

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Robert C. Kirsch

Columbia Center for Oral History

Columbia University

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PREFACE

The following oral history is the result of a recorded interview with Robert C. Kirsch conducted by Ronald J. Grele on February 8 and June 28, 2012, and September 13, 2013. This interview is part of the Rule of Law Oral History Project.

The reader is asked to bear in mind that s/he is reading a verbatim transcript of the spoken word, rather than written prose.

VJD

Session One

Interviewee: Robert C. Kirsch

Location: Boston, MA

Interviewer: Ronald J. Grele

Date: February 8, 2012

Q: This is an interview with Robert C. Kirsch, in Boston. Today's date is February 8, 2012.

Where I'd like to begin is a little bit about your own biography. You were born and raised in—?

Kirsch: I was born in Massachusetts in a town called Methuen, which is about thirty miles north of Boston. It's on the border with Massachusetts and New Hampshire. I was there until I went to college. Then I was in college in Vermont, at Middlebury College.

Q: How would you describe your family?

Kirsch: Average, middle-class family. My mom was at home with my brother and I. My father was an engineer who worked at a company at the time called Western Electric, which was part of the old Bell system. He went into one job and stayed there until he retired thirty or forty years later. A very middle-class, conservative American ethic. Both families were very working-class and I think I was the first one in either family to attend a university. It's sort of a classic American story. My father's family was German and had been in the country probably since the mid- to late-1800s. My mother's father was an Italian immigrant and her grandparents on her mother's side were Italian immigrants. It was all sort of a classic American story. They're a relatively conservative family, politically.

Q: Republican?

Kirsch: To the core, yes. Our discussions about this case—although with my dad, before he died, I think he understood what was happening. But my mother is still uncomfortable with the representation to this day.

Q: Are they religious?

Kirsch: My father was Episcopalian but I think in name only. My mother's family was Italian, so they were Catholics and still are. My mother is still very regularly church-going.

Q: You went to public schools in Methuen?

Kirsch: Actually, no, I went to a parochial school. I attended Catholic school for my first eight grades. I went from there to Phillips Academy in Andover as a day student, which was about a fifteen-minute drive from where I grew up. From there, to college. I worked a bit in my summers and then actually took a year between law school and college and worked as a weather observer on Mount Washington in New Hampshire. It's our tallest mountain in the northeast, in a place where you get lots of extreme weather.

Q: Bitter winds.

Kirsch: Lots of wind, lots of cold, lots of snow and ice—all the things that winter is supposed to bring.

Q: Was your family at all affected by John F. Kennedy and the mythology around that?

Kirsch: Certainly, I remember coming home the day he was killed. It was probably the first time I saw my mother cry, watching the funeral cortege on television when the funeral was broadcast. There was nothing beyond that. I suspect, despite everything, that while they had grief for the president—and I've never talked about it—my suspicion is that my parents had voted for Richard [M.] Nixon. I don't know that for a fact.

Q: Why Middlebury?

Kirsch: It was a good college. It was off in the country. A small liberal arts school is what I was looking for and something that was further north. I don't think you can get a more attractive campus. When you're at Middlebury College, you look at the Adirondack Mountains to the west and the Green Mountains to the east and it's just a spectacular place with smart people. It was a good environment for me.

Q: When you were at Middlebury, it attracted some national attention for being a leader in energy conservation. Were you at all affected by that as a student or do you remember it at all?

Kirsch: I guess I would have to say no because I don't remember that happening in the 1970s at all. If it was, I was unaware of what was happening. Or maybe I knew about it at the time and I've just forgotten.

Q: I ask because it was one of the things I remember about Middlebury. Given your own career, I thought there might be some kind of connection between the two.

Kirsch: I had an idea of what I wanted to do before I even got to Middlebury—although, at this point in life, I wonder how that could be possible. I certainly had an inclination to work as an environmental lawyer because, when I was young, I was very concerned about nuclear energy and the path that the country was on. At the time, I felt that it was an overly subsidized, dangerous, toxic-forever energy form, that there should be other places the country was investing and that it was particularly risky to invest in an industry that couldn't exist without extensive government subsidies, given our system. I had been active in some of the protests that occurred at the last nuclear plant that was built, which is in Seabrook, New Hampshire—not very far from here. Part of the motivation to go to law school was that I could see that while it was really a lot of fun to go to an event like that, you could be a lot more effective as a lawyer.

Q: Where would you have picked up that interest?

Kirsch: I don't know. I think just living and being aware. It's hard in our society. I guess you can be unconscious of the role of energy in our society but I think you almost have to do it willingly and with some effort. Energy is so around us and the fact that, in a place like this, if you see that

power plant, it is built on the edge of a salt marsh and you can see it for miles around. It's huge. Nothing seems to have gone wrong with it. Only one reactor out of two were built. In fact, the company that built it—which was a utility in New Hampshire—was put into bankruptcy because it developed that. So the concerns about the financial wherewithal of the technology I think were borne out. Whether that will change now because of what happened in Japan last year, with that industry being revisited—it's an interesting question for me as to where we're going to go with that now. Certainly, nuclear energy presents some opportunities in terms of greenhouse gas emissions, if that's the concern that we're after, but poses concerns in terms of long-term security—what you do to store and control the waste stream that comes from a plant and how you manage the risk of something going wrong at a plant, which we now know can be quite catastrophic, from what happened in Russia and what we saw happen in Japan recently.

Q: How did that find a focus in Middlebury? A particular course that you took?

Kirsch: No, I just knew that I wanted to go to law school and that Middlebury had a good undergraduate liberal arts program, which was what I was looking for. I didn't look at a school for a particular area of strength or expertise. I actually looked at it because of the reputation and the strength of its teaching faculty, which was very strong at the time. They were real teachers. It wasn't a university where you got teaching assistants with a lot of experts sitting in on large lectures. I remember almost no lecture courses there. Everything was really sitting in and participation, which was why I was there.

Q: I remember they had a reputation as a language school. People went there for foreign languages.

Kirsch: It does. It has very strong programs, particularly in the summer. They have summer-long immersion programs in a variety of languages. Interestingly, I never took a day of foreign language when I was there. It didn't happen.

Q: Any particular courses or professors that stand out in your mind?

Kirsch: A couple. I was a political science major and knew the members of the department quite well and the people who I have still tended to stay in touch with. One was a professor named Murray Dry, who just celebrated his fortieth year at the college, so he's still there and still active. I see him when I go back. He's actually invited me up a couple of times and I've spoken to classes. I've spoken to their pre-law program about the Guantánamo case. Murray has brought me back up for that. He was somewhat of the pre-law advisor to undergraduate students and also specialized in American politics as part of the political science program and some political philosophy. I had courses with him and have stayed in touch over the years. He's followed the progress of the case and has actually worked our case materials into some of his courses over time.

I also stayed in touch with Paul Nelson, who, when I was there, was the chair of the department. He was, I think, at the theoretical end of the spectrum. Paul really worked on political philosophy, so what I read and wrote with him was not at all on the practical end of things. It was

origins, theory, and philosophy. But we had a lot of fun and his courses, for me, required me to stretch quite a bit. We stayed in touch there. Overall, it was a very positive experience.

Q: Why Cornell?

Kirsch: Well, at the time, remember, I had gone from Middlebury and I was working at a weather observatory on top of a mountain. I needed a good law school that wasn't in a city.

Q: What's your aversion to cities?

Kirsch: At the time it just wasn't where I wanted to be. Ultimately, of course, you need to be in a major area to have work. At least, at the time you did. I'm not sure, today, that you couldn't exist with a space that appeared to be someplace and living where you wanted to. But at the time, if I could get a good solid law school education and stay in a rural environment, that was ideal.

Cornell really offered that because you have a huge university setting and all those resources and you're in the Finger Lakes. You weren't that far from the Adirondack Mountains, so you could hike, climb, ski, and do the things to have fun while you were learning.

Q: I would assume that the first year at Cornell was the ordinary contracts and procedures.

Kirsch: It's pretty rote. At least at that point, for American law schools, it was. I don't know if that's evolved at all or not.

Q: Did you find a special interest in conservation law at Cornell? Were you able to develop that?

Kirsch: No. It was there but I didn't tend to focus on it. I know I took one or two courses over the three years that touched on environmental issues but I really took a much broader, more general approach because my understanding—which is still what I understand today—is that when you're at law school, you need to come out understanding how lawyers think and act. Your learning doesn't stop at law school; it's really just teaching you how to learn and how to be effective as a lawyer. Then you have to get to a job and then the real learning starts. The education you get in law school simply qualifies you to get that next job and to continue learning.

I didn't. I suppose my education was all in that direction. I'm a big fan of a liberal arts approach and not necessarily having to specialize any sooner in life than we have to.

Q: And you got that at Cornell.

Kirsch: I got that at Cornell, yes. I was very happy there. I also started working there, for the first time, in their legal aid program. Cornell had a pretty active legal aid clinic and some of my closer friends from law school are the people with whom I work in the clinic. Some of us tended to be house mates over the years or just good friends who've stayed in touch. It was the folks I met there who have been the ones I've stayed closest to over the years.

Q: What kind of clinic did they have at Cornell, not being in an urban environment?

Kirsch: Well, rural poverty is actually much more devastating than urban poverty is. It's just harder to find—although once you know where to look, it's easy to find. But it's not nearly as concentrated. You find that the needs can be very, very significant. Certainly, there's a huge well of opportunity there with people who need services. There's always a need to do some kind of domestic relations work. I think all of us had to take at least one divorce case because that was necessary. Beyond that, it's discrimination cases, housing cases, and things where people who don't have resources run up against a system where there are hurdles to overcome and they're dealing with people and a system that does have resources.

But it was a good program. There were opportunities to get involved with larger cases, with some of the things that were going on there. It's funny. I haven't thought about this in a long time.

Q: When you were about to graduate from Cornell or leave Cornell, what did you think your future would be?

Kirsch: I knew, I suppose—by the middle of my third year, that I was coming to, at the time—Hale and Dorr because I had interviewed to come to the firm. I expected I would work in Boston for a few years and then settle in New Hampshire. I wasn't sure what I would do then. Probably work for a firm there.

Q: Why Hale and Dorr?

Kirsch: It was the people.

Q: Were there other options?

Kirsch: Oh, yes. I looked at a number of different firms that I recall, at the time, some of which aren't in business anymore. At the time, they looked like they were as good or better in terms of reputation and financial strength than this firm was. Whether it was fortuity or not, the guy who came to Cornell to interview me was Bill [William F.] Lee, who just stepped down a month ago. He was our managing partner, although at the time he was a younger partner on his way up. Just a fantastic lawyer. We didn't talk about law for a second during the interview. That's what I remember. It was the least standard interview of any that I had and it was very intriguing that way. We talked about public versus private education, the benefits of both and the obligations of society to public education, because he was at the point in his life of making decisions for his kids.

So that was our discussion and I, of course, was there at law school, having only set foot in public schools to play basketball or other sports. That was my only experience with public schools at the time. So it was an interesting conversation. Then the people that I met when I got here were—there was just an energy, a drive, and a sense of cohesion that I didn't pick up anyplace else that I went. There were lots of other firms with good lawyers but they felt staid, conservative, and somewhat bound up. That wasn't the sense I had here. People were happy with what they were doing. They knew one another. While I wasn't thinking about it, even at that

point it was clear—people talked about their pro bono programs and what the firm did. It's always made a point of being willing to take on and looking for, cases of significance.

Q: You say you weren't aware of that then?

Kirsch: I wasn't really thinking about it. It wasn't my focus. I remember that it came up, even in that first round of interviews.

Q: Were the practice areas defined or ill-defined or—?

Kirsch: They were quite well defined. I came as a litigator. At the time they were more standard. There was a tax department, a trusts and estates department, a corporate department, a real estate department, and a litigation department. There were fewer in the nature of specialties. I came here as a litigator, although wanting to do environmental work and expecting to do environmental litigation. Interestingly, the approach and the philosophy of the firm on the litigation side had always been—and to some degree still is, although to a more diminished degree now—that we were trial lawyers. You could just give us the case, give us a little time to prepare and we'd try it. It didn't matter what the subject matter was; we were going to go into court and we could do it.

I landed here in the fall of 1983, which was really as some of the most significant environmental statutes were just taking bite nationally and as statutes at the state level were just coming into effect as well. I wanted to do environmental work. I had the fortuity of getting on a pretty

significant case by—I think I came in the fall of 1983 and by the spring of 1984 I was on an environmental case.

Q: Do you remember what that case was?

Kirsch: Oh, sure. Yes. There was a company called Reliable Plating that was a subsidiary of a company that used to be called Augat [Inc.]. Plating facilities have lots of chemicals and, in particular, water pollution control issues and there was a question about whether the Reliable facility had been bypassing its wastewater treatment system and was discharging contaminated liquids directly into a sewer system. The attorney general's office had started an investigation and was threatening to bring criminal charges—which, at the time, was almost unheard of. It would have been devastating. I remember getting on the case and investigating it, actually, partly by fortuity, having a lead role in how we structured the settlement and the resolution—in part just because of something that I'd read about and I posed to the partner as we were walking down the street, going over to the attorney general's office. As partners do, he took the idea and worked it into something that would actually help resolve the case. After that, almost everything I took had an environmental bent to it. I took one other commercial case but only because that client asked me to get on it. There was a huge trade secret matter that litigated for years and years. But after that, it was all environmental work, whether it was enforcement or assisting in transactions.

Q: When you said that the law was just evolving at that point in time, it came to my mind that during those years there was an enormous amount of legislation passed on the state and federal

levels so that, as a young lawyer, you were constantly coming up with something new—a new law, a new practice.

Kirsch: Right. There were new decisions all the time, so everything was being litigated and everything was being interpreted. There was law and guidance. The mid-1980s were, to environmental law, what the last eight or ten years have been to intellectual property law. Everyone was an environmental lawyer at the time.

Q: It must have been pretty yeasty.

Kirsch: It was fun. Yes, it was great. For me, the good news at the time was that there were one or two partners here on the litigation side who did an occasional environmental case but no one had expressed an interest in focusing on it. I very quickly became, even as a second- and third-year associate, the senior lawyer at Hale and Dorr on environmental issues, which was fantastic. The firm has always had a tremendous ability to adapt to success so if you're in the right place at the right time, you'll get all the rope that you need and always just a little bit more. So it was a great time to start.

I remember, probably in 1985 or 1986, being told at one of my evaluations that the firm had agreed to my request that I could specialize. I don't remember asking anyone whether I could specialize because I knew that, in practice, it wasn't what we did. We were trial lawyers and we could pick up any case and do it. I remember going in and speaking to Jerry [Jerome P.] Facher, who was chairing our litigation department at the time. Jerry, of course, was the lawyer who

represented the Beatrice interests in the case that led to the book *A Civil Action*. He hadn't taken the case on yet but he was and is one of the best-known trial lawyers in the country, of his generation.

I went in to talk to Jerry and he was, as usual, very reassuring. He said, "Look, you can do this. You're doing great. Just do the work and don't forget about how to try cases but we're going to let you try this." At the time, I was the first lawyer in the firm who was allowed to specialize. I suppose I had really wanted to do it and I'd done it by default. At some point, more senior colleagues had looked at it and said it was time to recognize that I had done it and acknowledge it and say that it was okay. And that was good.

Which reminds me of something—my first encounter with Jerry was when I was a law student, before I was hired here. It was in the process of trying to decide on firms. I can't imagine anyone doing this today but I remember calling him and I said, "Well, I've heard that it's a sweatshop there. Is that really what's going on?" I can still remember the pause at the other end of the line, before he responded. He just said, "No. You're going to work hard. You're going to work hard wherever you go, if you like the work." I don't remember the rest of the answer but that pause will be with me forever. It was just a classic, and I'm thinking, "What in the world—?" Because at the time, I suppose, I didn't understand or appreciate who he was. I was a law student. I'd known one lawyer when I was a teenager but my family had never used a lawyer that I knew of. It was not the economic strata that my family was in. That wasn't where I existed. Jerry was great.

I stayed with Hale and Dorr until early 1988. In 1987, I decided I wanted to take six months off and went to New Zealand to climb mountains, just to live in that part of the world. I wanted to come back and live in New Hampshire. At the time, the firm—I remember talking to John [D.] Hamilton [Jr.], who was our managing partner and dealing with a number of partners who came by. Because, at some level, my practice was really taking off. I had a tremendous amount of responsibility and fantastic work. The environmental stuff was pouring in, but I also knew that if I didn't step back and take the time I never would because I was enjoying the work so much—I knew the way my system worked, that I would simply be there forever.

I went with the woman I was seeing, who was a colleague from here, to whom I've been married for twenty-odd years and we went to New Zealand.

Q: Did you just climb mountains?

Kirsch: We climbed mountains; we did tourist things and visited places. We bought a used car and sold it back. I think the car cost us \$150 New Zealand dollars for five months' use, which was probably \$100 American by the time we were done.

Q: Why New Zealand? It strikes me as a low-pressure place.

Kirsch: It's low pressure. It's not particularly large. It may be the size of New York or a significant state but within that you have glaciated peaks with still-active glaciers. It's a very, very new geology compared to what we have. You have tussocked moors, you have volcanic

peaks. You had virtually every kind of mountain that you could imagine in a very, very compact area. For me, it was ideal and all on two islands. The people are very open, very friendly. I remember buying the car on credit, just with our word, saying that we'd pay them the rest. I suppose they'd think, "Where are you going to take the car? You're in the middle of the South Pacific."

So we bought a car, waiting for our checks from America to clear. We ultimately sold it back to someone before we left the country and got back almost all the money that we paid for the car. So it was a great trade.

Q: When you came back, was it WilmerHale?

Kirsch: No, when I came back, actually, I worked at a firm in New Hampshire.

Q: Oh, you didn't come back to Hale and Dorr?

Kirsch: No, we moved to Concord, New Hampshire and I worked for a firm called McLane, Graf, Raulerson & Middleton, where the lead partner there was—and still to some degree is—Jack [B.] Middleton, whom I knew as a weather observer. Mount Washington has played a pretty significant part in my life. It's sort of a grounding place that I go back to. The weather observatory is a 401(c)(3) and I've been on the board for about twenty-five years now. I go back there a couple of times a year. I like the wind, the weather, and the cold.

I went and worked at Jack's firm starting in July of 1988 and that October I attended a business dinner. There's a New England-wide trade association that is sort of the link between the New England states and Washington, D.C., called the New England Council. One afternoon, I was asked if Anne and I would attend because some of the partners who were supposed to go had conflicts and they needed to fill the table. I went down and while I was there I ran into—Hale and Dorr was very active in the New England Council and I ran into one of the partners. That was my first chance to really catch up with people here, so I spoke with one of the partners who I'd done a fair amount of work for. He was a corporate partner who had represented some chemical companies and I'd done work in New England and New Jersey and in Texas for him. Within a week I got a call from someone here, saying, "Would you rejoin us if we opened an office in New Hampshire?" I agreed to do that and by the spring of 1989, I think by April—was it that soon? Yes.

I started working in June of 1988 and in April of 1989 I left and I came back to Hale and Dorr and we opened an office in Manchester, New Hampshire. I ran that office until 1997, I think. At the end of 1997 I was asked to chair our environmental practice. If I did that, the understanding was that four days a week I would be in either Boston or Washington. At that point, I packed up and we closed that office. I've been back here ever since. I guess starting in the summer, when I rejoined the firm.

Q: Do you think they opened a Manchester office because there was a special kind of law that had to be practiced in New Hampshire or because they wanted to bring you aboard?

Kirsch: It was a totally irrational decision and one that we would never make anymore. From a business perspective, we wouldn't have done it—although, by fortuity, it worked. It worked out in part because the 1989 time frame was the beginning of a recession. A lot of business dropped off and the real estate practice—which had been very large for the firm here in Boston and went through a huge boom in the 1980s—collapsed. In New Hampshire, shortly after we got there—probably in 1989 or 1990—five or six banks were closed on the same Friday afternoon by the FDIC [Federal Deposit Insurance Corporation]. That meant that there were huge reorganization issues, huge workout issues and any number of litigations.

Most of the New Hampshire firms were now conflicted out and we had just landed. We were on the street. We were licensed. As it turned out, the office generated a lot of real estate work, which kept people busy. I think that, from the time that we were there—we made money from the day we opened, which is unusual in that kind of a setting. But as the economics of the practice changed, I think, ultimately, it wouldn't have made sense to stay there in the long run. The firm at the time was trying to decide, "Are we regional or are we national? Are we regional or are we national?" That was our one step at looking to be regional, and ever since we've been national and now are really global.

Q: How did the firm becoming WilmerHale affect you?

Kirsch: Well, it made the case that we're going to be here to talk about possible, certainly. But it did a couple of things. It opened up new opportunities for practice. Wilmer, Cutler [& Pickering] had had an environmental practice, although it was largely dormant for the four or five years

before the merger because the partner who had led it had retired several years earlier. It allowed me to start a new professional relationship with one of my better friends who was an environmental lawyer at Wilmer. I had actually tried, softly, to recruit him at one point and hadn't been able to lure him to Hale and Dorr. I said, "Well, if you won't do this, then obviously we'll have to merge and then we can work together." So that was great. I think the most significant implication for my life has been this case. We merged at the end of March or April, maybe early May of 2004—I forget which date precisely but it was something like that. Then on June 28 of that year, the Supreme Court issued the *Rasul* [*v. Bush*] decision. It was through a Wilmer partner that the case came in and we were one firm the email went out to—partners—and a day or a day and a half later we had a case team up and running and we were off on the *Boumediene* [*v. Bush*, 2008] team.

Q: Where were you on 9/11?

Kirsch: I was at my desk here on the twenty-third floor. I was one floor down and one office over.

Q: When did you first hear about Guantánamo, that something was happening there? Or that there were prisoners?

Kirsch: I remember hearing about it as it developed and opened. Certainly, as a lawyer, you're aware of issues like this as they come up. I don't remember having in-depth knowledge about it because, like anyone else in a place like this, I was pretty deeply enmeshed in my day-to-day

business, doing my work. I was aware of it and certainly read about it but my knowledge didn't go much beyond that. I was not following any of the early cases as they unfolded. That's for sure.

Q: Who first approached you? How did you first get involved? You mentioned the email. The Center for Constitutional Rights [CCR] sent out the email?

Kirsch: No. What happened was, one of our partners named David [W.] Bowker is a partner in Washington and he worked in the State Department. David got an email—and I don't know if it was from CCR or from Reprieve or some combination—but he approached management, which immediately sent around an inquiry seeing if there were partners willing to take on the case. The email was, generally, to the effect that we had been approached to take on this pro bono matter and we were interested in seeing if there were partners who would be willing to supervise. I remember seeing the email. At the time, Steve [Stephen H.] Oleskey—whom I think you've met and spoken with—and I were on the same floor and I remember getting the email. I went down to Steve's office, which was maybe seventy meters away, and essentially said, "This looks interesting but I think this would be more than one person could handle. If you want to do it, I'll do it with you." That was how we started.

