right to a "sur-rebuttal." He denied our requests for a trial continuance, leaving us extremely concerned about the whether we could adequately rebut the additional evidence being offered.

The evidence closed on Friday November 14 with only classified closing arguments allowed and of course without the clients being allowed to hear these arguments. The Judge promised an extremely speedy decision to be announced only days later, on November 20. We anxiously gathered in his court room that morning with the press, other GTMO habeas lawyers, numerous Government attorneys from various departments and even family members to hear what he had decided.

The Judge found that the Government had failed to meet its burden of showing that there was a sufficient basis to hold five of our six clients as unlawful enemy combatants any longer. He therefore granted the writ to those five men and ordered them released.

Judge Leon said in open court that the Government's position that our clients "had a plan to travel to Afghanistan to engage U.S. and allied forces" relied exclusively on information in a "classified document from

an unnamed source." He ruled that the government had failed to provide him with "enough information to adequately evaluate the credibility and reliability of this source's information," a point that we had repeatedly stressed as to many such documents. The Judge also said that while the source's information "was undoubtedly sufficient for the intelligence purposes for which it was prepared, it is *not* sufficient for the purposes for which a habeas court must now evaluate it." His grant of habeas corpus to five of our six clients followed to our immense relief.

However, to our disappointment, the Judge denied habeas to Mr. Bensayah, our sixth client, ruling that the Government had provided "credible and reliable evidence linking Mr. Bensayah to al-Qaida and, more specifically, to a senior al-Qaida facilitator." He ruled that Mr. Bensayah intended to "facilitat[e] the travel of others to join the fight," which he concluded was "support" for Al Qaeda that justified continued detention under the broad legal standard he had adopted - a standard that did not require any showing of intentionality, presence in a combat zone or link to any combat assistance to any terrorists. (The Circuit Court later adopted the Obama Administration's new standard for continued detention - that the person was a "part of Al-Qaeda"- rather than the more vague "supported Al-Qaeda.").

Judge Leon then did something extraordinary, something which I had never seen or heard a Federal Judge do before and do not expect to see ever again - especially in such a high profile case. He unexpectedly

departed from reading his prepared, written decision in order to address the Government lawyers in the courtroom, and through them in substance the President who had appointed him seven years earlier:

> "*The Court appreciates fully that the government has a right to appeal its decision as to these five detainees whose petitions I have granted. I have a right, too, to appeal to the senior-most leadership at the Department of Justice, Department of Defense, and the CIA and other intelligence agencies. My appeal to them is to strongly urge them to take a hard look at the evidence, both presented and lacking, as to these five detainees. Seven years of waiting for our legal system to give them an answer to a question so important, in my judgment, is more than plenty*.

On that day, November 20, the Government had exactly sixty days to appeal. On that sixtieth day, January 20, 2009, George W. Bush would hand over the Presidency to Barack H. Obama. Candidate Obama had repeatedly promised to take markedly different positions from President Bush on many troublesome Guantanamo issues.

We again held our breaths collectively. The Government did not appeal but we did, for Mr. Bensayah, emphasizing particularly the legal deficiency in the broad standard for "support for Al-Qaeda" that the

Judge had adopted. What role Judge Leon's extraordinary remarks played in the Government's decision not to appeal I cannot say but they must have had an impact.

While this latest appeal was pending[6], the three clients who were Bosnian citizens were reunited with their families in Bosnia (2) and Algeria (1) in late 2008. The two other men that Judge Leon had ordered released on November 20, 2008 were given refuge in France in 2009 by the then Sarkozy Government as a result of very hard work by our team in advocating for this result through the French Embassy in Washington.[7] Of these two men, one, Lakhdar Boumediene, the Boumediene of the case caption, was reunited in France with his wife and two children[8], a reunion that the French and Algerian governments collaborated to accomplish despite their often testy relationship dating back to France's colonization of Algeria and the ensuing war of independence.

Despite Judge Leon's habeas ruling freeing the five men, all five were flown out of Guantanamo much as they had arrived: shackled hand and foot (but not blindfolded and tied down as they had been when flow to GTMO almost seven years earlier).