Steve has been probably a model at this firm—and actually in the country—for being a partner at a large firm but always having a very significant both pro bono case load and public service involvement. I'm sure you've seen his résumé. There is public service and legal services all over it for a thirty-five or forty-year career now.

Q: Had you known him, more than as just a partner?

Kirsch: Oh, yes. We were good friends. One of the things that this offered was the opportunity to work together. We had worked together when I was very young because I was an associate on some of his cases. He was one of the partners who had done sort of a smattering of environmental work. This would have been a chance to work together. Although, even when I said I thought it would be bigger than anyone should take on, I had no concept of what would be involved in the case and how long it could actually take.

Q: Do you recall how you got the Algerians?

Kirsch: That was just what was dealt to us. We got the call, we got the email, we ran the traps with firm management. There were things that were known about Guantánamo but it was not very much. The men were largely held incommunicado, both their numbers and identities were not known and the only thing that was published at the time was the mantra that was coming out of Donald [H.] Rumsfeld, which was that they were the "worst of the worst," they're very dangerous and that they're going to hurt our country. So there was some question, from the firm's perspective, what could this cost us? To the firm's credit, we took the case anyway, not knowing what was going to happen.

Steve and I were good friends. I had no doubt what we would do. We didn't find out who the clients were, I think, until we got on the telephone. I think Clive [Stafford] Smith was on the call. I'm sure there were others. I don't remember. By the time we set up that call, we had lawyers

from Boston, New York, and London on the telephone—all who had signed up to take on the case because once Steve and I were prepared to supervise, it was opened up to associates who would volunteer and we had fifteen or twenty kids immediately onto the case.

It turns out we needed it, and it may have been because of the size of it that Clive and CCR elected to give us the Algerians' files. I don't know if anyone knew—who knows when you first get a file? Every client's case sounds great until you hear the other side's case, so who knows what they were thinking?

Q: Clive Stafford Smith had been rounding up families and trying to locate people.

Kirsch: Exactly. I remember having the case described and summarized to us. Files were promised. We got off the phone and started figuring out what it meant to bring a habeas corpus petition for executive detention because we'd never done it. This firm had done lots of habeas work over the years but it had always essentially been representing state prisoners in the federal system, looking for habeas relief. We'd never done anything like this. In fact, there hadn't been an opportunity to do this since World War II—at least not one that was widely enough publicized. I'm sure there were some other opportunities; we just hadn't heard about them.

We were off and running by the middle of July. We had our first petitions ready. I think we filed something by the third week in July. We amended it right away, as I recall. I don't remember the reason anymore.

Q: Now you had not met the clients yet, at all.

Kirsch: We couldn't. It was impossible. Some of our initial efforts were to pin down their facts and take a look at the affidavits that had been collected. We did have an affidavit from each wife already prepared for us because Clive and CCR, to their credit, were thinking about what to do. There was an effort by them, as I recall—understanding what the court had done on *Rasul*, there was some concern that the [George W.] Bush administration might try to begin to get prisoners out of Guantánamo and put them in other places where they could be beyond the reach of the courts. They wanted petitions to be filed relatively quickly so that there would be the ability of judges to stop that from happening.

We got our petition in and we heard about the CSRTs—the Combatant Status Review Tribunals—which were put in place largely in response to the *Hamdi* [*v. Rumsfeld*, 2004] decision, which came out on the same day as *Rasul*, that suggested that there had to be some kind of minimal process. I think there was a man named [Paul D.] Wolfowitz who issued the order that set it up. It was really an order that was intended to provide the minimum possible procedural protection in what was largely a very, very biased—and, we subsequently learned, politically influenced—process, which was intended to rubber-stamp and essentially provide a camouflage for a process that covered up and refused to investigate mistakes.

I remember we had one issue that came up relatively early on with the CSRTs. We advised our clients not to participate in it.

Q: You had met the clients by then?

Kirsch: No, we hadn't. We sent them a letter. We prepared a letter. We sent it to the clients. One of the first things we did, frankly, that summer, was to work to find someone who would work with us as a translator. We needed to send documents to the clients and there was nothing in place yet that allowed us to get mail to clients. We were entirely reliant on the government—and still are, to some degree—for communications because they're in a system that had no precedent at the time, in a place where the only access is by way of the military. When we heard of the CSRTs and that they were happening, we actually tried to enjoin the government from compelling our clients to participate because we thought that this would only result in a decision that cut against them and that would be used against them later, in subsequent proceedings. We requested a TRO [temporary relief order] before Judge [Richard J.] Leon and the argument was to Judge Leon, who was on vacation. So there were lawyers sitting in the courtroom at a podium arguing over a telephone speaker, with the Judge sitting wherever he was, on vacation, listening to the argument somewhere else.

The first thing that Judge Leon did—and Steve argued this motion—was to raise the local rule that says that, in D.C., you have to have a document signed by your client agreeing to the representation. Judge Leon made clear where he was coming from by pointing out that it was missing in our case. He knew full well why it was missing and that it had been impossible for us to get any communication with the client. He allowed the argument to go forward, but he always put his cards on the table.

You have to remember, Judge Leon was appointed by President Bush. He had been on the bench for just two or three years when our case started. It turns out that, if you look at his background, he was essentially an activist, partisan, Republican lawyer working largely through the congressional system. He'd known Vice President [Richard B.] Cheney for decades, which we didn't understand at the time. I say that not to suggest that there was anything improper in the relationship or that he would do anything because of that, but there was a philosophical consistency among them. Judge Leon was clear in his view of the Constitution and the authority of the executive, under the circumstances—that he didn't have any role in this and didn't have any authority to do it and the president could do what he wanted. He thought that was fine and entirely consistent with the Constitution. We always got to make our arguments and he would issue his rulings, consistent with his view of the law.

Q: So from day one, you knew.

Kirsch: Yes, we knew entirely. Part of what we were doing was, if you know you're going to lose, you make your record. You make sure you're meticulous about making the record. Even when the judge is browbeating you, you stand up and say the things you need to say so you can point out later that you said these things.

Not surprisingly, we lost our injunction and our clients, I think with only one exception, ignored our advice and did participate in the CSRT proceedings. In fact, they made statements that were very helpful, which we were able to use—some of which have been publicized and some of which were included in films, later on. So thank goodness they exercised their own independent

judgment and weren't cowed by their big-city lawyers who were coming in to tell them what to do.

I started to digress and I should go back. One of the most important developments as we moved forward on this case was the relationship that we developed with our interpreter. We found six, eight or ten people who were possible candidates, and we tried to speak with them, run them down and meet with some of them. Purely by coincidence, there was a man in Boston whose office is at the Faneuil Hall market place, which, if you take the elevator to the lobby of this building and walk out the back door, you could throw a rock and hit it. It was purely by coincidence. His company was called The Multi-Lingual Group and his name is Felice Bezri. I think his father was Egyptian and his mother was Italian. He was born and spent a lot of time on the African continent, then grew up in Paris. He speaks English, Italian, French and Arabic. At the time, his biggest client was the State Department so when he got our first call, he was very polite but not overly enthusiastic—I think he was quite properly reserved about what he could say because he feared—and it turned out to be quite justifiable—that if he assisted us, it could affect his business.

We spoke the first time and I remember setting up a call with him. He was in Yemen that day. I think he was probably working on—I wouldn't doubt that he was on a State Department trip, traveling through the region and doing translation. We called back and met him when he got here. Ultimately, we talked him into coming on the case. It wasn't as if we browbeat him into it but he met us, we met him and we consulted. The chemistry was good. We talked about who our clients were and he agreed to take on our case.

Q: Steve told me that the first interpreter you had when you went to Guantánamo had worked for the government.

Kirsch: We had two guys. Felice was the one we hired. I may be recasting his role a bit but we had to talk him into it. There was also a man named Farid Boutros, who was from New York. He's Egyptian. It turned out he had worked for the government but he didn't tell us that. He had been on the other side during questioning at Guantánamo. Steve would be more familiar with this because on our first trip down—and I'll tell you a little bit about that—I worked with Felice and Steve worked with Farid. I think that when Steve observed the body language—that the clients were essentially withdrawing from Farid—we finally got Farid to tell us that he had worked for them and that there was an issue there.

Keep in mind that when we started, no one had security clearance. The first thing we had to do was to get security clearance and the two things that Farid and Felice both brought to the table was that each had some clearance because of their prior work. We didn't know Farid had it because he'd worked for the government so he had all the clearances he needed. Felice had a form of clearance through the State Department which, we learned years later, wasn't adequate for what he was doing but the government made a mistake and for the first few years just pushed him through when he was down there with us. Ultimately, he's now cleared through top-secret. He's actually capable of working in some of the more highly controversial cases because of that. He has been helping with them.

Q: You meant that you had to get clearances for yourself.

Kirsch: We did something that no other team actually did. We first put Steve's application and my application through because we wanted to be able to meet with the clients as quickly as possible. Then we went through members of our team. Of course, everyone had to be a citizen and we had some members of the team who weren't citizens so they weren't in the queue for applying. We had two paralegals for whom we applied for clearance and we had a secretary in Washington for whom we wanted clearance. Lawyers are great in these cases, but without support you can't do what you need to. We had the good luck of having everyone that we put through get cleared. Some took longer than others and people were nervous and hanging. Ultimately, we had probably twelve to fourteen people who were cleared, including two paralegals and a secretary.

By the time we got to going to trial—which we can talk about later—those early decisions were critical because we had the ability to actually have the troops on the ground who could assemble cases and put things together. At the time, we had no concept of what it was going to be like to work in a so-called secured facility and work with classified material. It simply changes everything you would assume you can do and how you have to handle, manage and build your case. In truth, over the years, we have loaned our support people out to other firms. It's become a regular practice now that our secretary, who's still cleared, helps other people do their appellate filings and work on briefs because, to this day, no one else has thought of having a support staff get clearance, so they can work in there. It made it much more efficient to use our time.

I think we got our clearance in September or October. We cleared calendar dates and put in a request and in early December of 2004 we made our first trip down. What I recall is that Felice and I flew out of Boston on a Sunday and started our meetings on a Monday morning. Steve's schedule wouldn't accommodate that, so he and Farid—

Q: Had you already divided the clients three and three?

Kirsch: Probably. At some point we did. We also mixed so that we would all meet everyone. What we used to do, during the first series of meetings, is we would go down in teams. The first time there were just two of us and two interpreters. Every other meeting, for the first five years, it was four lawyers and two interpreters. We would go in in teams and someone could always be asking questions and taking notes. You would always have someone there to bring things in.

Felice and I flew down on Sunday and started working on Monday, whereas Steve and Farid flew in on the Monday flights and started working on Tuesday. I think I must have had four days at the base that time and Steve would have had three. That's how we set things up.

The thing I most remember is the flight in because there was very little information. At the time, there had been one CCR team that had gone down before us and that was Gita [Gitanjali S. Gutierrez]. I think that was very fitting. She made a terrific impression and it was a very powerful statement that the first person into the camp was a woman. The next team, I think, was [George] Brent [Mickum]. I don't know if Joe [Margulies] was with him or not but I think Brent was on the next flight in and Steve and I were the third lawyers to get clearance and go in.

I remember coming in on the flight. Of course, the planes were quite small. The equipment has improved over time. I think the principal beneficiary of these cases has been the small airlines, although one of them went out of business. The original airline, Air Sunshine, has done quite well, with regularly full flights. I just remember coming in and because you're in a small plane, there's nothing that separates you from the pilots. Sometimes they pull the curtain back but on this flight they didn't, and I was sharing a fairly tight seat with a very, very large young soldier. They aren't seats that have things that pull down for an arm rest. They were essentially bench seats like you would have in a school bus in the 1950s or 1960s. It was nothing very elegant or particularly comfortable. I was sitting on the aisle, which was the one saving grace because I think I would have been crushed, given this guy's size, if I'd been sitting between him and the wall.

I can still remember coming in and looking out of the cockpit window and all you could see was the bay and the mountains in the background—because there are mountains in Guantánamo. The plane flies in perpendicular to the coastline because we weren't allowed to fly over Cuban territory. The runway is parallel to the coast, which I didn't know at the time, so you're coming in at, essentially, a ninety-degree angle. The runway is probably 100 to 175 meters from the water. As soon as the plane breaks over the shore—which means that it was headed constantly for the mountains and the bay, right up until that point—it cuts a ninety-degree turn and settles down over the runway. I just remember sitting and looking around the plane, thinking, "All right. Everyone who's done this before is very calm about this. But where's the airport?" All I could see was the water, the reflection, and the hills. But the GI next to me is sleeping and the other guys

are all talking, so I think, okay, I'm not going to be the one who panics and points out that the pilots are flying us into the drink.

They come in, they do a ninety-degree turn and you're on the ground. It's almost immediate because there's no space. Quite literally, you break the shore, they turn and just off the left wing, as they turn to the right, are the guard towers—because you're also on the edge of the camp. These are the guard towers that separate the base from Cuban territory. They are the Marine guard towers where there are mine fields and live ammunition. It was quite an eerie place.

Our first trip was quite memorable because we were a novelty then. There's always an escort that's assigned to you and our escort at the time was a Marine gunnery sergeant who'd been at the base for two years—which was an experience that we didn't have again. He was extremely knowledgeable about the base. It was like being in a small town with the former mayor. Everybody knew him. Everybody would do favors for him. If you had an idea about something, you would mention it and he would make it happen. He took us on tours. He took us places to eat. We were not treated like the enemy. We were not treated as if we were interfering with the mission. We were the third trip down, so we were somewhat of a novelty and we were trying to figure out what was going on.

The first night, Felice and I settled into what's called the combined bachelor quarters—the CBQ, which I'm sure you've heard of—which was a fairly austere hotel. It was a place where officers could go in the 1950s, 1960s and 1970s, I suppose, for their days off. It's on the quiet side of the base, not where most of the activity is. We got ourselves ready and then went over in the

morning. I'm sure you've heard of the commute that's entailed in getting over to the base in the morning. The truth is, they'd found a location for housing the habeas corpus lawyers, which was about as far away as possible from where our clients were—if they had put us any further away, we would have needed to have worked something out with [Fidel] Castro. We couldn't be any further away. At the time, there was very little internet access. In fact, there might have been none. It was dialup and it was miserable to begin with. So you knew when you went that you were really off the grid with your colleagues.

We had our first meeting the next day and we would meet with every client every day.

Q: One at a time?

Kirsch: One at a time. The first day there were only three meetings and I only met with three men. The men that I met with were Hadj Boudella, Mustafa Ait Idir and Belkacem Bensayah, who is our remaining client who is still there. We were allowed to start meeting at about eight in the morning and we were allowed to meet until five or six at night. At the time, we were allowed to stay in the camp and have our meals. I remember Felice didn't—communication is always a key to a successful relationship. I'd planned on working at Guantánamo the way I worked here, which meant you'd bring your food and you'd just keep working. You'd eat what you had to keep your body going. When it got to be time for a lunch break, Felice was expecting to go and I had, essentially, illegally taken things out of the mess hall at breakfast in the morning so I would have food. I had carrot sticks and peanut butter—the peanut butter cups to put in your things and some of the bread that they had, so I had a little bit of food with us. Felice was aghast. I now

understand why. It's much easier to be the one who's asking questions and taking notes than it is to be the one who's listening, repeating what you say, listening, repeating. While I did half the talking and the client did half the talking, Felice did all the talking, so he was quite exhausted.

For our first few trips, we were allowed to stay in Camp Echo, which is where you met with clients. There were picnic tables outside. One of the interrogation buildings had been set up as an auxiliary. It contained what we always referred to as the model cell. It was the place where they'd take press if they wanted to show them what a cell looked like. There was one that looked like it had been set up by *Good Housekeeping* magazine or something. The blankets were just so and the cushion was large. It almost looked comfortable. There was everything except a telephone and a small spa menu sitting by the side of it. That was there and the immediately adjoining space was an unused cell where there was a microwave and a refrigerator and we were allowed to keep food there. There was a picnic table in the back with a beach umbrella where we could go and have our lunch.

So we would see a client. We would take a fifteen- or twenty-minute break while they changed men over. We would put food into ourselves and then we would go in and see the next client.

Q: What were your first impressions of the clients?

Kirsch: Of course, we were all trying to take each other's measure.

Q: It's mixed up with what their impressions of you were.

Kirsch: Exactly. What we knew so far from the little bit of information we've been able to glean from our investigations is that the government believes that these guys were involved in a plot to blow up the American embassy. The clients say no, their wives say no—as any good wife would—but we didn't know their culture or their background. We knew that they'd been in Bosnia after the violence that occurred there. We didn't know exactly when they had gotten there. We had some idea but we hadn't been able to independently verify anything yet. We were all willing to represent these men and defend them and we hoped we weren't going to run into any guys who were out to harm the United States. Because you don't know who your clients are. Remember, these files were handed to us, so we didn't know who they were at the time.

My impressions today of the three men that I met are largely what they were on the first day. You could see their personalities right away. Boudella is very reserved and really offended that this happened to him. I think he's angry inside that it happened to him. He's a very sincere, soft-spoken man. We spoke at length. We spoke for two to three hours each. That was the time we were allotted. We would go in, we would talk and the first thing was to sort of introduce ourselves and to start to get their stories. Of course to them, I'm sure it felt like they were being interrogated again. We needed to get the facts down, and even explaining that and getting the facts down requires you to walk through some of the same things that I'm sure they've been asked about dozens and dozens and dozens of times by the interrogators.

One of the things we did was we brought with us a letter from their wives for each of them. We also brought a letter introducing us that had our pictures on it on the sides. We had our graphics

people put my picture and Steve's picture on a letter. Then we sent these documents to Bosnia and had each of their wives handwrite a note saying, "Please speak with these men. They're going to represent you. These are the lawyers that we've arranged to represent you in the case," so we could give each of them—while they had seen letters that had come in already, we wanted to give them some levels of comfort, to show that we were being respectful of the fact that they might be suspicious. By having things from their wives, in their own writing—we used that. Those were the first things we did. We sat down, we said, "This is who we are. Here's the letter."

One thing I should point out, because the first meetings were the ones of adjustment, is that Felice is the only interpreter of the men who worked at Guantánamo who was a simultaneous interpreter. He's one of the people you would see in the booths at the United Nations [UN] with the headset on, speaking. He also does that while you're interviewing someone. He's a simultaneous interpreter so while I'm saying to you—when I get to "saying to you," he starts saying, "While I'm saying to you—" Initially, what that meant was that you would see the surprise on the client's face and they would start to turn. We had to very quickly learn that while the intonation would come from me, it all went like this.

Q: Circular.

Kirsch: But it happened immediately. The men immediately became comfortable with it. Luck has so much to do with whatever you get to in life and Felice just turned out to be the strongest interpreter because of the work he had done for the State Department, his family upbringing—he had this tremendous cultural strength and cultural awareness of what these guys were like—what

would offend them and how they would be approaching things—so that he could counsel us on what would be of concern when we did it. He carried our intonation. If I said something with a sense to it, whether it was sarcasm or humor or anger or empathy, it was reflected in his tone. It was always reflected in his tone and you don't necessarily get that. It's different when you have to say something and pause and he says it. Part of what it meant was that, working with Felice, I would get eighty- or ninety-percent more done than you could working with the other interpreters. But it also explained why, when we'd get to the end of the day, he would be like a wet rag, totally exhausted. What we didn't realize at the time is that the stories are horrible. You've experienced that by having some of the interviews with these men. The stories are wrenching. These men were all at home with their families when they were taken away. The origins were the worst things we could fear. A government agent shows up and you're asked to go away voluntarily. You do it and you never come back. What worse experience can you have?

Q: They told you immediately about the way they had been treated?

Kirsch: Oh, yes. We had outlines of questions that we were asking and a lot of it had to do with, "How are you being treated? Are you being interrogated? What are you being asked?" etc., etc., to try to figure out if we should try to protest their conditions. Our roles were multiple, as they've stayed. The roles become, "What are the facts of your case, so we can represent you? What is your medical situation, so we can try to get things seen to here or we can arrange to get outside medical help and advise you on what to do with that?" which we continue to do. Also, just generally, "What are you being asked and how are you being treated?" so that if there are things that are happening that are improper, we can try to address it.

In truth, to the government, our role was habeas corpus lawyers and we didn't have any rights to do anything else and we shouldn't be asking about anything else. But I would also say, to the government's credit, that every time we had a medical issue, they saw to it. Our questions for our clients never went without including a series of health-related questions, to find out what was going on—in part because the health services there were so horrible. It wasn't because we had horrible doctors; it was because the doctors were working in a horrible situation where there was no communication and no trust. The prisoners were treated like a bunch of whiners by the guards and the medics, who would essentially give them Tylenol whether they had a headache or cancer. The prisoners felt that that's what was happening. They were given a Tylenol pill and told to go away, except in the most dire circumstances.

There were two things that, over the course of the case, I found the most troubling. A lot of other things, while I don't think are right and I think need to be fixed and remedied and not happen again, I at least can understand them more. But our country essentially withheld medical help based on whether someone was deemed to be cooperating in questioning. That's inhumane, it's un-American, and it's clearly, patently illegal and shouldn't have been allowed to happen. The people who did it should have been punished for it and they should have been called out. But it never happened and it was clearly the practice for several years at Guantánamo that, essentially, your interrogator was the equivalent of your caseworker in a social services setting, and that the interrogator had sway over whether you did—. Unless you had an emergency, that person had control over whether you saw a doctor and under what circumstances and maybe even what the

doctor did for you. That should never have been allowed to happen. I'll have to remember the second issue because it's escaped me.

Q: Had you ever had any experiences in the Muslim community or with Muslims at all before this?

Kirsch: The only Muslims I've met before then, that I was aware of, were taxi drivers who I'd spoken with. That was it. There weren't many when I was a kid at the Saint Monica School, a parochial school. Any kid who was a Protestant was considered an anomaly, never mind a kid who might have been a Muslim. I think the communities were much more limited in the United States back then. So no. I knew very little about Islam and that was part of what came out of this case—a lot of opportunity to learn.

Q: When you mentioned the interpreter being able to rephrase things in a way that would be understandable to—

Kirsch: He didn't rephrase. He was actually quite literal. But he would advise us—we could talk to him about issues we wanted to bring up and he would say, "Well, if you bring it up this way, this may offend them. Try coming at it this way. They might not want to talk about their kids in a certain context but in others, they may. They might be shy about pictures of their families but you can provide them to them this way." It was essentially dealing with their sensitivities. In truth, we probably had it easier than other teams because our clients, while they were Muslim,

had all moved to Europe. They had put themselves in a more open environment, an environment that was less driven by a theocracy than they might have been in a different country.

Q: They were in Algeria as well.

Kirsch: Yes, which was different. That's right. I think the fact that they had been in Europe made it a little easier for them to understand who we were and what we were doing, although—did Steve relate to you his initial meeting with Mr. [Saber Mahfouz] Lahmar?

Q: No.

Kirsch: I think I told you that we gave them the letters from their wives with the photographs and the signatures on them. At the time, the men did have correspondence from us introducing ourselves, telling them not to participate in the CSRTs—which they fortunately ignored. When Steve sat down with Mr. Lahmar, Saber pulled out the letter, which he had brought with him. They all had our files with them and brought them to the meeting. He had Steve's signature. He folded it over—

Q: Oh, right. He told me about the signature.

Kirsch: It's a great story. It's just a great story.

Q: Yes. He did tell me about that.

Kirsch: Of course, I was in a different room with someone else, but when Steve related it—it's so typical of Saber and such a great way to be introduced to your client—having to explain how large law firms work.

Q: You mentioned them giving their testimony and helping them with their health problems. What could you do to alleviate some of the torture or these things that were going on? Anything at all? Legally, at least?

Kirsch: There were a couple of things you could do. We always tried to keep as constructive a relationship with the management at Guantánamo as possible. I think that's one of the ways that, at times, we had to distance ourselves from other legal teams. Some people who went down there wanted to litigate with everyone. You're not going to litigate with a nineteen-year-old who's carrying an M-16. He's got orders. He's told what to do. You can be as smart and as crafty as you want but he's going to obey his orders in the end and you'll spend more time standing outside in the ninety-five degree sun.

We did have occasions where clients were being mistreated and we had occasions where clients were being actively mistreated and we raised it, if we had to. We always asked for a meeting, and I don't remember a time when, ultimately, we weren't accommodated. We met with the head of the SJA team [Staff Judge Advocate] on two or three occasions. We always got a courteous audience and always got the form letter saying, "We've looked into what you've said and, of

course, none of it's true. We run a humane and civilized internment center here. Thank you very much for your attention."

But things changed. We got results. They never acknowledged improper behavior and we had several episodes of it. I don't know if we'll get to it today but, certainly, Mr. Ait Idir was subject to a horrible beating in February of 2004, shortly before we started representing them—what we called the short-pants incident. I don't remember which block he was in at the time but there were two rows of twenty-four cells. The guards came through and began to go cell-by-cell and take away the men's pants. Muslim men, of course, can't pray if they're not covered. When they got to Mustafa's cell—he speaks English, not perfectly but well enough to be understood in that setting—and he explained that he needed his pants to be able to pray. The guards, of course, had orders. They didn't have any flexibility. They'd been told to take the pants. It got to the point, ultimately, where he said, "If you can just give them back to me to pray, I'll be happy to give them to you. Will you give them back?"

They said, "No, we can't promise anything. We've been told to take your pants. Those are our orders." So, ultimately, he refused to give them his pants. They called in—what is it? The IRT? The Immediate Response Team [Initial Reaction Force] came in, and I'm sure you've heard about these guys. They march in with boots, stomping in unison, six people coming in, arms on shoulders. It's a discipline/crowd control/intimidation technique. They came into his cell. They sprayed him with pepper spray, they came into his cell and he repelled them. He was a karate instructor and he was an international karate competitor. He, essentially, was part of the Algerian team that had worked—I forget which country he'd been in before but his work, really, was he

competed in karate. He taught all kinds of levels of kids how to practice karate. The soldiers came in, the IRF came in and he knocked them back and they retreated. Then there was another round.

This is at night. It's in the dark. Twenty-four cells facing this way, twenty-four cells facing this way, he's somewhere eleven or twelve in. Of course, you can imagine what happens when the IRF comes in. They spray, they come in and he pushes them out. Now you've got forty-five or fifty guys yelling in various Arabic languages and a bunch of guys speaking in English, in hushed tones, working around the edges. There's another negotiation. Someone comes in to talk to him and they reach impasse again. They come in again, he repels them again and this time he actually knocked someone's helmet off. The soldiers were out and now it's bedlam. People are screaming, the prisoners are yelling at him to stop and that, "They're going to kill you. Don't do this."

The thing that has struck me is that these guys are all, in a remarkably understated way, very, very principled. At this point, it was principle. He wasn't going to stand down. So the SOG [Sergeant of the Guard], the sergeant who's in charge, comes over to negotiate with him again. They're talking and Mustafa's saying, "I can't," and this time the SOG actually pulls a pepper spray out while he's talking to Mustafa and sprays him in the face—which, to you and me, is a totally underhanded thing and sort of an abuse of the white flag. But it was what happened and they really doused his cell. He uses his mattress—which is probably a little bit thicker than we would consider an ultra-light camping pad—as a shield to try to block it, but he says that on this third round his cell was essentially a fog of pepper spray.

This time when they came in, he repels them first but then one of the guys managed to put his arms around his waist and hold him there and then a second member of the team came in and essentially grabbed his testicles and just started squeezing and squeezing and squeezing, until he collapsed on the floor. Then they put him on the floor. Someone jumped on his back—it's their standard suppression technique. They jump on your back with their knees, push all the breath out of you and cause that sort of shock. His hands and feet were plastic-shackled. They must have undone his feet or cut his pants off at that point.

He was there. Then a few days later, they came back in and said they needed to talk to him. They wanted to inspect his cell. He's very street smart and he was quite suspicious of what was going on. He said, "There's no problem. I don't have anything. You have the pants." They said, "No, we need to look in your cell." They knew at this point that nothing could have happened because you see what's in the cell. So he put himself on the floor in a sitting position, which is what you do so they can come in safely. They manacled his hands behind him, they manacled his feet behind him and then they started beating him up. Someone jumped on his back, they carried him outside, they threw him on the ground, someone jumped on the side of his head and essentially almost killed him. At this point, his face is bleeding, his eye is cut and his face swelled up to probably two or three times normal, in terms of puffiness and water retention and he lost neurological control on the left side of his head.

He wasn't brought to a medical clinic for days because it would be so obvious as to what had happened and when they did bring him the doctors—and we have the medical records that show

this—found that he suffered from Bell's palsy, which, while it is a condition, is not caused by trauma. It's a naturally or normally organically-occurring medical condition, which does result in some of the same symptoms.

But that was the diagnosis. This is where, again, the medical staff at the camp were essentially complicit with the guards and the interrogation staff, and this is what I consider to be one of the two most unforgivable things that never should have happened at Guantánamo. Guards are going to act up and they're going to do improper things. These were guys who were clearly pissed off because he had repulsed them twice and made them look incompetent in front of forty-seven other prisoners. They were exacting their revenge from him. While he was on the ground outside, they took a water hose, stuffed it into his mouth and ran the water full force so he felt like he was drowning. What happened outside was horrible. The only accommodation that the guards ultimately had to make was they gave him extra time to eat because he couldn't move his mouth to chew. All the food was running out of it for a couple of weeks.

It took almost two years for the symptoms to finally abate and disappear. We actually got pro bono neurological consults from Beth Israel Deaconess Medical Center here in Boston. We had doctors working who were very clear that this was not Bell's palsy. That was clearly a false, cover-up type diagnosis. But, to give him reassurances, based on what was happening, it seemed that his condition was improving. There were times when it deteriorated.

Getting back to our effort to maintain as positive a relationship as we could—I don't remember the source of the message we got but I know that at one point—it was either on a visit or a

message that was relayed by someone else—that he was being told to take a certain medication and he was very suspicious about it because some of the medication was sort of anti-psychotic medication because of the brain-induced neurological symptoms he was having. We got a consult and I was able to get a very clear write-up from one of the doctors here as to what was happening and what was being advised, which I thought was quite remarkable that someone would be willing to do this, based on what a lawyer says a guy in a prison camp 1,800 miles away is experiencing. I wrote it up and faxed it through to the Justice Department, which got it, emailed it—I'm sure it was emailed—and it was at Guantánamo within twelve hours, in his hands.

So because we had worked to be constructive and because they could see that we were essentially saying, "Look, this is what you can do. The doctors are telling you the right thing. It's okay and here's why," we developed that kind of relationship because it doesn't make any sense to keep fighting so that they treat your client like shit.

Q: In April of 2005 you did sue to get the records.

Kirsch: Yes. We brought a FOIA [Freedom of Information Act] action in 2005, which is still pending here in the district court in Boston. That was based, I think, on a letter we wrote in September of 2004. Shortly after we filed the habeas petitions, we filed the FOIA request. Most of the people in these cases were civil or criminal litigators for some of the other teams, but I was an environmental lawyer and I know if I want records from the government, I use the Freedom of Information Act. So our team blanketed the government with FOIA requests. Because they

weren't expecting it at that time, the United States ignored them. What that meant was that the deadlines that they were supposed to meet passed, so we were able to file in court—we didn't keep following up and try to get them to give us our stuff. Our idea was to get in front of a judge and to start to compel things.

We also used the FOIA litigation, for example, as a means of publicizing what had happened to Mr. Ait Idir, which I just told you about. The press picked it up as a case about torture but it really wasn't. It was a FOIA case which we chose to plead because I knew that would play well in the press and part of these cases at the time was how do you hold attention, how do you generate sympathy for someone who doesn't have the podium that the president has, who's saying that all these men are bad? After a footnote, by the way, I'll go back to the FOIA case.

Later on, when all this was brought to light, the explanation we received from the Defense Department was that when they believed men were going to harm themselves, such as potentially trying to hang themselves, they needed to do things to protect them. So they took the pants away from forty-eight men because all of a sudden those men were at risk for potential suicides. Again, you wonder who thinks these things up and expects them to play well in public. This situation just so undermined the credibility of the Defense Department.

But we brought the FOIA action and because of it we were given access to thousands and thousands of documents that ultimately proved to be quite helpful later on in our case.

Q: How did that experience affect you? They're telling you about this brutal treatment—your country, your people. What's going on in your mind?

Kirsch: I'll take you back, Ron, because I remember when Mustafa first told us about this incident, in particular—the short-pants incident. I remember it in part because—and you should probably meet him. I don't know if your budget accommodates a trip to Europe again but, certainly, his English is good enough. Or, we can set up an interpreter that he could use to speak with you. What I remember is that as Mustafa is telling us about this, there's this horrible sense of brutality. We didn't know what was coming, fully, and he's describing it like such a story, telling, "Then they came in and I knocked them back and now they're really getting angry." Felice and I were almost rolling on the floor laughing because of the way he's relaying it. He's just telling it like a story, and he is laughing and smiling, describing how frustrated the IRF team was. "Then they did this—."

Even when he's talking about writhing on the floor and having someone squeeze his testicles so hard he thought he was going to vomit, then them throwing his head on the floor—which they did when he was trussed up and they started beating him up—his perspective was, "They needed my pants. I knew they were just soldiers. I knew something was going to happen." He didn't hold it against them individually. He was making a statement. He was taking a position based on principle because he knew that what they were doing was wrong. He was correct. It was as if he might have read some treatises on civil disobedience and understood that you can do these things and you're going to suffer the consequences.

I remember, certainly, being aghast that this had happened and just being shocked that this could have been allowed to go forward. We raised concerns about it. We protested it and it was, in fact, investigated. Then we asked for documents in the FOIA case and we knew from documents that were leaked through—I think it was an AP [Associated Press] story that mentioned this later on. There was an investigation, there were conclusions, there was a log, and there was a finding, ultimately, that there was brutality here but that it was not outside the norm. The soldiers were cleared, as we have a tendency to do in this kind of setting, but what we also found out was that this whole episode was filmed. When the IRF teams went in, there was someone behind them. The sixth guy carried the camera because they wanted to have a record, in case there was any kind of a complaint. I don't think anyone expected all of this to go on, so that the first thing we said with FOIA was, of course, that we wanted the film. We wanted the report. They found the film, then subsequently lost it. So someone, over the years, destroyed the film. They claimed that they couldn't find it. Ultimately, it did not show up. We've asked for it in several ways but I have no doubt that it doesn't exist anymore. Someone has taken the time to destroy it.

Everything was filmed down there and it wouldn't surprise me if all those films have somehow found their way into a trash bin and don't exist because they would reflect so poorly on the Defense Department and the military in terms of how things were done. You've got to remember to put this into context. You've got a base that's a backwater. You suddenly bring in hundreds of men from places where they've been snatched, in a very short period of time, based on limited intelligence, sometimes no intelligence at all, sometimes based on allegations borne out of revenge or borne out of greed by people who are impoverished and saw a chance of getting ahead. It's a huge detention facility but it lacks all the attributes of our normal penal system.

There's no professional staff. There's no long-term record of what's going on. There's no rehabilitative program. You have guards who cycle through for six to twelve months at most. They're not assigned to any single area for the whole time. In fact, they're rotated around, partly as a means of ensuring that they don't develop any relationships with prisoners that could compromise their security. You have interrogators who are learning their craft and this is sort of the training ground for a whole generation of U.S. interrogators, again, asking the same questions and repeating what's been put in front of them.

But there's no system. There's no professional staff. There's no rehabilitative staff. There are no files. One of the things I knew we were going to run into when we brought our FOIA case is, this wasn't a normal agency proceeding. They were making it up as they went along, so there weren't going to be normal records. In fact, that was the truth. That was the case. We were asking for things that you knew should exist and the answers kept coming back, "We can't find them. They're not there. We don't know where they are."

Along with getting orders that the government had to produce records to us, we were given discovery, which almost never happens in a Freedom of Information Act case. As we were going to trial in our habeas corpus proceedings in 2008, we were also deposing three military officers who had the responsibility, as keepers of the records at Guantánamo during various periods, to try to figure out where the records were—where they would have been kept and what had happened. In truth, we did the FOIA case to generate documents we would be able to use in the litigation and also for the publicity value that it brought and just to create a record. You don't know when your case is going to break. For us, we were quite sure at the beginning that our

clients would never get out because of anything that a judge did and that it would be some kind of a politically-motivated activity that got them out. Again, you can see how wrong we were because, ultimately—nobody thought it would take that long but it was a judge's order that freed five of them.

Q: Did you go to Bosnia?

Kirsch: Yes.

Q: To meet with the families?

Kirsch: To meet with the families and to negotiate—to try to get the Bosnian government—Steve probably walked you through some of the legal proceedings that had gone on in Bosnia when these guys were there.

Q: Right.

Kirsch: We had court orders from the Bosnian high court, from the European Court of Justice, I think, and the Human Rights Commission.

Q: We didn't quite get to that.

Kirsch: It was pretty well-known that the Americans were setting up Guantánamo and that the six men were going to be sent there when they left Bosnia. Legal proceedings were initiated on their behalf to stop that, so that there was an order by an international court in Bosnia that required the Bosnian government to act to help the men and protect them, including getting them lawyers to get them out, and Bosnia never did that. So one of the things we were doing was trying to go to Bosnia to negotiate with various government ministers to see if they would ask the United States to let the guys come back. We knew other men had been released, and they were getting out because of political connections.

What we hadn't focused on early on in the case was that our clients had been singled out by President Bush in his 2002 State of the Union address. I don't remember when we found that but it was later when we saw it. I think it explained some of what was happening—that you weren't going to take the only guys the president actually talked about and just let them go. The Bosnian government, of course, was cowed and didn't know what to do. We would always get meetings. I started meeting, very early on in the case, on the diplomatic front, so that even within a week of coming back from meeting with the clients in Guantánamo, I was meeting with an Algerian diplomat who happened to be in Boston that week and it was the first of our diplomatic meetings. To this day, I go to Washington most weeks and have at least one diplomatic meeting with either a country that we're negotiating with for release or a place where these guys are. So until the case is closed, we're doing what we can to try to improve their situation.

We've met with several European governments, certainly the French, on many, many occasions and other EU [European Union] countries as well and the Algerians and the Bosnians on a very regular basis.

Q: Do you meet with the French here or in Washington or—

Kirsch: Both.

Q: —Paris?

Kirsch: Yes. My first trip to Bosnia was not until February of 2007. I think Steve went in January of 2005 and I think he went again in June. It probably was 2005. Then we had a gap. I went in 2007 and then I went again in 2010. But the 2007 trip was a follow-up. I met with all the families, certainly, just to give them news and just some sense—

Q: How would you characterize their understanding of what was going on?

Kirsch: I think they understood, objectively, the facts. I don't think it's possible, sitting in that culture in Europe, to understand the political milieu in which this was playing out in the United States. I think that's the problem. We could talk about that, we could articulate that, but I'm not sure how effectively you can ever communicate that to someone who is from a different culture. What they see is a huge and powerful country holding innocent men and they don't understand that. I don't think they had a sense of the public reaction to September 11 and how effectively

that imagery was used to justify many, many things we did that were horrible, in the wake of that and it's still going on. It's now playing out in Syria, for god's sake. The Syrians under [Bashar al] Assad are essentially using the George Bush playbook by going after "terrorists"—or so they say. I'm not sure they ever fully understood that, but we certainly communicated it with them and we wanted to communicate with their kids to let them know who we were, to find out what information we could and certainly to get specifics that we could go back and speak to the men about—about their families—because that was what was sustaining them at the time.

When I met with them, we were still in the appeals process. Remember that Judge Leon dismissed our case on, I think, January 19 or 20 of 2005 and we were in the D.C. Circuit until the spring of 2007. It was a long time. We had two oral arguments and we filed briefs on four different occasions because the law kept changing. The court kept hoping that something was going to happen to take them out of the line of fire. It was a long, long appeals process and ultimately it was under the 2006 statute, I guess, that they used to justify bouncing us.

Q: Somewhere along the line, it became clear that it was much more complicated than you had imagined. The team was growing, etc. What was the response of the firm? Did you say, “Whoa, what's going on here?”

Kirsch: I certainly never got a sense of any pushback. Our expenses were monitored because it was and I think remains—and I'm sure, in the eyes of the firm, hopefully will be—the most expensive pro bono case we've ever taken. Our out-of-pocket expenses went way over \$1 million. When you think of each of these trips to go visit your clients, you have two interpreters,

four lawyers, typically at least one hotel room on the way down or on the way back and sometimes both, depending upon the trip. You have the air fare to get everyone back and forth. The expenses at Guantánamo were insignificant because it was very cheap when we were first there. Food costs nothing and the lodging was dirt cheap. But each trip was \$12,000 to \$15,000 to \$16,000. If you made four or five trips a year, that in and of itself could have been prohibitive for a smaller firm.

Then you had correspondence that had to be translated. We had an agent working for us on the ground in Bosnia—a man who had been a journalist and, subsequently, a political commentator. He actually became our eyes and ears on the ground and he was on retainer to us. He was being paid every month and was collecting information and talking to politicians. We were working full-bore, so it was a very involved and costly undertaking. In order to work on our case, to see our notes, we had to go to Washington. Everything was expense.

So we're mindful of it. We never try to waste money but we never—you wouldn't know the difference between working on this case and working for Intel on its cases, which we did the same way in terms of the resources that were made available. In fact, we probably had less pressure on us for resources because the firm wanted to do right by it. Once we were committed, we were in.

Q: Was there a change in the procedures over time? Did they get easier or more difficult or complicated? The way you described the first trip was the kind of informality that, I would assume, over time, would get much more refined and formalized.

Kirsch: Yes, there was an evolution. The first trip was, in many respects, a learning experience on both sides. You have both us and the government trying to feel their way out. We brought cases full of documents in court bags—hundreds and hundreds of pages of documents—which we wheeled in with us and started reviewing with the clients. Except for a cursory contraband check, nothing came of it. As I said, we were allowed to eat there and do what we needed to. That was probably true for most of the first year. There was not much change.

Somewhere around the end of the first year and into the second year, the rules changed and they had to check your documents when you went in to make sure there was nothing improper. Of course, this raised the question, how could they do that without reading them? You could have been writing instructions on them for insurrection or improper conduct within the camp. I think the thing that was most challenging was that the rules changed regularly, dramatically, and unpredictably. Each time there was a change in the command structure, anything that happened would lead to a new set of procedures. Things that had been accepted and actually encouraged in the past would suddenly be changed and there would be no communication. You would only find out about it when you went to do something and were told, "Well, you can't do that." You might have done it five or six other times, and that was interesting, but it had absolutely no bearing on what you were going to be able to do that time.

Part of what we learned was to adapt and how to work in that kind of administrative environment. That's why I said earlier that you can't litigate with a twenty-year-old with an M-16 who's under orders. It doesn't happen. So you figure out what to do in a system like that. Maybe I

came at it differently because a lot of what I did as an environmental lawyer was administrative practice and what that means is that you learn what the rules are and you learn how to use the rules. You don't fight them. You learn what they're trying to accomplish, how they're setting it up, and then you figure out how it can work to your client's benefit and you use it that way.

So we did use it that way. We very quickly cut back on the number of documents that we brought down. If they were going to search all your documents, you don't bring a thousand pages anymore because that will take fifteen or twenty minutes of standing outside in the sun and you won't get to see your clients. You bring fewer documents. You can have your documents pre-certified in Washington before you go down, which was something we learned. We don't go down with just paper anymore. We go down with sealed envelopes and when we get in we simply walk through the guards without any further review because we have an envelope that bears a privilege review team stamp on it, and they're not allowed to open that. We can bring it in and they may look at it on the way out, but who cares? You don't care about it anymore then.

For us, the rules did change. You soon couldn't go into the camps at 8:00 in the morning. I can remember hearing reverie, for the first year or year and a half, on visits. This is a military camp. They play the bugle at 8:00 in the morning and right around sunset or 5:00 in the afternoon. Very many times in our first year, we would be at the guard station, waiting to go into the camp, when the colors were played in the morning. The guards would stop, they would all stand at attention, it would be played, then we'd go about our business and go in.

Now you can't go that early. You can't get in until 9:00. We used to be allowed to stay right through lunch, regularly. Now you can stay through lunch only if you ask permission in writing, and it's granted. We would take short lunches. Now, you have to leave at 11:30 so the clients can pray, although our clients were always willing to stay with us and not pray. They considered getting their case accomplished as something that God would understand and they would pray later. Now you're allowed to go back at a specific time for lunch and you have to leave at 4:30. We were allowed to stay until 6:00 many times, whereas, on our first visits—I told you about the gunnery sergeant, an extremely seasoned Marine who knew everything and could make it happen—you very quickly began to have the greenest, most inexperienced recruits as escorts. The camp intentionally set up a program where the escort duty was given to kids. They were great kids, but they were essentially at the bottom of the military experience barrel and it was an intentional means of making our job as complicated as it could be. That happened very quickly.

Q: Of course, over time, the number of lawyers going down increased enormously.

Kirsch: Yes.

Q: It was six hundred lawyers or something, eventually.