[6] This appeal was argued quite persuasively, this time by partner Mark Fleming, who is a an appellate specialist.
[7] Partner Rob Kirsch, a well-respected environmental lawyer, proved to be equally adept at dealing with foreign diplomats
[8] An overwhelming emotional moment for some of us on the trial team occurred when Mr. Boumediene was being flown from Guantanamo to a French military base. As we listened raptly to a French colleague speaking on an open line from the French airfield outside Paris, he regularly reported "he is 100 miles from French air space.. he is fifty miles from French air space…Mr. Boumediene is in now in French air space and a free man."

We won Mr. Bensayah's appeal in 2010 with the Court of Appeals ruling that notwithstanding all of the Government's direct and rebuttal evidence offered against him, there was "no direct evidence of actual communication between [him] and any Al-Qaeda member" and that there was no record evidence of anyone planning to travel to Afghanistan to fight the US as a result of his help. The Court made it clear that there would have to be further evidence offered by the Government in a second habeas proceeding for Mr. Bensayah to continue to be held in Guantanamo. In the meantime, an interagency task force set up by the Obama Administration to review the continued detention of the men still there had determined that Mr.Bensayah posed no threat to the United States and should be released.

His habeas retrial consequently never took place and the case was finally dismissed as moot earlier this year. After our lengthy efforts to find Mr. Bensayah a home in Western Europe or Bosnia proved unsuccessful, the Government ultimately sent Mr. Bensayah back to Algeria involuntarily in December 2013. There he has no job, no money, no fixed place to live, no family (his wife and daughters remain in Bosnia) and no prospects. But he is a free man now for the first time in twelve years and I am no longer a Guantanamo habeas counsel.

I would be remiss if I did not emphasize how much our habeas representation was simply one among hundreds undertaken on a pro bono basis by lawyers in firms as large as ours and as small as those of

solo practitioners. At a moment when it would have been easy and understandable for American advocates to have ignored the plight of these widely reviled men being held largely incommunicado and out of our sight, many lawyers-with notable support from bar associations large and small- stood up to a task as rooted in our collective professional DNA as is our veneration of John Adams' representation of the British soldiers accused of unlawfully perpetrating the Boston Massacre of 1770.

What does this mean to you as lawyers who are also involved citizens? Let me close with a few points for your consideration.

1. The political issues raised by the potential use of Guantanamo Military Commissions as an alternative to Federal Court indictment and criminal trial were on view again this week following the announcement of the seizure over the weekend in Libya of the man who allegedly orchestrated the notorious Benghazi attacks. How do you come down on this issue?

2. How do you feel about the de facto creation of a new extra legal category of prisoners called "too dangerous to release" which allows for men to be held in Guantanamo indefinitely without charge or trial, while some version of the War on Terror winds on apparently indefinitely.?

3. Do you favor closing Guantanamo? If so, are you willing to have at least some of those charged in Military Commissions brought to the US for military trials here?

4. Finally those deemed "too dangerous to release" are presently entitled to periodic administrative hearings (PRBs) in Guantanamo where they can attempt to show that they are not dangerous and should be released. If you would like to represent someone in such a proceeding, let me know and I will pass your name along.

Thank you and have a great Bar meeting.

Statistical Appendix: After the release of the five men to Qatar on May 31, here are the present statistics for Guantanamo:

779 total detainees were held in Guantanamo overall. Most of them were released by the Bush administration, predominantly to Saudi Arabia, Pakistan and Afghanistan.

149 detainees remain after 17 men were released in the last year, including the five men controversially released May 31 to Qatar for Sgt. Bergdahl.

78 are cleared for transfer.

38 are slated for indefinite detention. (Privilege Review Board ("PRB" proceedings are contemplated for these men. The five Afghans released for Sgt. Bergdahl were in this category.)

23 are recommended for prosecution. (Unless and until prosecuted, these men are subject to PRB review.)

7 are in military commissions: The five 9/11 defendants and Nashiri (all in pre-trial proceedings) and al Iraqi (charges sworn but not referred).

3 were convicted and (1) serving sentences (Bahlul) or (2) awaiting sentencing (Khan and Darbi).

15 of the remaining 149 detainees are so-called "high value" detainees.