Kirsch: It did. It changed the dynamic. There were lawyers among the teams whose approaches were different than ours. To decide you're going to be on a military base as a guest under escort and that you're going to take on an entity that is trained as a fighting force and you're going to fight them—maybe it feels good, but it usually doesn't help your case. In our experience, it didn't

advance the interest of anyone's clients and it actually undercut the experience of everyone else because every time something would happen, the military would figure out how to avoid it in the future. That meant imposing a new set of conditions on everyone who went down. So our approach, again, always, was to understand the rules, figure out how to make them work for you and don't fight the rules because you don't have time. That's not what we're there for. I can even remember a time when we were down, having people go through our bags during one of the times when they hadn't told us about what was happening, and having Steve just getting furious at the guards. I had to take him, push him up against the fence and leave him over there and say, "Okay, we're going to go. We need to get in. You can't fight with these kids. We need to get in. Our clients are waiting and the clock is running."

It changed. When you think about it, 9:00 to 11:30 is two and a half hours and 1:30 to 4:30 is three hours. Essentially, that's a five and a half hour work day for having traveled all those miles to go down there. I was just grateful we were able to do the first several years of our case on our schedule. There are too many sidetracks here, but remember, our meetings were set up so that Steve and I, quite at random, divided up into three and three clients whom we had primary responsibility for, although we made sure both met with clients I met with. So from the 8:00 to 10:30 time slot, more or less, we met with one man. That was Mr. Boudella, the first day. The second time slot, which would have probably been from 11:00 to 1:30, Mr. Ait Idir. Then the third time slot, on the first day, which probably would have been from 2:00 to 5:00, was Mr. Bensayah.

We would go in, take a little break and get some food. The guards would rotate the men and bring him in and that's how we did our case. Steve and I would run on parallel schedules so that, by the second or third day, we'd go back and forth across teams, which ultimately allowed us to meet all of our clients. Now it posed some concerns and led us to have to be careful and to have an understanding with the guard staff because you weren't supposed to communicate from one man to the other what one man said, of course. All the communications had to be treated as classified until they were declassified and we weren't allowed to communicate classified information to the clients, which mean it was a violation of the protective order and of our rights to communicate with our clients if I told Mr. Bensayah what Mr. [Lakhdar] Boumediene had said earlier, without first running it through a privilege team, which required first coming back to Virginia. If they had thought through their rule, they never would have allowed us to cross-pollinate between teams. Of course, the young guards saw us and our clients as somewhat faceless. They were oblivious to which lawyers met with which clients.

Q: But you talked to one another.

Kirsch: We could. We were allowed to talk to one another. We simply couldn't say, "Gee, Hadj, Mustafa said blah, blah, blah." But we could say, "Hadj, what do you think about this?" You could do the same thing, but you just had to do it in a way that was consistent with the protective order. This is all about not going to the SJA down there and screaming, "I have to be able to do this. I can't represent my clients unless you let me do this." You could spend two hours having that fight and you'd lose because it's treated as classified information under a judicial protective order. Or, you could figure out that you are allowed to say exactly the same thing, as long as you

don't attribute it and continue working for your clients. We chose the latter route because there was only so much time and we had a case to construct.

Q: Moving on to the habeas petitions—the first time it was in the wake of *Rasul*, right?

Kirsch: That's when we started.

Q: What did you think was going to happen when you first submitted your habeas petitions?

Kirsch: Well, remember, we filed our petitions and we hoped we would get a hearing. Of course, we imagined—we read the *Rasul* decision—that they've got a right to habeas corpus. It didn't take long before the Justice Department revealed that they were going to be moving to dismiss. Remember, the cases were assigned to a coordinating judge. Has anyone talked to you about the procedural aspects of the litigation and Judge [Joyce Hens] Green being pulled out of retirement?

Q: Very briefly, from all kinds of angles.

Kirsch: Well, the critical thing, I think, from the perspective of this case is, remember the background I related to you about Judge Leon. By the way—just a small footnote because it will become valuable later—Judge Leon was from this area, graduated from Holy Cross College in Worcester and attended law school here in Boston at Suffolk University. If you try cases and you know your judge might be a Red Sox fan and you happen to be sitting in Washington, there are things you could do that others might not do—that your Justice Department opponents, being

from Idaho and some other god-forsaken state, simply won't have the same ability to talk to the judge.

We knew Judge Leon's philosophical bent from early on. That was clear. But it became very clear quickly that the Justice Department was going to move to dismiss and that they were essentially taking the position that this thing had a statutory right, but, essentially, "Go ahead and file your petition but you have no substantive rights. You're going to be bounced." Judge [Royce C.] Lamberth quickly brought in Judge Green and Judge Green was given all the cases. We've since been led to believe that Judge Leon actually resisted that consolidation of cases. I'd have to refresh myself, Ron, and you can probably look at this. Actually, I used the wrong verb. The cases were not "consolidated." The order in the procedure that was used was actually a "coordination," and Judge Green, who had headed up the FISA [Foreign Intelligence Surveillance Act] court, was the coordinating judge. What that meant was that she could rule on things but it was still ultimately up to the judge assigned to the specific case to make certain decisions.

What happened in our case was that in the fall of 2004, both sides were filing their motions. The government filed its motion to dismiss, we filed our opposition. That was what was coming up. Once the motions were filed and the cases were queued up for argument, Judge Leon took our cases back. All the other cases—I think twelve stayed with Judge Green, two went back to Judge Leon and ours and one the name of which escapes me but a colleague—I'll remember it before we're done.

Q: You'll get a transcript.

Kirsch: Oh, great. Then I'll be sorry I didn't speak more slowly.

Judge Leon took our cases back. There are a couple of reasons you could do that or you might expect a judge to do that. We were pretty sure he was going to do that because he already knew where he thought the law should come out and he was concerned that Judge Green might go in a different direction. So after months of briefing, argument, and appearances before Judge Green, Judge Leon took them back. I believe on December first, the arguments in the other twelve cases were made on the motions to dismiss before Judge Green. Then on December 2, I made our arguments on the motion to dismiss for Judge Leon. I know it's interesting because you knew each side could watch both arguments and understand what was going to come up. It was like night and day in terms of the approach and the concern and the way things were going. Judge Leon clearly had a bent. He knew where he wanted to go.

On January—I think it was the nineteenth. It's probably not even on here. It's too specific. But it's easy to just go to the record. Judge Leon dismissed us and two weeks later Judge Green refused to dismiss the petitions in the other cases. So we had two judges on the same legal issues, reaching different conclusions. That was how we went up on appeal. There we sat through, I think, a September—we briefed, initially. We had a September 2005 oral argument. I can't remember if only one or both had classified portions to them but we actually had to clear the courtroom. The circuit was pretty limited on who it would allow in. When people were moving

too slowly, Judge [David B.] Sentelle essentially roared at people from the door to "get the hell out of the courtroom," so they could finish with their classified session.

We had to brief again because the *Hamdan [v. Rumsfeld, 2006]* decision came down in the middle and the Detainee Treatment Act [DTA] was partially invalidated while we were waiting for the circuit. Ultimately, there was a lot of paper that went into getting a decision in the spring of 2007.

Just a couple of loose ends before we move on to other things, because I feel like I've started in on things with you and not finished. I did think there were two things I found most, just as a person, inexplicable and sort of unforgivable in our government, in the way it handled the men at Guantánamo. One was the linking of medical services to interrogation, which I think should never have been allowed to happen and I hope we'll never do it again. But in this kind of setting, who knows what happens? The other was the total random isolation of these men and the failure to deliver mail from their families and kids. The mail just didn't go through and when it did go through it was censored in a way that simply did not make any sense. No one was really censoring for substance; they were censoring for vindictiveness. They were censoring just because they could. Maybe they were censoring because they didn't know what they were doing.

There were occasions when the same letter was sent by different family members and they were censored in different ways so at least the man would get to read the whole letter then, because some words were out and the same words were allowed to pass in others. There were letters that were coming from six- and eight- and ten-year-old kids that never got through to their fathers for

years. Particularly with these guys, where it was clear that they were being held based on a mistake, very early on in their tenure at Guantánamo, regardless of the fact that they were not going to get out. There wasn't any reason to treat them or hundreds of other men in a way that was just so debilitating, dehumanizing, and ultimately made it more difficult to maintain the security of the camp and the safety of the troops that were there guarding these guys. We simply did things that were not well thought, in part because this wasn't what we did. This wasn't how we ran things and we didn't have professionals who were running it. It was being run with a temporary, rotating staff.

Anyway. Direct me. What do you want—?

Q: We're moving through the court now.

Kirsch: So we're dismissed in January. We all file. We put our briefs in in 2005. We have an argument that fall. We have to rebrief after the *Hamdan* decision comes out. We have to rebrief after the 2006 statute is put in and ultimately have a second argument. I don't even remember exactly when that was anymore and when it occurred.

Q: I have February 2007.

Kirsch: That makes sense.

Q: The court of appeals denied the—

Kirsch: Okay. So our argument would have been October, November, December of 2006, probably.

Q: This decision came down in February.

Kirsch: So the decision comes down in February. We then file our cert petition and it's denied. And it's denied with a dissent, which is very unusual, of course. What we have since surmised—and I either don't know or forget or I probably shouldn't say yet how we surmised this—that, ultimately, we didn't carry all the judges we expected we would. Certainly, we knew we had four votes, which should have gotten us cert, but what we understand happened is that at the time of the first petition, we didn't have Judge [Anthony M.] Kennedy with us because circumstances just were such that he wouldn't have been prepared to rule in our favor. Quite strategically, the justice who could have had the vote that brought us in, voted with the other side to not bring the case yet because he didn't want the wrong decision to come out. The court sent the case back. You can certainly read the dissent and see what's there. We took some comfort in that and we had a lot of discussions about what to do next.

There were ramifications here both for our case in chief—which I'll talk about in a minute—and for what we did. We talked at length with our appellate team. By now, Seth [P.] Waxman, Paul [R.Q.] Wolfson, and Mark [C.] Fleming are on the team because we're going before the Supreme Court and this is what these guys do every day. We knew that, in forty or fifty years of practice, the court had reversed itself on a cert decision only once. What we did was we filed a motion that

would have had the court reconsider. Then we also filed a motion asking the court to stay the ruling on that motion until such time as the procedures that were going to go on under the Detainee Treatment Act—which was the basis for bouncing us—would have been borne out.

We did that for a very strategic reason. Once we were out, we had no more case and our ability to see our clients was pursuant to a protective order that had been issued under our habeas petition. We did not want to bring actions under the Detainee Treatment Act, which we considered unconstitutional. We thought it was an invalid congressional act and it wasn't going to stand up. So we hadn't filed the DTA petition and essentially I was in the position of having a visit approved after cert was denied, but the government essentially saying, "But you don't have a protective order right now. You've been thrown out of court. You don't have a case and we're not going to let you in unless you file a DTA case and sign on to one of the DTA protective orders." The DTA protective order allowed the government to read our communications with our clients and we were not willing to do that. So by filing to reconsider and asking that the court stay, in our view, we could keep our case alive. Because we were still on appeal and unless they ignored the request for the stay and ruled and said, "No, we're denying you," we were still alive and we still had a case to go in on.

Now the Justice Department disagreed with that position and ultimately we filed DTA petitions. We had them ready in case we needed them. The DTA petitions were filed the day before we got on the plane to go down because they weren't going to let us in. Terry Henry at the Justice Department was very clear and said, "Look, we've made arrangements. Your clients are ready. They're all going to be there, but you're not going unless we have these petitions and there's

nothing I can do about it." So they played chicken with us. This was the appellate people. This was what I would consider a reprehensible litigation tactic because, in truth, we had found a way to keep our cases alive and they did not have a right to put us out this way. But they did it and until the court granted cert—which, fortunately, was only a few months later—for that brief window of time, we were subject to a different protective order. So as soon as we actually got our petition granted, we made sure that they stopped reading our mail and didn't have the opportunity to do it. The privilege review team was good about that. They knew which practices governed and what happened.

One of the benefits of having Judge Leon throw our case out as early as he did and take our case back is that all the other habeas cases were coordinated into being handled through the district and the protective orders in those cases were changed. They were modified ever so slightly. The government, for whatever reason, never thought about asking that our protective order be modified and it got a little bit worse. To this day, we've always kept our head down because we're working under the most favorable protective order in the case. I think we're the only case left that's working under it. We've never had to fight about the distinctions, but once again, this is what I was explaining. You learn what the rules are and then you figure out how to make the rules work in your favor.

Q: Didn't the other lawyers realize that there was this difference?

Kirsch: It's not something we would raise. Why would we raise it? It can only cut against our clients. Since a judge had already made a decision to raise those, if we raised our hands, ours

would be changed. So our approach was that these protective orders are largely self-policing. If you have to go to a judge, you get intervention. But until then, it's up to you to obey it and we were obeying a standard that was more lenient than others had to obey that was and remains a good thing for us.

Q: In reading the brief, there are a couple of things that struck me. Did you make a conscious attempt to appeal to Justice Kennedy? Because in the brief, he's the only sitting justice who's quoted.

Kirsch: He was the only one who needed to show up for the argument. That was it. Certainly, for this, you may want to spend some time talking to Seth. I think your discussion could be shorter because his involvement started at the appellate level, specifically at the Supreme Court level, so it was a much more circumscribed period. But it was very clear that four justices were going to rule against us and four justices were pretty much in our court and that Justice Kennedy was the swing vote. The whole line of cases and the reasoning that he used in his *Rasul* concurrence was where we built our argument, and there was not uniform agreement among the briefing teams on how to proceed with that. If you look at the briefs that were filed going up, you'll see that ours focused on those issues from the beginning, even as we were going before the Court of Appeals and we built them because we felt very strongly that that was the way you had to go. Others, if you look at the Judge Green cases—and I don't even remember the dynamic of who had the lead on those briefs anymore—but they disagreed with us on tactics. I think, ultimately, ours was borne out because it was Justice Kennedy, Justice Kennedy, and Justice Kennedy. That was who you needed to win.

Q: There's another level where it struck me that in the attempt to cite situations in which habeas applied in the common law, in the king's realms, you came up with the Channel Islands, Hong Kong, and all those in the brief. Judge Kennedy, in the decision, paid great attention to that. Did you realize that that was a particular strain in his mind?

Kirsch: Well, we knew—we hoped and expected. I shouldn't say we knew because you don't know anything in these cases, but we believed that he would be an adherent and what would govern here is that since we were looking at executive detention, we were looking at habeas corpus sort of stripped bare. We were looking at the right that existed at the time the Constitution was put in place. We needed nothing more and nothing less. The cases that existed at the time were really the most significant. The others all had a gloss to them—some procedural or historic aspect of something that was going on. This was the king imprisoning someone and we needed cases that were built around that concept, so that's why we went back.

In truth, that should have been where all the justices looked, and I think if you look particularly at the colloquy that Seth had with Justice [Antonin G.] Scalia, you will see that there was an awful lot of history being discussed on December 5, 2007. I think everyone acknowledged that these were the cases that you had to be looking at. Then there were just lines of cases, and Justice Kennedy's *Rasul* reasoning really made clear that we're in this because of the unique relationship of Guantánamo and the United States and the documents that allow us to be there. If you view the rights and the principles that attach to a piece of property and where it is—whether it's American or Cuban property—almost like a cable with thousands and thousands of smaller

cables, the length of that cable, which, when Guantánamo started, was intact in terms of something that belonged to Cuba, was down to a single strand and all that was left was sovereignty and that was not enough. Every other strand was America, as if we'd been here in Boston or in the Bronx. It didn't matter.

That unique aspect, frankly, that accident of history, that President Bush happened to choose that location where we had those contracts—that's the only reason we got to bring this case and get these men out. Had there been a different contract, something more standard, something more akin to what we have at all our other military bases, we would have been out of luck. It's one of those odd aspects. All this litigation, all this money, all this time, but the fortuity of getting these men out all happens to be because of the way the United States handled the aftermath of the Spanish-American War.

Q: The other thing that struck me about this was tacked on at the end—something about Israel and the way Israel operates. Was that put there for a reason?

Kirsch: In the brief?

Q: I didn't understand what the connection was.

Kirsch: I think, again, you should probably see if Seth can make some time to speak with you because he and to a significant degree, Mark C. Fleming, who's here, on our appellate team, were the ones who had to make some of the fundamental decisions on the brief. But what we knew

was that Justice Kennedy, if you look at the decisions of the court, is one of the strongest in terms of having respect for the way international law has an interplay with U.S. law. We also knew that with his relatively conservative background, he would look at the way a country like Israel, which deals on a very regular basis with risks of terrorism, would have dealt with this kind of an issue. We had examples of what had been done in a setting where people knew you had to exist with terrorism and it was quite favorable in comparison with us. We had a brief of legal scholars, as an amicus, that we could rely on, that articulated the point very, very well.

Q: Did you attend the—?

Kirsch: Of course. How could you not be there? That was a standing-room only argument. It was just a fantastic day in the court. I remember there were people lined up starting very early in the morning. People started lining up the night before. We got so many tickets for our team and they were all dispensed. I use this regular taxi driver when I'm in Washington. I remember having Bob come by to get me at about 5:00 in the morning that day and we stopped at a Starbucks and got two five-gallon vats of coffee and I drove them down and left them on the curb for the people who were standing in line because they'd been there for hours and it was snowing. We brought them ten gallons of coffee and some cups to make their wait a little bit more endurable. Then we went back to the office to help with the remaining preparation.

Q: Had you seen Waxman argue before the court before?

Kirsch: I had never seen him argue before. I'd seen him in moot, certainly, in preparation for this. It was a brilliant argument on both sides, frankly. Both he and Paul [D.] Clement did a great job, but in truth, we had the better law and the better facts. At some level, we were able to weave in bits of our facts, which makes you wonder why the government wanted our case to be one of the lead cases to go.

I don't know if you've looked at the transcript of the argument or listened to it, but there was a man who had been taken prisoner. He was living in Germany, was taken prisoner, brought to Guantánamo and insisted he didn't belong there. They said he had planted a bomb. They said he had been the friend of a suicide bomber. These were all the reasons it was appropriate to hold him. Then he'd been unceremoniously flown out of Guantánamo and dropped off, without explanation—allowed to go free but with no apology, no nothing. You're just there. What we saw there and what Seth quite masterfully pulled together—the facts had just come out before the argument—was that this was the encapsulation of why you needed to have habeas corpus, why it was important and why lawyers could make a difference.

If you look at the closing two minutes of the argument when he got to stand up again, at the final piece, and the question that came almost as if on cue—and I believe it was Justice Kennedy who asked the question—Seth rolled out the explanation that this man had been told this thing and this thing and this thing. Because he had a lawyer, the lawyer could do this and this and this. In fact, the man who was the suicide bomber—not only was he not a bomber but he had never committed suicide. He was still alive and filed an affidavit that explained that he was still alive.

That's why habeas was important and that's why the provisions of the Military Commissions Act weren't going to be sufficient to protect clients. It was a brilliant, brilliant closing.

Q: Was the *Al-Odah* [*v. United States*, 2008] argument made the same day?

Kirsch: It was one argument. This was, as you know, appellate arguments and you can either split your arguments or you can decide who's going to argue. We'd done a couple of things. People have a tremendous amount invested in these cases—their heart, their soul, their time and their egos—it's in the case. We were able to persuade the other teams that Seth should make the argument because we were there with twelve, thirteen, or fourteen cases. We were given the pen on the brief. Everyone participated but in the end he made the final call because he was going to be up there. Our client would be the lead petitioner, in part because the facts were so favorable. We had a very equitably appealing case. We looked at the other cases and I'm sure there were some others that were appealing but ours—six guys in Bosnia with their families, working jobs, taken away by police and never brought back. It was not a mistake. I think this was a tactical decision by all the teams and everyone agreed to step back. For the good of making the law we wanted to make, in appealing to the court, Lakhdar Boumediene was the guy to have out front.

Q: When you walked out that day, were you optimistic?

Kirsch: We certainly felt positively because the argument had gone so well. It's almost impossible to read. I've always felt that the court would rule that there was habeas corpus. I thought it would have required Justice Kennedy to reverse himself on his *Rasul* reasoning. We'd

relied on that. I thought that his questions indicated he was still where he was. The questions of the other justices certainly led you to believe that it was four and four and it was all going to be about Justice Kennedy. It was just a matter of what we would get. I tend to be an optimist and I had faith that the court was going to—what I thought was simply confirm the right. There are a lot of people who said this was making new law, but if you look at the reasoning in *Rasul* and work your way through the real estate documents that give us the right that we have at Guantánamo, it really isn't making new law. The place is so different than any place else that we would have thought to extend the Constitution, that we really weren't extending it. There was no need to extend, given the basis of our control there. To me it was more of a confirmation than it was anything else.

I don't know where you want to go next. We have lots of strands out there. I've got you in the middle of our FOIA case at some point.

Q: There's the decision, then back to Judge Leon. That's the story.

Kirsch: Well, good. That's true. All right. I was thinking there is still so much that was going on in building the case.

So we get the decision and the decision arrives while I'm at Teton National Park, in the summer of 2008. It was June of 2008. We argued on December 5, 2007. I can remember quite distinctly because we were at Jenny Lake, about to board the boat that went across and my son, who at the time was eleven or twelve—it was in broad daylight, at 9:00 or 10:00 in the morning and a bat

flies over and lands in the middle of my son's thigh, on his shorts. I'll never forget. I was on the telephone on our first strategy conference call, deciding on what we were going to be doing.

Actually, I take that back. That was the summer of 2007 when I was at Jenny Lake. The court had just granted cert at the end of the term and we were having our first call, to figure out how we were going to brief the case. That was the Jenny Lake bat incident. I remember having to briefly sign off on the call, saying, "Look, a bat has just landed on my son's leg. We need to figure out how to handle this. I need both hands for a minute." Bats aren't known to be out at that time of day.

Of course, the district court went from having a bunch of state cases to suddenly having two hundred active habeas corpus cases on its docket and needing to move them. So there were coordinated sessions held relatively quickly by the chief that were set up and we went down and participated in the discussions. We were trying to figure out what was happening. The Justice Department understandably took the position that they would move as quickly as they could but they couldn't really move very quickly and that they needed time to staff up. The first few meetings were really about the Justice Department explaining how it was going to take and why it was going to take long. These were in the common sessions. Ultimately, all those cases were stayed.

We were relatively quickly called into Judge Leon. Your record probably should include the transcripts of some of those public sessions because he did have two cases at the time. He called us both in. Our case was going to go first. His opening was words to the effect, "Welcome to my courtroom. I don't know what your plans are with your families for vacations and things but

whatever it is, just get on the phone and cancel them. The Supreme Court has said these men have a right to habeas corpus and except for the constitutional rights that people have on my criminal docket to a speedy trial procedure, you're next. All my civil and commercial cases are going to be put off. Get to work." He was quite clear that he didn't agree with the court. He thought the cases had been properly decided before. He thought he did the right thing at the circuit, decided properly but if they wanted him to do this, he was going to do it and he was going to do it fast, so get ready.

So, suddenly, starting in July and working through August and September, our team was more or less living in Washington. By now our trial team didn't have any people from Washington, but this was when our decision to have a security-cleared secretary and a security-secured paralegal really paid off because we had probably a dozen lawyers who were able to participate and we had our support team. Once the Justice Department made the decision to stay the other cases, we also had, by and large, the use of a secure facility. I've got to say, all the other teams were so generous and so magnanimous and they essentially let us descend and we occupied everything because we had bodies. There would be anywhere from three or four of us to ten or twelve or fifteen of us. The hours were extended at the facility and we were working, sometimes, on a twenty-four hour basis, just getting things done. Keep in mind, some of our facts were being developed by outside experts. Some of our facts were being developed by people on the ground in Bosnia, where we had to put things.

The court pressed the government to essentially state why it was holding our clients because, remember, the only thing that had been filed in response to our initial petition was the procedural

record from the CSRT hearings, which was a piece of crap. My first strategic maneuver was to try to hold the government to that. "Well, you said that this was why." Let them stand on this record. The government, of course, immediately said, "Well, no, we need to amend our returns. Now we really need to say why we're doing this."

On August 22, the government filed hundreds of pages of a return—I think a fifty-eight or fifty-nine paragraph narrative and hundreds of pages of exhibits attached to that, most of which consisted of classified records that no one could talk about. Initially, the whole submission was classified. In addition, they filed a motion and a package under seal—which Steve probably talked to you about—which we have historically and consistently referred to as "the black box." They filed their allegations, then something under seal that they didn't show us, which the court hadn't even seen. The motion that went with it essentially said, "Please keep this under seal and if you're going to rule against us, open it up and look at it." So this is the, "We think this is enough evidence but if this isn't enough for you, wait until you see what's in here, your honor."

Of course, we went crazy. I still think it was a total abuse of what the government could and should do and that they needed to either be on the record or not and that it was totally inappropriate to suggest that not only was there this evidence, but "There's more. It's much better. We know you'll believe it." Judge Leon's point—and the cases do support this—was to say that habeas is an incremental remedy and it's up to the government to decide what it wants to do. There's nothing that compels it to release all of its information. It's trying to protect national security, even though this case—this was totally bogus. There was no national security issue, ever, in our case. He backed them on it at every turn. He never pushed the government on that

and, in the end, for our record, going up, it was probably better. It made it a firmer case and it helped us on our appeal for Mr. Bensayah.

Starting in August, certainly once we got the government—

Q: But the government did dismiss the charges of or dropped the charges about Sarajevo.

Kirsch: Not yet. I'm getting there.

Q: Not yet. Okay.

Kirsch: The first round had several allegations. Interestingly enough, if you ever could diagram it out, most of the allegations against most of the men were ultimately supported by many, many, many, many cross-references to a single piece of evidence. Ultimately, when we parsed through it, their whole case hung on one very—I think, if you read Judge Leon's public decision, you will see that it's characterized as a slender read and it was insufficient as reads go.

We started then doing two things. Number one, so much of what the government had submitted was classified intelligence information and none of us had worked in that setting before. We had done all kinds of different cases among us but no one had worked with that. If you were bringing a medical malpractice case, we would get medical experts. If we were bringing a business damages case, we'd get commercial or damages experts. So we went and got intelligence experts and we were very lucky.

We'd been digging over the summer and we had three really extraordinary experts who were helping us—people who have since appeared in other cases, more by the time we were done. We had the chair of the 9/11 commission. We had a former CIA [Central Intelligence Agency] guy. We had Gary [D.] Solis, who was a military law teacher and expert and a former Marine. Initially, we had to get permission from the court—which meant we had to inform our opponents—to bring these experts on to say who they were and what they were going to do. Essentially, the way these cases were set up, you had to reveal an awful lot of your strategy in terms of what you were doing, so they knew who our experts were and they knew what they were looking at. These men took time out of very busy schedules. This was the first case, so no one knew what was going to happen yet. All we knew was that we had won in the Supreme Court and that they agreed, on a pro bono basis, to come and assist us and read this stuff, traveling to this crappy, dingy facility, where we had to go and live our lives while we were preparing the case.

They came in and ultimately we had an affidavit from each of them. Looking at the case, looking at the facts, looking at the allegations and the record and to a person, without any kind of goading from us—what we understood was that the ground rules were that they're going to look at it, they're going to give us their opinion and we can take it or leave it, use it or not. We weren't getting to write it; they were writing it, because these are guys with security clearance who take what they do very seriously. We ended up with three supportive declarations. I think it's probably all classified, so it can't be discussed. We filed all the documents. We filed what they concluded, we worked with it and we were able to take their advice, in terms of understanding how we

should present aspects of our case and why what the government was trying to do with its intelligence information was improper.

That was a real advantage. During August and September, into early October, we fought with the government about discovery. We largely fought with Judge Leon. Judge Leon entered a procedural order as to how the case was going to go forward that was meticulous but made it almost impossible for us to make any progress. He made us fight page by page for discovery—literally, page by page. In order to produce something to us, he wanted us to explain why documents that we'd never seen were going to be relevant and help our case and weren't going to be burdensome to the government to produce. We have ten, twelve, or fourteen discovery motions that were filed in that relatively short period of time. We lost almost every one of them, with a couple of exceptions. At one point—this will tie back into our earlier discussion—we asked the government to at least review all the records it had produced and collected and reviewed in our FOIA litigation. Because we knew, from what was done there, that there were tens of thousands of records looked at and the government, of course, insisted all along that it would have done that.

Then one day, in late September, I think—they'd called us the night before—they reported that, in fact, they couldn't find a lot of the documents from the FOIA case, that they'd looked in the "safe"—and they put the word "safe" in quotes—and they were missing. That, of course, tactically meant that the FOIA case suddenly was reaping increased benefits because it was creating doubt in the integrity of the government system that we'd always known was there. The government was never able to find all the documents and for every day we appeared before

Judge Leon, from then until the day of the trial—which was at least four days a week and sometimes more and sometimes two sessions per day—we were essentially living in Washington, trying to prepare a case for trial that no one had ever tried before. We were inventing the process as we went along. We did a lot of talking about the Red Sox at those sessions and about things in Boston because Judge Leon liked that. That's what you do and I credit Steve with a lot of that because he's followed the Red Sox more than me.

The court forced the Justice Department to report every day on their progress at finding the documents from the FOIA case. They had to get up and report on percentages and what steps they were taking. Of course, this was something we were able to pound them on because we knew there were some things out there that were helpful to us. They didn't even know because of what they'd lost, what we'd seen that had been produced to us. We now had the advantage of being able to show the court things that we knew that they had and claim that they were hiding them at this point. Who knows if it was just incompetence or intent, but a number of things happened. Along with those documents, part of what we asked for was all of our clients' historic records. Several of them, especially Mr. Boumediene, had been convinced that if he could just have shown the Bosnians and then the Americans who he was, they would let him go. When he was taken he had his original passports, his current passports, his driver's license, his working papers, certain academic diplomas and things that he'd received, awards and correspondence about his jobs. Every document that the United States, directly or through NATO [North Atlantic Treaty Organization], took custody of was lost. Nothing was left. The men's watches, the men's wedding rings—every single thing—which is why I pointed out earlier that we were doing it for the first time, we'd never set up a system like Guantánamo.

For purposes of FOIA, for purposes of maintaining personal property, Guantánamo was a mess. It was not well thought-out and it was not properly done. It was administrated as well as it could have been by a constantly rotating team of young people who were essentially told how dangerous and bad the men they were controlling were, when, in fact, very little of what they were told was accurate. That was the problem. But they didn't know that and you can't fault them for believing it.

One of the things we were really fighting about with the government was that we wanted them to disclose to us exculpatory information. We knew from two things. We knew from our FOIA case that there were little glints of exculpatory information out there. In the fall of 2006—this will be just a brief detour—one of my colleagues had given a talk at the Harvard Law School on our case and at the end of the talk a student came up and spoke with her and said, "Gee, I know about your case. I was such-and-such." He had been an intelligence officer, and essentially, without offering any details, said that, "There's no case. We knew about that. There's nothing there," and "Would you talk to us?" She said, "Sure, I'd be glad to talk to you about it." So she came back the next day and what I realized was that he couldn't say anything to us without violating what was protecting him as a military officer and whatever he had to sign to get classified information.

So we contacted the head of the International Military Justice Association. Linda Greenhouse's husband, Gene [Eugene R.] Feidell—we contacted Gene and said, "This is what's happened. This kid needs a military lawyer. Can you represent him on a pro bono basis? Because we don't want him to help build our case and end up going to jail." Before we did anything to reach out, we got

him Gene, then reached out to contact him and never heard from him again. Until we're insisting to Judge Leon that we get the exculpatory information and he finally orders the government to disclose certain records to us. The government says there are twelve records that it's going to give us and before they deliver them, the government stands up, and we're in court and the government says, "Your honor, we just want you to know that we've reviewed the cases and decided that there will no longer be any allegations about a bomb plot in Bosnia."

We said, "Oh, that's great. By the way, now there are only six documents to produce." As I was standing up to object, Judge Leon said, "Sit down, Mr. Kirsch. I know where you're going." He just looked at them and said, "There are still twelve documents. Give them the twelve documents."

Lo and behold, let's just say things circled back to the student, who was by now a practicing lawyer. He had been an intelligence officer. We were aware of that. I don't think I can say anything more about it at this stage of the case but when this came out, his name came up and Judge Leon—this shocked the Justice Department—handed out the Google search that he had done on this man's name—but he handed it out in closed session. I won't go any further than to relay that he did it. You could just see the expressions at the table at the Justice Department. Because what were they going to do? Go and object to what the judge was doing and say that the judge was breaching national security? Except I'll tell you that what he did, of course, was look at something that could be publicly—we did find out about this guy and we did then subsequently contact him, but everyone was contacting him by then and you can imagine how

interested he was in speaking with us, with the Justice Department, and petitioner's counsel all calling him at the same time.

Again, you do your legwork in a case like this and you don't know where you're going to find a helpful witness, but that small incident back in 2006, suddenly, in 2008, becomes relevant. We're seeing who the guy is.

So those things disappeared, and now what we end up having is a case that distills down to just two allegations, in the end. One allegation is that the men were planning to go to Afghanistan, presumably to oppose the United States. It wasn't that they were conspiring; it was that they were planning to go and thinking about going. The other is the allegations that were made only against Mr. Bensayah, which included that he was thinking about going to Afghanistan and that he was planning to assist others in going to and from Afghanistan. That was it. We continued to fight about discovery, we talked about process, we said we wanted clients to testify, and this had never been done before.

In a feat that I certainly didn't understand was occurring, the FBI [Federal Bureau of Investigation] had its technicians working around the clock behind the scenes, essentially setting up a secure satellite-based internet link to allow for video from Guantánamo. That wasn't ready the first day of the trial. It wasn't ready until they had to testify, days later. We also agreed with the court that our client should be able to listen. Steve and I agreed that we would have both a public opening that he would deliver, so the clients could hear their case, and we would have a classified opening that would get into the meat of things that the clients wouldn't be able to hear.

So we divided it up. I took the classified portion of the case, Steve took the public piece and the clients were actually brought into two separate rooms because they were segregated. Mr. Lahmar was kept separate from the other five men. I don't know if we can talk about this. He was treated separately, for a very Orwellian reason, as time went on. But the men sat during the opening. Did Steve tell you what happened with the botched instructions?

Q: No, we didn't get to that.

Kirsch: You didn't make it quite there? Well, I'll put you there. Then we can come back and we can cover some of these other details.

We've set this up. The system is tested the night before the opening. The judge has us into his chambers and we test it out and make sure you could hear at Guantánamo, in the courtroom. So we come in in the morning, we get ready, the clerk sets up the system and he picks up the phone and says, "Can you hear us?" The soldier on the other end says, "Yes, sir. I can hear you." So we start and we go through the openings. At some point, we took a break, the clerk says, "We're taking a break. We'll be back," and he said, "Okay." Then I started my opening. "Can you hear us?" "Yes, I can hear you." Well, it turned out that the soldier sat there for the whole time, since no one said, "Put it on speaker, so the men can hear." He was asked, "Can you hear it?" and he listened, he heard it but the clients heard nothing. At the end of the day, the Justice Department understood this and to say that Judge Leon was livid—we'd gone through this whole exercise and we had an interpreter in the courtroom reading as we went along, so all this time and all this expense—he was livid. The Justice Department ultimately prepared overnight transcripts and

there was a recording and the recording was over-nighted to Guantánamo and played for the clients the next day. It was sort of typical of what happens with the logistical challenges that this case presented.

We started with our opening and the judge had essentially broken the case down to eighteen sub-issues. The case was less a normal trial than it was a series of almost summary-judgment, evidentiary hearings on eighteen separate issues. It was all on the paper and we divided it up. Steve took some, I took some, Greg [Gregory P.] Teran, one of our other partners, took a few issues. One of our senior associates, who has subsequently left, argued one issue. All through the case, the issue that was floating around in the background was, "Don't forget that black box—that secret evidence that's sitting out there."

I need to backtrack a little bit. When the government filed its return on August 22, 2008—I can remember getting up on August 23 and the first thing I did was dictating—I was at my brother's house in Vermont because we were having a short family stay up there—dictating a motion over the telephone to get filed with Judge Leon, saying that we objected. We certainly didn't want him to open this thing. We wanted him to consider rejecting it and that the government had essentially tainted the whole proceeding by filing in this fashion. Ultimately—again, going back to learning the rules and using them—we waved that black box around every time we had a chance to win the case because it was just sitting there all the time with the government pretending it had something. Part of the question was, is there anything in the box at all? Was there anything there or not?

The other thing that happened as the trial went on, in distinct phases, is that the government would come in and ask for an *ex parte* session with the judge because they wanted to be able to produce evidence that the judge could see that we couldn't see. One of the issues I handled was the secret evidence issue, and the law in the circuit is pretty clear. There actually are circumstances in which it would be acceptable for the court to hear something *ex parte*, but there are steps that can be taken. They should at least try to prepare some kind of surrogate so that there's information that we had. Ultimately, I think what we were able to effectively argue to Judge Leon is that that should—he should never get to that in this case because, if you think about it, the allegations were that the guys were thinking about going to Afghanistan or thinking about helping others. How could you ever get to something that could implicate national security enough to rise to the level that would cross the thresholds, that the cases say that could happen?

Ultimately, I think that was right. I don't know what it was that the government was trying to persuade Judge Leon about, but there were two or three occasions when we argued this issue, and even shortly before the trial on our own. I will admit that a piece of this was just tactical, to push back on the Justice Department. We asked for an *ex parte* session with the judge. We told him that we had ethical concerns and needed to be able to speak to our clients about the continued representation because it was clear that the allegations that the government was making against Mr. Bensayah were different, at least in tonal quality and more serious than were being made against the others. There was a chance that the clients had to be informed that there might be an advantage or consequences, to multiple versus individual representation. Maybe the case would have to be done.

Q: I was going to ask about that.

Kirsch: So we went down. Because the case isn't over yet, I don't want to tell you what our communications were with our clients or what the clients' decisions were, although you can see how the procedure went. One of the advantages to what we did was we were able to have an *ex parte* session with the court and the government had no idea what we were talking about or why we'd asked for it. You know that, as a trial lawyer, you never want to see your opponent in with the judge without you being there. This happened shortly before the trial. Again, there was a tactical and a substantive reason to do it. We also got an expedited trip down to the base because we needed to be able to meet with our clients and consult with them and just tell them what was going on.

Now as we're preparing for the trial, we also had told the court that we wanted our clients to testify. We weren't sure which ones. By the time we got to a few days before the opening, we pinned it down to Mr. Ait Idir and Mr. Boudella. They were the ones we wanted to have testify, in part because they would present the best and the easiest—very sympathetic. That arrangement was made and what we did is we didn't want to be running questions over a video from Washington to Guantánamo. We had a partner and an associate who were going to go to Guantánamo and ask the questions.

The government—even though we had made this clear, it's one of those situations where you hear what someone's saying but your view of how the world is going to work is so different that they expected someone to be there and they were just shocked when they realized that we had

lawyers who were going to be on a plane, at Guantánamo, both prepping witnesses for a week in advance—which they had to accommodate because the judge said the case is going, “You're going to make this happen, right?” They were going to have to set this up so that we had our interpreter—we didn't want to have our interpreter in the room with us, we wanted the interpreter to be with the clients so they would feel comfortable. Mr. Bezri was going to be there, being able to do the case. Again, remember, I knew that he would be communicating with the tone and the inflection the client stated, so if they were saying something sympathetically, Judge Leon was going to hear that.

We started in on the hearings and we started through the issues. We were allowed to produce and refer to the expert affidavits of our security experts. We had dozens of declarations that were filed—some from family members, some from employers, some from experts. For example, there were allegations made that the men had aliases, whereas, in the Arabic world, there are nicknames, which we called aliases. We even had an expert on nomenclature and what Arab culture used for that, to make sure we could disarm some of the absurd claims that were being made by the government. But every argument except the public opening—until we got to the public closing—was made in a classified, closed session. No one could hear or see what was going on at all. It all had to be done in secret. I think the closing argument was just divided up by cases and allegations. I don't think we had a public session. I don't think the clients were able to listen to that. I think Steve and I just divided that up, in terms of the subject matter of the case and presented that.

We fought every day. We started, I think, from the sixth to the fourteenth of November. I'd have to check the dates. The transcript would show that. We opened on Election Day, right? What I remember—and it was quite auspicious—is that we opened the day after Election Day and I remember we had two places we could work. One was in our secure facility, which is in the Washington area. The other was a room in the very bowels of the federal courthouse, which we referred to as the Libby Room because it's where [I. Lewis "Scooter"] Libby's defense team had preceded us when they were defending him. It was set up as a skiff. There were secure phone lines there, there were secure printers but it was dark and the air was stale. It was a pit.

I went there the night before the opening to finish working on—Steve could work on his opening wherever he wanted because he was doing the public piece and everything had to be able to be published in the newspaper, but I was there working on the final stages of the classified opening. I remember distinctly walking out—we were opening at 9:00 the next morning—at 11:30 or 12:00 that night and the courthouse was about a six- or eight-minute walk from where we were staying. The firm had corporate apartments at the old Landsberg store, now apartment building, in Washington, by Penn Quarter. The election results were being announced. Much to my surprise, literally as I walked down the street, Washington went from being quiet to, all of a sudden, having horns honking and people opening their doors and coming out and screaming, whooping and just hollering. It was a very moving time to be going to this kind of a case. Like any other good trial lawyer, I took it as an extremely good omen that the night before opening, Barack [H.] Obama had won the White House.

We had our openings in the morning. The technology failed. The judge was furious. We were back the next day. We started in on our issues. Ultimately, this was the place where having us as the first case really worked to our advantage and partly to the advantage of those who came behind us because we were about to get a good result. We had the bodies to throw at the issues. We had fourteen or fifteen cleared lawyers, plus we had another eight or ten lawyers working on the team on the public side who were following up on issues, talking to witnesses. We had our contact, Mr. [Sinad] Slatina, working for us in Bosnia. At times we were getting documents—I was calling him with requests and sending him things over night that were coming back in translated form in the morning. We would wake up, get the documents, and bring them into court.

One of the things that happened during the course of the trial was that the government made some assertions against Mr. Bensayah which were essentially all guilt-by-association. In fact, the whole case against him was guilt-by-association. A lot of the assertions—and you can see this in publicly leaked documents from 2001 that were leaked to the press—was that he had a connection to Abu Zubaydah. I can't tell you what was said about Zubaydah in the case but what I can say is that when the filings were made, we reached out to Joe Margulies—whom I don't know if you've spoken with yet but is Mr. Zubaydah's lawyer and was very familiar with his case and the facts and the developments about it. We were able, without breaching the confidence of our classified information, to let him know the kind of thing that was being said.

He flew from Chicago in the middle of our hearing. He got into Washington at some point in the early evening and worked until 4:00 or 5:00 in the morning preparing an affidavit to be

submitted in our case, rebutting the government's assertions about certain facts that were being used to create guilt by association. I can't tell you any more than that, in part because his security clearance is above mine and we've never seen what he prepared. But we know that if he prepared it and gave it to us, it wasn't going to hurt. What I remember is we delivered it to the court first thing in the morning. I'll go back and talk about the details of that in a minute because it's something that people need to remember about these cases, but what I remember is how angry Judge Leon was when we got in, in the morning. In my sense of oblivion, I didn't know what was going on. But as we got into session, he essentially looked over and said, "Mr. Kirsch, now you're doing it to me, too." What I hadn't realized is that what Mr. Margulies had filed was at a security level above the court's, that Judge Leon couldn't even see it. Now we had filed something he couldn't see and he was angry. He thought that, "Look, you guys, somebody's got to play fair here." Of course, we didn't know what was in what Joe had filed but we knew it was there.

One thing I forgot to mention earlier on is that from the very outset of the first meeting with Judge Leon, once we were preparing for trial and the decision had been rendered by the Supreme Court, we essentially said that we wanted Kirsch, Oleskey, and at least one of our outside experts read into the program to a top secret level, so we can see whatever evidence the government has and that there shouldn't be a black box out there. We can address this right now. Bring us into the case and we'll do it. The government, of course—number one, it's a need-to-know basis. It's the executive that makes the decision. We're saying no and they said it very nicely but it was, essentially, "Judge Leon, you don't have anything to say about this. Sit down and shut up." It was

never put that way and the judge didn't push them on it, but ultimately that's the way the law stands on this issue.

We would object every time the government asked for an *ex parte* session because there was some government agency with three letters in its name that would show up with its lawyer, with the Justice Department, explaining to the court why he should take certain evidence. What I can't tell you is what they said, whether they summarized the evidence, whether they made a proffer saying, "Your honor, if you would just let us do this we would be able to show you—." I don't know how much they tried to taint the process but in the end what I know is that, throughout the proceeding, Judge Leon refused to take evidence that we couldn't see, down to the point that after all the evidence was in—we probably got through four days and the court had agreed that he was going to let the government know how he was doing. He said, essentially, "I want you guys to know you're not there. You're going to lose." So the government at that point—since it was being handled on the basis of a motion, practically—we would go issue by issue, we would fight out the issue in court, each of us having the evidence that had already been admitted to the court—what was out there and what was in the body of their documents and our documents.

The government then brought on its rebuttal case—rebuttal here meaning that we didn't get to see it until they produced it. They came in with another twelve or fifteen exhibits, every one of them classified. They made another run at the court to take secret evidence that we couldn't see, which he rejected and we, of course, tried to get more discovery. Because here we were, in the middle of trial and we had overnight to start to examine whole new pieces of evidence that we'd never seen before.

Again, we were in a better position than any other team would have been because we had more bodies and we did have our experts. And these guys, to their credit—we had them lined up—and I can't remember who it was anymore but one of them came in, looked at the classified information with us again, walked us through some of the issues—how to examine it, what to be looked at, how you would have to criticize it—because, to you and me, when you don't see these documents daily, you don't understand how they're assembled, what they mean, how they're actually used in the intelligence-gathering and decision-making process. Part of what was happening here was the government was being forced to use as evidence documents that were never collected to be used as evidence but they were trying to make them out to be much more than they were.

There was an exhibit we all referred to as "Intelligence 101" that the government submitted in the beginning of the trial, and in the end we rammed it down their throat several times, because if you studied what the evidence was and how it was to be used, everything was being used for a greater purpose and with more certainty and to have more weight than it should have been in the original process. That was something I think we were able to hammer through with Judge Leon.

Q: As I'm sitting here, listening to you tell the story, it's quite clear that if you don't have that kind of a team and the enormous resources, you have no chance at all.

Kirsch: This would have been almost impossible without the backing of this firm—which, at that point, the firm had no idea what we were doing because we all simply disappeared into this black

hole of a facility. We had our annual partners' meeting while, I think, five or six of us, as partners, were tied up and not even attending because we didn't have the opportunity to surface at all. We were all over there.

Q: Yes. But the mythology of the maverick lawyer is just that—mythology. It's just grinding it out by a team and all the expert witnesses.

Kirsch: We were there overnight, trying to pull this stuff together. This was big-case litigation and we just happened to have very smart, very dedicated members on the team, people who really believed in what they were doing and a partnership that was backing us.

Q: How effective were your clients? The client testimony?

Kirsch: Well, I don't remember if Judge Leon was reading the newspaper during any of that testimony but it was pretty close. He let us do it because we said we were going to do it; we did it, in part because we wanted to make the statement that we wanted these guys to know that they were going to be heard in court. It was important psychologically for it to be done; in truth, I think it had some benefit but I doubt it had much influence on the substance of Judge Leon's ruling in the end. But sometimes there are other reasons for doing things.

Q: Have you ever read the book by Paul Winke, *Guantánamo Lawyers*?

Kirsch: I didn't and I do want to read it. I'd love to keep a copy of this, if I can.

Q: Yes. I gave Steve a copy of it last time. I had another copy made up for you.

Kirsch: Thank you.

Q: Because what it shows there is how important it was to the clients.

Kirsch: Yes. And I think it was. They never forget that these guys were there. They were working with them. You know, it's hard, after all this—these guys had faith in our justice system in a way that kind of amazes you; that they could maintain it after all this time. They thought, "If I talk to Leon, he will understand. Judge Leon will listen and he'll know me." Now, in truth, Judge Leon had a number of other issues to look at and it wasn't just going to be witness credibility. It's possible that if we wheeled out Mother Teresa being held at Guantánamo it would have made a difference, but these were just guys in the wrong place at the wrong time. But Paul and Doug Curtis, who went down with Paul—they were present for the opening of the trial, so they would have a sense—what we wanted to be sure of was that we all knew what the courtroom was going to feel like and how it was going to be conducted. Because they need to know when they're going to be at the end of a wire, how it's going to present, and what they should do. Then they headed down.

Paul actually went down first and Doug attended more of the trial and then went down there. This is when I told you that the Justice Department went nuts because they claimed to think we were going to be doing the questioning from Washington. Why would we ever do that? You

want your lawyer in the room. You want to be clear. And, frankly, we wanted to show them we could do it. We wanted to force them to add a lawyer. They didn't have the resources we did. They added a perfectly good guy who knew nothing about the case and that's who went down. They were in no position to make any kind of an objection or do anything like that because they hadn't thought that piece of their strategy through.

So we sent someone down to do that. They did their cross-examination of the witnesses from Washington with a guy who did his first cross-examination ever, over a wire, of a prisoner at Guantánamo.

Q: What went through your mind when Judge Leon handed down his decision?

Kirsch: Well, we're not quite there yet.

We've got—so remember that we'd been pressing the government on the security clearance issue. We wanted more of our team in, to make that issue go away. Judge Leon tells them that they haven't made the grade, so they bring on their so-called rebuttal case and we raised all kinds of questions and challenges to that because it wasn't really a rebuttal case. There was nothing to rebut. The government hadn't met its burden and essentially the court was giving them a second bite at the apple without giving us any discovery or any opportunity to have enough time to look at their evidence. The playing field was really, really against us.

Because we had the number of bodies we did, we were able—I can comfortably say that there was nothing that the government produced in its evidence or allegations that we weren't ultimately able to undercut, if we had a chance to look at it. But it all fell apart under close scrutiny. It just wasn't there. They didn't have their case.

But at the end of the arguments on Thursday night—I think we closed on a Thursday—the judge wrapped up and the Justice Department came in again. They made another run at him for an *ex parte* appearance and this one took—we were there. I think we must have stopped the trial at 5:30 or a 5:45 and we were there until 7:30, waiting while they worked him over and tried to get him to look at evidence. The judge called us in—and he had heard me screaming about this, in my monotone way—screaming about the fact that there was a mechanism, that we wanted to have people read into the program, that we could do it. So Judge Leon said, "Mr. Kirsch, I just want you to sit down. Just listen to the whole thing. You don't need to get up. I know what you're going to say."

So what he said was that, in the end, they wanted the evidence in so badly that they were finally offering to read someone in. What he said was, "They're willing to read Mr. Waxman in." So Seth, of course, who had been Solicitor General and who wasn't at the trial—who had not been around—and he said, "But I told them you wouldn't accept that." Because he could see me just sort of straining. He said, "So, they're willing to read in one of you. But what that means is that one of you will get to see this evidence, they'll get to introduce the evidence and then you can deal with it in your closing. But you can't talk to anybody else about it and we'll have to clear the courtroom of everyone but you and me and your opponents when you talk about it."

I know we broke to confer a little bit but instinctively, both Steve and I agreed that this was essentially, "Shove it. We're not going to take it." Procedurally, that would have done nothing but weaken our clients' position. If the government wanted to stand on the secret evidence, we weren't going to let them put it in and the judge never looked at it. I don't know, again—did they proffer it? But you've got to imagine—this is the night before. All the evidence is in and they still want to take one more run at Judge Leon. Who knows if this is related to what's in the black box, but by now we've argued about the black box and the secret evidence five or six times. We wanted the judge to just nuke that and get rid of it.

But they never asked him to look at it and he refused to take this. Who knows? My suspicion is that they did make proffers and that they essentially poisoned the well. And some of the reason that Mr. Bensayah is still there has to do with what they claimed they would be able to show. If you look at what they publicly leaked to the press in 2001, the allegations are of transcript of wire-tapped conversations between Mr. Bensayah and Abu Zubaydah. It's out there. I don't know what they were trying to protect but that's what they contended they had, in public. Our belief always was that that's part of what's there and in this case we've had the opportunity, twice, to debrief military intelligence officers who worked on our case, including a guy who was in the air on September 11, as a reserve officer, who landed in Bosnia, expecting it was going to be a peacetime effort and was handed a gun with live ammunition. He said, "Our plane landed. They parked us off on the side. We didn't know what was going on. They got on and told us we may be at war, the country's under attack, and we were given weapons and live ammunition when we

got off the plane." They thought they were on a peacekeeping mission to Bosnia. So the world had changed.

But he knew about our case, and while none of them could tell us the details, what he told us was how amazed he was that—essentially the electronics and what we monitored and what we collected. So what he said, in the end, was that there are transcripts; that there are recordings; that someone said something to somebody. Nothing was ever done but there were clearly discussions and that's what we think might be out there somewhere, that the government is refusing to give us and doesn't want to release—although they've released it to the press. They released it to the press immediately, in 2001.

So we finished that night and go and prepare our closing arguments. Steve was making the closing argument for the other five men and I was making the arguments for Mr. Bensayah because most of the allegations were against him. It was just necessary, to tie all the evidence together. In the end, it was purely a guilt-by-association case. The core of our argument became the core of our argument on appeal, which was that, number one, the evidence doesn't show that he was thinking about either going to Afghanistan or helping other people to go to or from Afghanistan and that even if it showed that he was thinking about that, we can't detain someone for what he was thinking about. Judge Leon rejected all of that and said that the evidence was sufficient and that it constituted a basis for holding him.

So we finished the closings and the arguments and came back into session. The judge announced that he would give us his ruling, I think on the twentieth, which I believe was a Thursday. I

remember it in part because when we were pressing for other days—or maybe, did we start the case on a Thursday? I'd have to go back and look. You should check our calendars.

Q: I don't know.

Kirsch: We'll have to go back and look. Because one of the very clear things the judge said—because we had been pressing, I think, to start the case on a Friday because Mr. Bezri was going to be available then and he wasn't available on Thursday. So this was probably the openings. What Judge Leon clearly said was, "Mr. Kirsch, we are not going to start on a Friday. Do you know what happens to the Saturday newspapers? They're used to wrap fish."

So we started on a Thursday. We did not start on a Friday. The announcement—the publicity on this case did not wrap fish. But Judge Leon's decision also was on a Thursday. This was a great case. There are a lot of great stories. We're only touching the surface.

When we came in on the twentieth for the decision, two things happened. One, which was normal—although not during the trial. During pre-trial proceedings—number one, things were late. We were not able to have Mr. Bezri there that day. We had a first-time interpreter because the decision of the court, in the public session, was going to be announced to everyone in the courtroom and the wire setup was there, so that the men at Guantánamo were able to listen. The interpreter, unfortunately, was terrible. He was bad enough that Judge Leon looked down at one point and said, "That's not what I said," and he doesn't speak Arabic and he knew the man was messing it up. It was terrible.

But the clients were still able to discern what was said. We were in the ceremonial courtroom, which is a huge, huge courtroom and it was packed. Every other team was there because, remember, everyone else had been held up. None of the cases were going forward. They had been waiting for this, in part because the Justice Department was convinced they would get a good result from Judge Leon. And while he made our lives hell and made us fight for every single piece of paper we got, in the end he acted like a judge. He did what a judge is supposed to do.

As he went through his preliminary reasoning, I knew we had won. Because he was offering reasoning that would have been irrelevant if he were going to rule against us. I didn't know how many we were winning for; I didn't know if it was everybody, three guys or four guys. There would have been bases to win for three, four, five or six. In the end, it was five. He was clear and when he started to read off the names, that he was granting the writs, certainly, for me, I could feel the hair on my neck standing up. It was electric in the courtroom.

This courtroom was huge. It's packed and it's silent. It's just silent. You could hear everybody listening. I can only imagine what's going on in Guantánamo—the guys sitting there. I will confess that my first thought, as he got through the list and read his conclusions about Mr. Bensayah, was the fact that I was going to have to call Anela that afternoon and tell her that we had lost his case.

Q: This is his wife?

Kirsch: His wife. I had this combined sense of elation, and dread, and sadness because no one knew how long it was going to take to accomplish this. But we walked from there, spoke to some reporters and reported back to the firm, because the firm had invested so much. In fact, I guess we were at trial during our partners' meeting and it was a great result. It was just a fantastic result. It was not expected. We had a wonderful lunch, then set to work trying to press the government to get the clients out and set to work on Mr. Bensayah's appeal. Quite literally, there was two or three hours of a wonderful meal together, for everybody on the team who could be present, then we were back to work. And we're still at work.

I'm out of my rope. I'm happy to continue with you but this is probably a pretty good time to take a break.

Q: It reached a point—you'll get a transcript and you can decide if you want to go further.

Kirsch: A transcript will help. Well, there is definitely more to say, because the work that was done—a lot of work was done to get these guys out. Winning the case was only part of it.

Q: Yes. That's an interesting story.

Kirsch: I've sort of been on point for the diplomatic piece and even getting the clients to go to Bosnia. We know part of what happened now, partly from what we did at the time and partly

because of the WikiLeaks documents that have come out, which essentially confirm what we knew was happening but what the government was denying was taking place.

[END OF SESSION]

VJD

Session Two

Interviewee: Robert C. Kirsch

Location: Boston, MA

Interviewer: Ronald J. Grele

Date: June 28, 2012

Q: We were talking about Neal [K.] Katyal's—

Kirsch: —the amicus brief, yes.

Q: You knew it came in over the window.

Kirsch: We were aware that Neal had written—and I do recall that there was some discussion about the positions he has taken because his clients were somewhat differently situated. Neal was representing some of the very few men who were actually charged by the military commissions. Of course, in his *Hamdan* decision, he had successfully struck down the effort to establish the military commissions the first time by President Bush. So he was out, as I recall, trying to make certain that his client still had the ability—even before his commission hearing—to gain a right to challenge the president's ability to hold his client through habeas process. I don't remember the details of what Neal found. In fact, at the time I don't even recall having to read it, we were so engrossed in getting our briefs in. We knew of the amici [curiae] whom we had encouraged and organized and we did have an oar in that water. But Neal's brief came in; we saw what it was and understood that he was advocating for his client.

I think, as a practical matter, given the relatively low threshold that exists for the government to prevail in a habeas case—even as they were being anticipated and initially decided, assuming the government has any kind of a credible case at all, to support a charge—it's certainly an uphill battle to try to prevail there. I'm sure that's why Neal was fighting and scrapping for an opportunity to have that hearing because it's one more chance to get in front of a judge. We all know that if we just had one more chance, we'd be able to accomplish what our client needed.

Q: To me it presents an interesting problem, an interesting historiographical problem because as I read it, I found different kinds of interpretations, offering the court different ways of moving. Then I saw in the decision the court just kind of ignored those suggestions. So it's after the fact that I'm making an issue of it, when it wasn't an issue at the time—an interesting historiographical problem.

Kirsch: It is. Recall that because of the different procedural posture, Neal had objectives—not all of his objectives were inconsistent with ours but he would have been happier with reasoning that might not have advanced our case as much as we wanted. At the same time, our brief was built around what we anticipated Justice Kennedy—as we discussed earlier, what we anticipated Justice Kennedy would want to see and we did that based on his concurring opinion in *Rasul*, and what he had written of previously. He is one of the few members of that court who looked fairly openly and in a welcoming way, to international legal standards. Some of the justices just don't seem very open to that. Justice Kennedy was open to it. We also knew that there were lines of cases that had developed historically that seemed to be, if not persuasive in light of his *Rasul* opinion, certainly consistent with the kind of reasoning that he adopted there. Really, since the

filing of our petition, we had been aiming and trying to structure our approach and our legal arguments in ways that would be consistent with his reasoning.

Q: We came up with that last time.

Kirsch: Yes.

Q: You were also in contact with the *Al-Odah* lawyers.

Kirsch: Yes.

Q: Was there any discussion with them about tactics or how to rule or any tension at all?

Kirsch: Well, in these cases there is always a need to cooperate, and at least communicate even if you can't cooperate. Here, we cooperated from very early on and certainly the *Al-Odah* team had been involved with the case since the outset. We did have some differences of approach. My memory is that early on they expressed concerns about some aspects of our strategy and the case lines we wanted to rely on. Ultimately, we agreed to disagree. We went our way. When you looked at the opinion, it came out along the lines that we were anticipating. But I think lawyers have to do their best to represent their clients and we were all looking for the same objective. We just weren't always looking to the same route to get there.

Q: Interesting, your reading the decisions and the briefs. It's quite clear that there is a consistency between your brief and the decisions. Whereas the other briefs, not necessarily so. There are arguments made but they don't seem to be taken into consideration.

Kirsch: Well, maybe it was prescience, maybe it was luck but, certainly, we put a lot of time into thinking about where we would go. We're all human beings and different arguments appeal to us to greater or lesser degrees. I've always said there are two different categories of lawyers in these cases. There are those of us who are more in it—or at least as much in it—for the cause as we are in it for the client. There are those of us who are in it for the client and are there with the cause but it's mainly about the client. Our team is a client team. The cause is a wonderful thing. It's nice to stand up and get warm rounds of applause and be able to tell people that you're wrapping yourself in the flag but our opponents wrap themselves in the flag, quite convincingly—and quite objectionably, to many of us. We tended to stay away from the cause and focus on the client and I think that's very, very important in this kind of a case, to really keep that perspective. It's challenging because of the nature of the issues and the strength with which a lot of people feel the issues and the strength with which a lot of people want to pursue the issues.

Q: That's actually a nice segue into this second session—because we left off with the court's decision in *Boumediene*. Now the question is what is going to happen to your clients? How do you follow through with your clients, to get them settled, resettled, freed?

Kirsch: We had gotten through Judge Leon's decision.

Q: Yes.

Kirsch: Well, that started a whole new line of work, although more in terms of emphasis than activity. We had been very, very active, since the very start of the case, pursuing diplomatic efforts right alongside our litigation efforts. Our habeas petition was filed in July of 2004. We had started a Freedom of Information Act case through a letter in September, then we filed it in court the following spring. By December of 2004, we had our first diplomatic meetings, starting to try to open doors and gain information, all in an effort to get our clients released. I began meeting with representatives of the Algerian government through their embassy delegation in the U.S. in December and we had been meeting with representatives of that government on at least an every six or ten-week basis for the entire period, continuing to today.

Q: What was their attitude?

Kirsch: Well, it was interesting because our approach was a little bit different than you might expect, which is one of the reasons I thought it was very important that we make contact with them. Our clients were all born in Algeria but they were all seized in Bosnia. So by the time these events had transpired, all of these men had made the decision—largely because of political and economic conditions—to leave Algeria and to travel to Europe. They had wanted to put themselves and their families in a place where the economy and the society were a little bit more open than they were and where the government was more transparent than it was in Algeria. So while I was representing Algerian men, I was representing Algerian men who were seized in

Europe. We really wanted to maintain that distinction if we could. At the time, I believe there were a total of twenty-three men who were held at Guantánamo who were of Algerian birth.

So the attitude of the Algerian representatives in the U.S., from day one, was extremely supportive. Ultimately, the message that came through at some point, in every meeting, was thank you very much for representing these Algerian men—because they knew that the case was taken on a pro bono basis. They knew, if only from the level of our communication with them, that we were going at it essentially guns blazing, trying to get as far as we could and get as much assistance as we could for these men. Our approach was to prepare very, very simple briefing papers on each of the men, so that a diplomatic officer could walk away from a meeting with a set of documents that would look very bureaucratic in nature. Have the man's name, his picture, his place of birth, where his family was from, all the information that they might need to fit it in whatever cubbyholes the Algerian government maintained so that they would feel comfortable that we were actually updating them and informing them of the case.

We did that and the first meetings were really informational; telling the Algerian government what had happened, describing to them our effort. What I don't recall now is whether—at the time we had that first meeting—I had been to Guantánamo or not. Because my first trip was also in December. My instinct would be that I had just been to Guantánamo, only because that was very early in the month and I'm assuming that it was later in the month that we had the diplomatic meeting. I think all of our efforts would have been focused on setting up the trip, at first.

Q: Was there ever a fear that if they were sent to Algeria, they would face imprisonment or charges over there?

Kirsch: That was always a concern. That was one of the reasons why we thought it was important to communicate immediately with the Algerian government because four of the men had families in Bosnia. Two of the men—while their families had been in Bosnia when they were seized—their wives were born in Algeria and the fathers of the women were in Algeria. As a practical matter, all of the families—when the men were seized and rendered to Guantánamo—all of the families ended up falling back on their families for support. So the women who were born in Algeria, of necessity, packed up their kids and returned to Algeria. But the others stayed in Europe and we wanted them to know, "Look, it's very important that these men maintain relations with their wives and children. They all would like to return to their families." For the men who didn't have families, we said, "It's important that they be able to return to their jobs." We were making the pitch that, "Look, they're Algerian, but please, when you speak to the United States about your men at Guantánamo"—and we knew that that was happening—"consider these men as something different." To this day, they have done that. The Algerians have been very attentive. They have maintained that segregation right from the start.

So, just leap-frogging ahead a little bit—at some point—I believe it was in February of 2006—an Algerian delegation actually traveled to Guantánamo and met with the men of Algerian birth. To a man, when they met with our clients, they knew who they were; they knew their cases; they knew their facts. The meetings were essentially social and supportive. Actually to the point where the Algerians were inviting them back but giving them some level of assurance that they

would not be forced back if they didn't want to come; that they would be accepted back and that they should have no doubt that, if they were innocent men, they would be welcomed and have no problems.

That was different than what we came to hear had happened to each of the other men. Most of the other Algerian men were interrogated by their nationals. The men who went included a representative of the embassy in Washington, a representative of the justice ministry and a representative of the interior ministry. So, essentially, a security guy. They wanted to understand who was at Guantánamo and why. I think, as a practical matter, the Algerian government had been involved with our clients indirectly, even in the beginning. Shortly before the Bosnians turned our clients over to the United States, they reached out to the Algerian government to see if they could dump them on them. They simply didn't want to have the hot potato of these six men. But the Algerians, in a fairly principled way, took the position that, as far as we know, these men have done nothing wrong. We're not going to take back men who have done nothing wrong and don't indicate that they want to go here.

So they were supportive. We communicated with them regularly. We asked for their assistance sometimes and answers from the Algerian government about what might happen to or for these men as they come out.

Q: In your conversations with representatives from Algeria—did they tell you of the conversations that they were having with American diplomatic officials? Or people in the State Department?

Kirsch: They were fairly careful about that. I was aware that the communications were going on and I was aware of the nature of what was being discussed. We did communicate about it but we did not communicate openly. There was never, "The United States said this and this was our position." They were very open about saying, "The position of our government is or will be or was X," because those are positions that they are, in essence, instructed to take. Those we were always informed about. I don't recall ever having anything come out that I thought might have been revealing a confidence but, certainly, public positions that we knew the United States was taking they were free to discuss. I would make a point of raising the issues that we knew were on the table because I knew that that would free them and allow them to discuss things more openly. Our tactic has always been to be as active on all fronts as we could, so the diplomats could speak openly with us.

Q: When was Ambassador [Daniel] Fried brought in?

Kirsch: I think Ambassador Fried came in right around the time of our decision. I don't recall if a switch was made by President Obama after he took office or not. Certainly, he's been in place since President Obama. I believe there was another Foreign Service officer whose portfolio it was to essentially get men released but I think Ambassador Fried, in that respect, is sort of in a category of his own. Certainly for our clients, he had already done work in the Balkans and Eastern Europe and he was fairly known in that part of the world. So it was nothing new to have him show up but if you listened to the discussions, he was somewhat of a flesh salesman. He would show up and would be offering Palestinians or Jordanians, whip out his catalogue, open it

up and let you know what he had for you today. We were told that he was quite aggressive about it.

So, let's go back to your question. We won the decision and immediately we did two things. Seth Waxman and I went over to meet with the Justice Department, to make the same pitch that Judge Leon had made from the bench—which was, "Don't appeal. We don't believe you should appeal. There's no basis to appeal." It was one of the strangest meetings I've ever been to because Seth and I were on one side of the table and on the other were senior representatives of the civil section and the appellate section; management-level staff at the Justice Department; people from the Defense Department; senior lawyers. So it was the two of us and twelve or fourteen government lawyers. We had introductions all around, there was a little bit of small talk—because, of course, Seth had been very active in the department as solicitor general and was known to a lot of these folks. I think we made our pitch and within fifteen minutes of walking into the room we were walking down the hallway again, having finished. They really had nothing to say. They certainly didn't indicate that they were doing anything but listening but I think we both commented on the fact that it was one of the strangest meetings that either of us had ever been in. That may be one thing for me, but for Seth to make that observation I thought was quite remarkable.

We wanted to make sure that we put in our pitch to try to quell any interest on the part of the government, and in truth I think the government had wanted to have its say; they had done what they could and they came up very short on evidence, but I suspect that they knew they would. They knew that they didn't have many arrows in their quiver for our case. In fact, our clients

probably should have been released years earlier; then they could have had a good case to litigate, as opposed to ours.

Immediately after that, I started reaching out to the Justice Department to try to find out what was happening about release and who would go. Because we knew initially that three of our clients had Bosnian citizenship and since they had Bosnian citizenship and had been seized in Bosnia, there was no good reason for the United States not to send them back to Bosnia. In fact, that was the place where the United States, by rights, should have been returning all these men. What I do recall is finally getting a call late on a Friday, maybe 8:30 or 9:30 at night, from a former senior Justice Department lawyer in the Bush White House, essentially telling me that the clients were going to be put on a plane without telling me that. These were the things that he couldn't say but it was essentially that "Your three clients who have Bosnian citizenship are being returned to Bosnia." I think this was on a Friday night and by Monday morning they were landing on a plane. So they were either about to be or were on their way to a plane at the time.

Q: So you had no negotiations with the Bosnians at all?

Kirsch: Well, actually, we had been in negotiation with the Bosnians starting in January of 2005. We had made efforts. Steve Oleskey made two trips to Bosnia and I made two trips to Bosnia, really for the purpose of setting up meetings and seeing if we could instigate some level of activity by the Bosnian government. Keep in mind that there was an order of a Bosnian court that required Bosnia to take action to try to get the men back. The Bosnian government had violated an order by allowing the United States to seize and render the men to Guantánamo. The Bosnians

were to be compelled to do something and they largely did nothing. They did send a very mild-mannered, mid-level, milquetoast bureaucrat who dutifully went to Guantánamo, conducted a very, very basic interview with each of the men and gave a drab report back. Essentially confirming that, yes, they're at Guantánamo, they're being treated humanely and nothing ever came of it. That was the Bosnians checking the box, to show that they were making efforts to get the men back. But, in truth, they did nothing.

But we had meetings at however a senior level that we could. When I was in Sarajevo, I met with Haris Silajdžić, who was then the Bosnian representative in the presidency. Bosnia has a tripartite presidency under the Dayton Peace Accords, essentially preserving and institutionalizing the ethnic differences that led to the breakdown of civil society there, in that way assuring that the government could do absolutely nothing—because with the three disparate interests, they simply didn't have the ability to reach an agreement and act.

But we were always warmly received by the Bosnians and we do know, in fact, that the Bosnians made appeals to the United States to get the men back, subsequently, through the presidency's office. But it was too little, too late by the time it was happening. It did not take a very firm rebuff from Washington to have the Bosnians stand back because, of course, they're not a particularly powerful or wealthy country. They were relying to a large degree on the good offices and support of the United States for their continued existence, so they didn't pursue it very openly or aggressively. But we thought it was important to maintain both positive contacts with the Bosnians politically and to reach out to the Bosnian press to get humanizing stories about our

clients to be published, in part because we did know that, at some point, they would be back and we wanted them to be received as positively as possible when that happened.

Q: Two of your clients ended up in France, with very different stories. How did you negotiate that and why?

Kirsch: Well, the French story is fascinating. It's sort of the confirmation of the timing-is-everything cliché. Shortly after President Obama was inaugurated, I met with two of the associates on the case and our team paralegal in a brainstorming session to figure out what the next step would be. On December 16, 2008 three of our clients had been released to Sarajevo. They had been flown by military plane to Sarajevo, but we still had Mr. Boumediene and Mr. Lahmar, who had succeeded on their habeas corpus writs but were sitting in cells—albeit better cells than they'd been in before but still sitting in cells—at Guantánamo. What I decided at that staff meeting was that we needed to find someone who would want to make a splashy play with the United States, someone who would essentially—I think a fairly artful term we used at the time—want to suck up to President Obama and the best candidate we could identify was President Nicolas Sarkozy.

It turns out that we were right, and following the meeting we identified a lawyer inside the French embassy and that lawyer happened to be a man named Philippe Cailloll. I wrote to Philippe by email, asking if I could come in and talk about the possibility that France might become involved in our clients' cases. In particular, we decided at this point that we would try to pitch Mr. Boumediene. This was a very long-fraught and difficult decision internally, whether

we would try to go with one client or two but our firm judgment was that it would be easier to do one than to do two. Mr. Boumediene, through his wife, also had family members who were living in France. Two of his wife's sisters were there, one with her husband and family and one on her own, having been divorced, was living there.

But we had someone who had been the plaintiff on the successful case against President Bush and had won. He had been the petitioner before the Supreme Court who had won. There happened to have been a president of Algeria in the past who was named Boumediene, so the name had a certain flair and marketability to it and we knew—or we at least suspected, based on the news reports that we had—that President Sarkozy would be very intent on making a positive impression with President Obama. You will recall, this was just after the inauguration, so the whole planet is essentially buzzing with the fact that the United States has a new president. That we have, in effect, elected a black man as president and the world by then was—in the world's perception—rid of President Bush—who simply did not make a good impression internationally because of his approach.

So the meeting was set up and on March 10 I went to the French embassy and met with Philippe and with another career French diplomat, whose portfolio included human rights in Guantánamo. His name was Laurent Delahousse and we had a fascinating meeting. I walked Laurent and Philippe through our client's case. We met for two and a half hours over lunch. I will tell you that, having worked on this case for years, the diplomatic dining room at the French embassy was the best meal I'd ever had on the case. Right down to the tuxedo-clad, white-towel-over-the-arm waiter, who stood there and who, very interestingly, when Mr. Delahousse asked him if

there was a menu available in English for "our friend," as Mr. Delahousse put it, the waiter simply looked down over his nose at me and said, "No." There was no menu outside of the menus in French.

Nevertheless, it was a wonderful lunch. But I will say that from the outset and continuing to today, the French diplomats have impressed us as the most professional, the most thoughtful, the most creative and dedicated—frankly, the best and most directly wired into their government of any that we've met with, and we've tended to try to meet with several to keep up contacts so that our clients would have a prospect for being released.

In addition to the meeting, we prepared summaries on the case in general and specifically on Mr. Boumediene. We delivered both to them in person, and as I walked out, PDF [portable document format] copies were emailed over to both of them so they would have materials to be able to transmit to Paris. We had some brief follow-up emails that were just clarifying issues, then we sat until April 1. So, three weeks from the tenth. I was sitting, again, with one of the same colleagues who had been in the meeting when we decided to approach the French, with Mr. Delahousse called. He said, "Rob, in two days, at Strasbourg, President Sarkozy will tell President Obama that we are going to accept Lakhdar." I will admit that my initial reaction was that it was April 1 and this was some really horrible way of introducing himself to us—that he was trying to show his sense of humor—but I asked a couple of questions and it became clear. He said the information had to be very closely held. It was only going to be communicated at senior levels. But, suddenly we were going to be opening up Europe in a way that I know both

the Bush administration had tried, unsuccessfully and that President Obama was extremely interested in at the time, to try to shrink the Guantánamo population.

So we waited and, in fact, the two presidents met in Strasbourg. The offer was made and accepted and we were off and running. It was interesting because you can see that it was a purely political decision. While we had been of a mind that Mr. Boumediene was a good client to sell for this reason—and I think the objective factors were of assistance—the timing was critical. Having a new president and having an initial meeting taught us how significant these leverage points would be. We've tried to use those on a going-forward basis with our clients. The process actually, on the political level, had outstripped the bureaucratic process by warp speed, so we had an EU country, subject to the Schengen visa requirements, having agreed to accept a prisoner from Guantánamo, having done no consultation with the other EU member states. We had an agreement between presidents with no investigation having been done, except for the information that we provided through the embassy.

Now we did learn—this began very, very intense and frequent discussions between us and our colleagues at the French embassy because it was now very early April and, of course, it wasn't until mid-May that Mr. Boumediene actually got on a plane and arrived in Paris. He, of course, was ready to go immediately. He was ready to leave. So the questions there were—let me try to start chronologically because these were both interesting and very different episodes.

President Sarkozy, while making a magnanimous gesture, was not, I would say, entirely on board with the plan. All he had focused on, I believe, was being able to make a good political offer to

President Obama, to establish some rapport there. Because one of the comments that the French press reported was a remark by President Sarkozy to the effect of "They have jails at Guantánamo, we have jails here in France. We're happy to take this man for President Obama." I immediately got a call from the embassy, assuring us that, no, he was speaking out of turn. He simply hadn't been informed and France had no intention of putting Mr. Boumediene into a cell. That he was going to be released and he was going to be free when he got there. Obviously, that remark got our attention. I think in many respects—and I won't elaborate on it but I think it showed why we picked President Sarkozy and why he was the horse to ride for this first burst.

Interestingly, we also knew that, at least in Europe, when it comes to relationships with the United States, the UK [United Kingdom] is first, then France and Germany stand shoulder-to-shoulder. So we also knew at this point, now, that there would immediately or very shortly be an opening with the Germans. At least we thought there would be because they tended to try to match the French one-for-one on issues with Washington. But that's for a later discussion.

We set up a conference call through the Justice Department with Mr. Boumediene—and by now we were able to have calls either on a non-privileged basis—they were all privileged but we were able to have calls set up in advance, either including classified information, in which case we would have to travel to Washington and use a secure phone line or, if there was going to be no classified information discussed, the call would be monitored by a member of the privilege review team. At the time, the privilege review team member was a man who had initially worked out of Washington and then later came to actually be stationed at Guantánamo, to assist other cases. We developed a very positive relationship with him. I think I told you earlier—our

approach with the rules in these cases always was if you bridle at them don't fight them. Understand them and learn how to work with them. Well, his job was to make sure that information that was truly classified didn't accidentally get into the public forum through the communications in these cases. We developed a very, very positive relationship with him. He was scrupulous and meticulous in terms of doing his job but time and time again he went out of his way to things quickly and turn them around for us, in part because we acted respectfully and within the rules all the time.

He set up a call and we worked with Felice Bezri, whom I believe you've spoken with, our case interpreter, and representatives of the French embassy and had a telephone call in which the French formally—with Ambassador Pierre Vimont, Mr. Delahousse, and I, on the telephone—formally invited him to come to France and he accepted over the telephone. It was very exciting. We spent several more weeks trying to work out details, with us very much trying to say, "Which plane? When can he go? Would it be a French military plane? Would it be an American military plane? Did the French want us to travel with Mr. Boumediene? Did they want him being alone?" In the end, a lot of the negotiations were very, very difficult and were ultimately between Paris and the American military command. Our military was fairly conservative and tied to concerns about security, despite the fact that a judge had now ruled that, essentially, these men had been held by accident for eight years and didn't pose a risk. The government never treated them that way.

So that when our first three clients—when Mr. Boudella, Mr. Ait Idir, and Mr. [Mohamed] Nechla were flown to Sarajevo, they were shackled for the whole flight. In the flight hold, they

were shackled. Essentially, their comment was, "The flight back was just like the flight over. We were treated like prisoners. We were held in our seats. We weren't allowed to see or hear anything," and they were essentially sent back. The French were fantastic about fighting for the fact that Mr. Boumediene was going to France. He'd been invited by the French government and he was not to be treated as a prisoner. Now that meant that they had to fight to not have goggles put on him. They had to fight to not have hearing muffling headphones put on him. They had to fight to not have his hands shackled. The government still insisted on having his feet shackled, so he still had to fly back to France on an American military plane and treated as if he were a prisoner but less so than would have been the case if it had not been for the diligence and the persistence of the French. Certainly, one could argue that there are reasons, in terms of protocol, for the United States to proceed that way. But, frankly, I think it was an overreach, as the facts of the case by then were quite clear.

I should backtrack a bit, just to say that shortly before Mr. Boumediene went to France—and for formality, the French wanted to meet him before he was taken into the country—reviewing the file was key. I think I told you we provided our information because of our FOIA litigation. We actually had several years of Mr. Boumediene's medical history, along with other things. We provided a very full workup in terms of where he had lived; what he had done; what his job had been; the case against him; the facts alleged against him; the facts that he used to rebut it—probably fifty or sixty pages of information, plus medical files, which our colleagues in Paris said contrasted very favorably to the four pages of paper that the United States deemed to send over, as a means of advocating that France accept Mr. Boumediene. So you had either the

bureaucratic package—which perhaps was very, very complete in its brevity, I don't know—and ours, where we tried to leave no stone unturned, to persuade them to accept him.

But in May—I think around May 14 or 15—Mr. Delahousse and I flew from Washington down to Guantánamo. I'm trying to remember how we flew down. We flew down on commercial aircraft. Our first run-in with American bureaucracy was with the TSA [Transportation Security Administration], which confiscated all of the French jams and jellies that Mr. Delahousse had in his bag, trying to bring with us. Which was a wonderful gesture—but jams and jellies just could not survive at [Washington] National Airport, so they ended up in the wastebasket with the TSA. We got to Florida, which is where we were to fly from, got to the ticket counter—and by now, of course, I've been very closely involved in working on the logistics, as had the defense and justice departments and the state departments. It was unusual to have a diplomat travel down this way and there were problems with Mr. Delahousse's paperwork. The government had screwed up. They didn't have him listed properly, so we spent an hour negotiating with the State Department case officer, on the telephone, at the ticket counter of a very small airline called Air Sunshine, in Fort Lauderdale. Ultimately got enough done so that they allowed him to get on the plane. We were met at the airport by military officers.

I will tell you that, in my thirty-plus visits to Guantánamo, three of the visits really stand out. The first one, when we were a novelty—I think I described some of that to you earlier—and the military escort assigned to us was extremely experienced and knowledgeable, at the time—actually met us at the airport and told us what would be happening; took the ferry back to the other side of the base, where he said he would meet us in the morning and that was very open.

Without exception, there has been no one to meet us on any other flight. No one cares. They're there in the morning, and if you show up they're there to help you. If you don't show up, they're just as happy.

But arriving with a diplomat was eye-opening. It was a very, very different experience. Keep in mind that this was a diplomat under a new president, who was suddenly, if things went well, about to open up Europe for other releases. So we were met by two military officers at the airport and they weren't just waiting at the security line; they met us at the plane and walked us over to the security line, in contrast to earlier. Now what they still weren't able to do—in the past we had hoped that there would have been better accommodations for Mr. Delahousse than there were for me. We were always allowed to stay only on the back side of the base. As I sit here, I don't recall where he was allowed to sleep, but I think it's possible that he may have been taken over to the other side of the base.

But what happened that was unusual was that, unlike on other occasions when we would arrive and not be able to meet with our clients, in the morning we were met—actually, he did sleep on the side of the base with me because we had our breakfast in the morning and we were then met by military escorts again, who came over to our side of the base to retrieve us. They came with a vehicle, which hadn't happened since the first trip. They brought us to the water's edge, where a Coast Guard speed boat was waiting. We were rigged up with our life jackets—and these are the speedboats—they're essentially a sixteen or eighteen-foot open boat with three or four hundred horsepower engines and fairly large machine guns mounted on the boats. Within four or five

minutes, compared to the thirty-minute ferry ride, we were to a special dock—not the normal ferry dock—where another Navy vehicle was waiting for us, with further military escorts.

We were put into that vehicle; we were taken to a facility where badges were distributed—because even the diplomats were required to obtain badges while we were there. Then we were driven to the Subway. Normally, we pick up food for our clients and we'd bring it in—and this was fairly important because, at this time, Mr. Boumediene had been on a hunger strike for about thirty months. He had been fed only through a nasal tube, with one or two cans of Ensure twice a day, for those thirty months. He was fairly thin and fairly weak. One of the things that the French had asked, in their very diplomatic way, was that before he came to France, if he would mind making an adjustment—which meant, "Will you start eating?"

So we stopped at the Subway because we were picking up beans and rice. We had done some consulting with dietary specialists and gastroenterology medical doctors here at the Beth Israel Medical Center. They had been providing us with pro bono medical consults throughout our case, really and continue to support us whenever we need something. We had been advised on what he should eat, how much he should eat and what pace he should eat. So we got three servings of beans and rice, one for Mr. Delahousse, one for me, and one for Mr. Boumediene. We were driven to the base, where we had a nicer-than-normal room to meet in. We met with Mr. Boumediene, who sat with us and took his first meal in thirty months, of beans and rice—which was, of course, a very important show of good faith toward the French.

While we sat there, we were allowed to make a phone call. Mr. Boumediene's wife was calling from the airport in Algeria because the French government had arranged to have his wife and his daughters released from Algeria. This was significant because when Mr. Boumediene was seized, the Algerian government had taken away the travel documents of both families who were there—because they were responding to what, at the time, were the allegations of the United States that these men had engaged in inappropriate conduct and the Algerian government had no problem stripping people of their travel documents. So, through the French consulate, Mrs. Boumediene and her daughters were being driven to an airport near where they lived, put on a French commercial aircraft and that day were being flown to Paris. This was the day before he was to be released.

As you can imagine, everything was fairly time-intensive and it was necessary for us to keep asking, "When can we go? When can we visit him? When will he be released?" By the time the French had actually worked out the details between their EU colleagues to set up a protocol for future people, they had to allow a two-week consulting period to go by, so that someone could express a veto if they wanted to express a veto and no one did. Then we set up our meeting with Lakhdar present, being given a portable telephone and he was able to speak to his wife for the first time in eight years, while we were there. She was being escorted as they were talking. Mr. Delahousse took me by the shoulder, we walked across the room and he said, "There are two remarkable things going on, one of which you understand and one you don't. First, it's wonderful to be able to have this call with Lakhdar, with his wife, for the first time. That's very remarkable. But the second thing is that the job of the director of the French consulate, near Mr. Boumediene's family, is to keep Algerians from getting into France." He said he's never before

been assigned the task of going out, collecting a family, bringing them to the airport and putting them on a plane.

So it was just a remarkable experience. Because of the significance of having Mr. Delahousse with me, we were regularly interrupted by officers coming by to simply introduce themselves and thank him for coming. At one point, just as we were coming back from our lunch break, the camp commander came in—the Guantánamo, joint task force commander—came in with the senior judge advocate. Mr. Delahousse, to his credit—because he didn't know that this would be prohibited, asked if we could take some pictures. The officers paused for a second—and you could tell that his was not in the playbook—and they said, "Sure. Why not?" Mr. Delahousse started offering them assurances about only taking a few. I just took him by the side and said, "The answer can't get any better than yes."

So we went into the next room and I have in my office now the only pictures that were ever taken of lawyers and a prisoner and a diplomat at Guantánamo, in all the years of the case. You can see Mr. Boumediene essentially beaming at the prospect that he's going to be home. He's thin and he's weak but you can see the joy and relief in his face—because by now he'd spoken with his children for the first time in eight years. He'd spoken with his wife and he realized that—the one thing his lawyers had assured him about for four years, that wouldn't happen—that a judge was going to be responsible for him getting his freedom—had actually happened. That a judicial order had resulted in his release from Guantánamo.

That was a great meeting. We did not fly with him and the French were under some orders not to give us too many details of what happened. They honored that to the extent they needed to but we had also worked with a former colleague in our Brussels office, who now had a legal practice in Paris, who was serving as our local counsel. He had been involved in discussions and negotiations with the French government to make arrangements for the logistics in being on the ground—what was going to happen; where Mr. Boumediene was going to go; where his family would be housed, initially. So we knew fairly certainly when things were going to happen because David was in touch with us very regularly by text and he essentially said, "I've been told to be here at such-and-such an hour," so we knew the day.

They traveled from Paris in a high-security military convoy, which included—he was introduced to Mrs. Boumediene and their daughters. They traveled in, essentially, the kind of security limousine that you see in our government mobile convoys, carrying VIPs [very important persons]. They went with sirens wailing through the streets of Paris out to a military airport in the Paris suburbs, where they waited. Because David was with them, we had a very, very regular stream of text messages and emails as to what was happening and who was coming. I should point out, we had that same advantage with our clients in Sarajevo when they landed, through our contacts there. We actually had lined up pro bono counsel there too. Looking back through these messages, over time, they're very moving and very compelling because you see people writing about the plane coming into view, the door opening, and the man's first view of freedom in years and families' first opportunities to see their fathers and husbands.

But we had David on the ground and he was able to give us assurances that Lakhdar was able to walk off the plane on his own. He was sent, with his full medical workup on a CD—one of the things we had asked the French to really insist on was that they get his full workup of medical records because there was certainly a lot going on at the base. But Mr. Boumediene did not get any of his personal property back; it was all lost. His wedding ring was lost. His passports were lost. His working papers were lost. Anything that was collected from him before he went to Guantánamo somehow disappeared in the intervening years. He was given a plastic trash bag that contained hundreds of letters that his family had written, that had never been delivered to him. This, to me, remains one of the most inhumane elements of what we've done to these men at Guantánamo. When we do deliver mail to them, historically it has been censored in such an arbitrary and random way that it makes no sense. Occasionally, in our experience, letters—I think I told you this before—letters would be written—the same letter from different people and the whole letter would get through eventually and you could really see, then, the arbitrary nature of the censoring that had happened.

But Mr. Boumediene went from the airport—he was given some time to spend alone with his wife and daughters and then they were driven, in convoy, from the military airport to a military hospital. His wife and family were given rooms in a hotel a few minutes' walk from the hospital. He stayed there for his first two weeks while doctors examined him fully, spoke with him, and started him on the course of actually getting his digestive system fully functional again so he would have the strength to move around. But we had the ability to speak with him by telephone, actually, immediately upon his landing—because David was there with his cellphone, so we were able to check in and confirm with him—which was very, very reassuring in all of these

releases. A couple of weeks after the picture we took of him in Guantánamo—I have this beaming picture of Lakhdar standing in a flower-filled park, with green in the background, in Paris. It's a fantastic juxtaposition.

Q: Not the end of the story but a place to break and go back now to Mr. Lahmar—who is still there.

Kirsch: Mr. Lahmar was still there and presented more challenges because his only contacts were with Bosnia or with Algeria. He did not want to go back to Algeria; he ideally wanted to be reunited with his family, which meant that we could go to Europe. As soon as the French agreed to accept Mr. Boumediene, we put together the same package of information on behalf of Mr. Lahmar and submitted that and it started making its way up the chain of the French embassy, into Paris.

By this time, the French bureaucracy had caught up with the process of Guantánamo releases. I think it's safe to say that the Interior Ministry in France was not in favor of the French government accepting anyone from Guantánamo, but once President Sarkozy had made the offer to President Obama, there was nothing that could be done. The deal was done and they essentially got rolled or outflanked, depending upon your perspective. But the French bureaucracy being what it is—which is, I suppose, the platonic ideal of bureaucracy in the world—they were not going to let this happen again and the security side of the government really lined up against Mr. Lahmar coming to France. They didn't have any specific reason but there were three factors that were cited, initially. Number one, he had no contacts there—and he

didn't. I think Saber had spent about thirty-six hours in France as a fourteen-year-old, on some sort of a school trip. You can make of that as much as you want; it's still less than two days in France. Let me continue on.

So we were negotiating with the governments and we were getting pushback with respect to him. Secondly, he was from Algeria and the word that the French uniformly use—and it's just a pregnant word—is that there is a "complicated" relationship between France and Algeria. "Complicated" can mean many things but if you're a man from Algeria and Guantánamo, "complicated" is not good. Because there had been, in connection with Mr. Boumediene, discussions between France and Algeria about the decision by France to accept him. There were representations made about support and non-opposition, but feelings at the sovereign level got hurt. Certainly, even though the Algerian government was always very supportive of us and with us—and we had also made very clear—I had immediately gone to the Algerian embassy to make sure they knew what was happening, as soon as we were cleared to do it—there were issues there. So the fact that this was another Algerian man was going to pose a problem for them and this was something that was offered up.

The third thing was simply the security interest. The interior ministry took the position that one man from Guantánamo was one too many and if we brought two men back from the same case, if there really was any issue of their conduct that was improper, that the French would be setting themselves up for trouble by bringing in two men who might have known each other before. It was all very much about the security services seeing ghosts where there was nothing present.

So we went through several months, after Lakhdar was there in May, where the French government essentially demurred. Eventually, we got an informal response saying that they were going to say no. We knew that was happening. At about the same time, Judge Leon called us into court for an update on what was happening. He was essentially saying, "In November I ordered the United States to do everything that could be done to get these men out. It's now been more than six months. The Justice Department—I want to know what's happening; why things aren't going on here." Well, what we knew from conversations that we had had in Sarajevo, and what we knew based on reports that were probably improperly leaked to Mr. Lahmar from the ICRC [International Committee of the Red Cross], was that the United States planned on releasing him to Bosnia. At this point, he didn't want to go to Bosnia.

In an earlier meeting with him, shortly after Mr. Boumediene was released, we had delivered the text of a letter from Mr. Lahmar, to put into his words and to add his own, essentially writing to Bernard Kouchner—who, at the time, was the French foreign minister—introducing himself and asking that he be permitted to go to France. Talking about his interest in France and love of the country as a beacon on the hill. It was a beautifully written letter by a man who had been held illegally, by that point, eight years and wanted to be released. So that letter is percolating around out there but the other side of the French government, in the security ministry, coming from the president's office, was, "No. We've done enough so far. Let others take more of an active role."

When we got into court, I was pressing very hard for the government to come clean about what was happening. The Justice Department was taking the position that it didn't have to say anything and that it was not free to talk about negotiations that were occurring. So we did a lot of

this discussion in chambers, with things that at the time couldn't really be talked about and were considered to be protected information. But we were quite sure that there were negotiations going on and I told Judge Leon that I wanted to go on the record and express our concerns and dissatisfaction and Judge Leon wanted none of that. He didn't want anything in open session that would have been critical of the government at that point.

The Justice Department, at the time, denied that the United States was trying to release Mr. Lahmar, against his will, to Bosnia. I think they also would have been open to releasing him to Algeria and the position they took in court was that if he would go to Algeria, he could be released tomorrow. The one thing the government had forgotten, though, was that when he was a lawyer for a congressional committee, Judge Leon had spent some time in Algeria and it had essentially left him—the only thing in the case that we ever found that he was sympathetic with our clients on was the desire not to return to Algeria. It was borne of the fact that he had been there for a time and had been left with an impression that it probably was a place you might not want to live in the long term.

So Judge Leon, I believe, kept me from going on the record publicly with anything. The Justice Department denied the discussions with Bosnia but we learned last year, through Mr. [Julian P.] Assange and his WikiLeaks program, that, in fact, everything we had suspected was occurring. You can see very, very detailed diplomatic cables describing the pressure that the United States tried to assert over the Bosnian government and the resistance that the Bosnian government took to that, essentially showing that because he did not have citizenship, the Bosnians did not want to let him back into the country—which was fine with us because he didn't want to go back there.

At about this time, Mr. Lahmar was told that he was going to be going back to Bosnia and he resisted. He told them that he wouldn't leave and at that point we had taken the position—the United States denied that this happened—but we took the position that he was beaten up. He was extracted from his cell and was being put into an isolation environment. His clothes were literally cut off him while he was being held up, suspended by guards, then he was dropped on the floor and violence—he essentially suffered an assault from the guards. Now we wrote up in great detail that this had happened. He showed us evidence on his body that was consistent with force being applied to him and he complained about it. It's clear that something happened. The United States never said that nothing happened. The United States always said that nothing "inappropriate" happened—which could mean that they took the position that they needed to restrain him for something and the guards denied having been violent against him.

Nevertheless, we filed a complaint with the joint task force immediately and then wrote up what had happened and communicated it back to the French, saying, "This is what's happened." What Mr. Lahmar had said was, "I don't want to go back to Bosnia. I have an application in with Dr. Kouchner to go to France and I want to go to France. I'll wait. I'll wait as long as I have to, to be admitted to France." While the French had said no, Dr. Kouchner saw the write-up on what had happened, we sent it over to him and in what remains another totally unexpected, sweeping humanitarian gesture, he changed the position of the French government and they agreed to accept Mr. Lahmar. They accepted him essentially because he'd suffered at the hands of guards because he had expressed that he wanted to go to France. I think the French have really stood out

in this as the beacons for freedom that you have always expected the French government to be, over time.

So that happened in the summer of 2009. We worked out the details and then there was another round of phone calls with Ambassador Vimont—by now a new diplomat. I'm going to tell you about the flight to Guantánamo again, only because it's worth memorializing in the annals of this case how unfortunately incompetent our government can be at times. If you remember, I mentioned earlier than on my trip with Mr. Delahousse, while we were treated like princes at Guantánamo, he was not properly in the document manifest to get down there. In fact, when we went to the airport to leave, he still wasn't on the manifest properly and we spent another hour at the ticket counter to get him out, requiring the intervention of the command staff at Guantánamo, to authorize that he be put on a plane.

Our trip to see Mr. Lahmar was set up so that we were flying on a military flight that was leaving, I believe, at 6:00 in the morning from Baltimore Washington airport, north of Washington. We should have arrived at Guantánamo at about 9:00 or 9:30 in the morning, then our plan was to spend the afternoon with Mr. Lahmar. Then we would board a plane at 8:00 the next morning, a commercial flight, and make our way back to Washington. Because it's the military, a flight that leaves at 6:00 means that you have to be at the ticket counter—which was out at BWI [Baltimore Washington International Airport]. It flew out of the military desk at BWI. They insisted that you be at the ticket counter at 4:00 in the morning. Just because of the way these things work, I don't think we got to the hotel near the airport until about 11:00 the night before.

So we were going to get a relatively short period of sleep and up to now because of the issues with Mr. Delahousse, I had been very, very emphatic with the Defense Department, with the Justice Department and, in fact, with my secretary—"Let's make sure that the paperwork is done properly so that when I arrive at the airport with the diplomats, everything is in place." One of the last things I recall doing, shortly before leaving Boston to go to Washington, was to ask my secretary, "Is everything in place?" and she sent me the email that she had gotten back from the State Department, saying that, "We have checked with the Defense Department. We're all set. He can get on the plane." We had that email and that was from someone at DOD [Department of Defense].

We got to the airport desk at 4:00 in the morning and there were two military staff members there—essentially ticket agents—and I went over. Probably within ninety seconds I had my boarding pass and seat assignment and was waiting. I went over to my French colleague and I stood there. His name was Aurelien Lechevallier. Aurelien was waiting and they couldn't find his name on the manifest. This was now for a military flight. We were not flying commercially anymore. This was a military flight out of BWI. So I asked that we go pull out the documents. To make a long story short, the only document that anyone had actually transmitted—despite my insistence to the Defense Department and the State Department and the Justice Department and my secretary—was this "conclusory" email that said everything was all set. Unfortunately, it wasn't.

So here we are, starting at 4:30 in the morning on a Saturday, starting to go up the chain of command, first getting the situation officer at the State Department on the telephone—because that was the initial contact that Aurelien had and we called there. That person knew of the situation officer at the Pentagon. So by 5:00 on a Saturday morning we were speaking with sort of a disaster team at the Pentagon and the State Department, trying to get Aurelien onto the plane with me. The plane was scheduled to leave at 6:00. By 5:15 or 5:30 we're now going up the chain of command because no one can make the decision to put him on the plane. Now we're starting to go up the chain of command to find the officer who's in charge of the flights, and by luck the plane was leaving late because one of the soldiers who was on the flight and had already checked in was asleep someplace at the airport and they couldn't find him. So while they're searching the airport for this GI [soldier]—who, fortunately for us, is off on his own—we're scrambling back and forth, trying to get through. By the time we finally got an officer in the chain of command, responsible for the flights, to agree to let us on the plane, the plane had pulled away. Which meant that we had to get the officer in charge of the contracting system—because once the plane pulls away, it's a contract extra to bring it back to the gate to pick someone up.

This was between 4:30 and 6:00 AM on a Saturday morning. I will admit—at one point we're standing at the ticket counter and Aurelien is on the telephone. This poor sergeant is going back and forth and we had three active cellphones—because we had the Pentagon on and we had the State Department and we had the chain of command for the military contracts—I was working two cellphones at once because Aurelien at some point just said, "Could you try to do this? My English is good but they're driving me crazy with this bureaucracy."

To make a long story short, we ultimately did not get on that flight. We spent two hours at the BWI airport on a Saturday morning not to get on the plane. At some point, seeing the writing on the wall, Aurelien and I went and sat at a small restaurant at the airport to get something to eat, since we clearly weren't getting down there. I used my BlackBerry and telephone to learn whether we could travel from Washington to Florida—whether there was a Florida flight on the small airline, that I told you about earlier, that was traveling to the base. In fact, there were flights, there were tickets, so I called our Justice Department contact—that was the third phone—and essentially said, "We're going to go, but you have to get us assurances that when we arrive,"—which would now be at 9:00 at night, as opposed to 9:00 in the morning and we had an 8:00 AM flight out the next day—"that we'll be allowed to see Mr. Lahmar. And you need to make sure that Mr. Lahmar knows—he's been expecting us—that we're going to be late." Because one of the problems at the base is that anytime something goes wrong, the prisoners are never told. They're either left hanging or no one retrieves them or they're allowed to stay in a room alone, with no one to talk to, for hours at a time.

So Aurelien and I drove back to his house, got his car, we went from BWI to Bethesda, he said goodbye, again, to his family. Now they were all awake. They hadn't been awake when he'd left late the night before. We went to National Airport, where I'd made reservations for us with U.S. Airways on a flight to Fort Lauderdale. We got on a plane and flew to Fort Lauderdale, went from there immediately over to the ticket counter for Air Sunshine, we paid for our tickets and got on the plane. The military had managed to get all the approvals we needed through very, very quickly after this major screw-up and we arrived at 9:00 at night. Once again—now we really were met by military officers at the plane because they took us from the airport into a van

immediately, down to the water. We were taken across the water and by luck, this time, we had actually brought food with us for Mr. Lahmar. We had arranged to have take-out food brought, a nice lamb and rice dish, which was with me on dry ice in the bag. We brought the lamb and rice over. The officers escorted us right to the base and at 10:00 at night; we started our interview of Saber Lahmar for his admission into France.

I should point out—I forgot about this when we were speaking about Mr. Boumediene—but in both cases, the French had gone onto the web, onto our website that has information about our clients and has photographs, albeit 2001 photographs of them, and they had downloaded the photographs and superimposed them on a visa, so that when we arrived at the base, Mr. Delahousse gave Mr. Boumediene his visa. He made up something that they had made up from online services and it was delivered to him so that he would have his documents. You and I may think that's a wonderful gesture but when Mr. Ait Idir, Nechla, and Boudella arrived in Sarajevo, they were taken aside by civil authorities immediately because they didn't have any documents with them to be re-admitted to Sarajevo. So we may think that it's kind of a stupid issue—and it was treated as a fairly bureaucratic one—but possessing documents, when you're crossing a border is still significant.

So the trip back from Guantánamo was a little bit bleary because we, literally, had now been up since 4:00 in the morning—actually 3:45 or 3:30—to get to the airport by 4:00. We met with Mr. Lahmar until about 1:00 AM and arrived back, after being shuttled across the water, by 2:00. My colleague Aurelien for some reason decided he wanted to take the military up on the offer to give him a tour of the base and since we had an 8:00 flight, he had to be with them at 5:30 in the

morning. So he slept for about three hours. I took the full four hours of sleep at that point, to get up at 6:00, to go to the airport. But what it meant was that the plane wouldn't leave without him. We at least knew that they had the ability to shut the airport and hold that flight from leaving until he got here. They drove him around, showed him what was Guantánamo, brought him to the plane, we got back on and reached Florida three hours later, where I managed to leave my laptop at the TSA counter because I was so tired from flying back. That was the story of Mr. Lahmar's repatriation, right through the beating and the drama and the continued screw-up of our defense bureaucracy with travel arrangements.

Q: One more, who is still there.

Kirsch: [Belkacem] Bensayah.

Q: Bensayah. He's still there.

Kirsch: He is.

Q: You did not handle that case; your colleague did?

Kirsch: No, no. We have this case. We treated everyone together, but when we closed with Judge Leon we decided to break the case down into Mr. Bensayah and the others, just because the allegations that the government had made against him were different. In some respects, the allegations against the other five were derivative of the ones that were made against Mr.

Bensayah. The government claimed that he had been planning to travel to Afghanistan and that he had been planning to help others to go to and from Afghanistan. The others were among those who were planning to go, and even though the court found that none of the others were planning to go and that there had not been any discussion of it, Judge Leon still elected to allow the government to hold Mr. Bensayah.

Q: So the next step was to appeal that?

Kirsch: We appealed immediately and the case was appealed—I guess we had our decision in November and in December we filed a notice of appeal for his case. The appeal was argued, I believe, in the spring of 2010.

Q: In 2009.

Kirsch: The argument was 2009. The decision wasn't until June of 2010. So we argued the case to a fairly mixed panel and our colleague, Mark Fleming, handled the argument—

Q: I still have him in my notes.

Kirsch: A brilliant appellate lawyer. He just did an outstanding job. The panel, which took all those many months to issue its decision, was unanimous—which, as you know, if you've looked at the Guantánamo cases, is rare, except in cases of an aligned, conservative panel, which has tended to cut against the men lately. But this was a panel with a judge from the extreme right, a

judge from the extreme left and a judge from, these days, the extreme center, and they were unanimous. Now, the decision was narrow—which is what you would expect with a unanimous decision—but the point that we argued there, which was the same position that we took with Judge Leon, was really two or three-pronged. It was that the evidence did not show that Mr. Bensayah had been planning—it wasn't even quite planning. It was more thinking about going to Afghanistan or that he was thinking about helping others go to or from Afghanistan. Our second point was that even if the evidence had shown that, then it wouldn't be sufficient as a basis for holding someone in a habeas corpus proceeding. The appeals court panel agreed with us. It came down squarely saying that, "We've looked at what was there and the evidence does not support the judge's findings. The evidence isn't there."

Q: Now a lot of that was argued secretly.

Kirsch: The details were argued in a closed argument.

Q: I saw the decision and a lot of it is redacted.

Kirsch: Yes.

Q: In the normal course of events, will it ever be opened?

Kirsch: It will have to be declassified before it's opened. I don't know. It would probably have to come at a point when the country was treating the kind of information that would be in the

opinion more openly than it would have been treating it now. Some of our briefs were certainly filed in the case with classified and open sections to them. A lot of the specific evidence that supports the conclusions that I just summarized to you—they were all based on information that we couldn't talk about outside of the courtroom, in terms of the details. But the conclusions were public. It just wasn't there.

Q: The last paragraph was just resounding.

Kirsch: It was all that we'd hoped for, frankly.

Q: But he's still there.

Kirsch: He's still there. Now his case—it was quite interesting. When the case was tried, the men were segregated. There were five in one room and one in the other. But the one who was held on his own was Mr. Lahmar. Mr. Lahmar had been held separately from the other men for the last two or three years of being held at Guantánamo. This was the ultimate illustration of no-good-deed-goes-unpunished. There was a commander in charge of the joint task force who, at one point, had the idea of trying to improve morale and prisoner discipline by setting up an intermediary body. It was called the "Council of the Sheiks." Did we talk about this last time?

Q: No, no. Other people have talked about it.

Kirsch: Well, it was interesting because two of our six clients were asked to serve on it. Mr. Ait Idir—who is in Bosnia now, who is very intelligent, has a good grasp of English and is probably one of the most street-smart human beings you'll meet—was invited and declined. He essentially said, "No good will come of this. I don't have any authority over these men. They don't have any obligation to me. Why should I? This isn't right." What he told us was, "I knew something would go wrong."

Mr. Lahmar—Saber has more ego than he does street smarts and he was very happy being treated as one of the six sheiks. In fact, these men met together to consult—which was something that was not allowed among the prisoners—and they met with the command staff a couple of times, which was unusual. But, unfortunately, while I think the officers had anticipated that this was going to be a means of disseminating information and instilling discipline in the prisoners, in fact it became a means for articulating grievances and it was disbanded almost as quickly as it had been formed. Unfortunately, having now bestowed this imprimatur of authority on these men, the command staff punished all six—the six who had stepped forward to volunteer were all held in isolation after that.

So Mr. Lahmar suffered immensely. He was in a very, very—I would say—clinically depressed state from being held on his own, with no human contact, except the guards who were bringing him food every day, for more than a year. We had a period when we were hardly able to see him. Because of this isolation, the five-to-one ratio—so that Mr. Bensayah was allowed to sit with the other men. The interesting thing was that but for occasional periods, when they were housed together, these men had not seen each other in years. In fact, Mr. Bensayah only knew Mr.

Boumediene. He had known Mr. Boumediene; he didn't know any of the other three and he'd met Mr. Lahmar. Mr. Lahmar didn't know any of the other five, except at Guantánamo but for the link through Mr. Bensayah, who knew Mr. Boumediene. But when it came to have the day for us to make our opening arguments, the five were allowed to sit in a room together. Food was brought in and they were allowed to talk. I think it was one of their better days—aside from the fact that they were actually getting to hear their case open up. But Mr. Lahmar was held separately.

Mr. Bensayah had actually been in the room with four other men when Judge Leon's decision was read and he lost his case. I think that was quite devastating. Honestly, there was some concern by him and by his family that we must have done something to carve them out or give better treatment to the others because they didn't understand. We still aren't in a position to explain in detail what the difference might be, if there is any, and the evidence between them we could explain in general terms, the difference in the allegations that were made. But his case was more challenging because of these aspects to it. I don't think there was any more substance to the government's case but it looked as if it had more stuff to it and it looked as if there was more evidence. The question was whether any of the evidence should be given any weight at all.

Q: What's the impediment to his repatriation? Congress, obviously.

Kirsch: Well, let me step back. We'd been trying to repatriate him immediately but it also became clear that as long as the negative habeas corpus decision sat out there, it just wasn't going to sell. So while we talked to embassies about the fact that he was there, we essentially said,

"We're confident in what's going to happen in the appeals court. This is someone that we want you to be interested in and we'll be back when the appeals court comes out." Now in January of 2010, the president's inter-agency task force completed its work and while I can't talk about their decisions with respect to any man—because that's still treated as classified information—I can tell you that on the day after they finished their work we got a phone call with the Justice and the State Departments and I can tell you that since that day we've been working cooperatively with them to repatriate Mr. Bensayah. Once we got that call, I was able to reach out to the French and inform them of the call and what was happening and to communicate with the Bosnians and tell them that.

Then in June, when the favorable appellate court decision came out, at that point we then put our documents together because we now essentially had the package that we would need to be able to sell Mr. Bensayah because the appeals panel had essentially said you put all the evidence back in and there's nothing there. What they didn't do, unfortunately, was order him to be given a writ [of habeas corpus]. Ultimately, that was what we had hoped for but we knew it was a stretch. It's much more common, of course, for the case to be sent back with an order and right now the case—we have extended the date on which we or the government would have to file for reconsideration of the case. It remains before the circuit. The mandate has not been issued in that case yet, while we negotiate and try to arrange for him to come out because it would not take much evidence for Judge Leon to make another adverse decision.

The government claims it intends to retry the case, if given an opportunity, although I'm not sure that that's true. Since we have been working cooperatively with the State Department to try to

repatriate him, one might wonder why the Justice Department would want to bother doing anything more. But I think they don't want to lose again, so our position has been to work cooperatively with them, to keep the decision up with the appeals court and not run a risk or impose the work on anyone, to have to consider putting a case together again at the trial court level.

Q: Does he understand this complicated situation?

Kirsch: I don't think entirely that he does. We've explained it several times and while he gets who's spoken with whom and where the case is, he has asked many times to have his day in court, being just convinced that Judge Leon will see that he made a mistake before and that he'll let him out. But I think the truth is that the state of the law because of the decisions rendered by the circuit since our decision has so undermined our original victory in the Supreme Court that you or I could lose a habeas corpus case against us right now. It just takes so little to hold someone. So the position that my analysis—not getting into any advice that I may have given—is that there is nothing to gain from another trial and everything to lose. Right now we have such a favorable appeals decision that we don't need a victory down below.

Q: When you started out, you talked about the serendipity of timing. In the whole case, there is a serendipity of timing. It's those early days of Obama, before things began to close down. You got five out. Will you ever get anybody else out? A couple others are gone. But the situation just is on hold.

Kirsch: Yes. I think it's very unfortunate right now. In truth, it's because of the lack of preparedness or the naiveté of the staff that was and should have been supporting President Obama. He made a strategic mistake, however principled and appropriate it may have been, in deciding that he was going to bring Uighurs to the United States. It was simply a strategic mistake not to confer with Congress and to bring legislature on board before cutting that deal. So when it was announced, when congressmen learned of this through an announcement, he was already suffering with Congress cutting his feet and his ankles off in terms of his ability to do anything with Guantánamo, and it was only a question of how far up his leg they were going to go for the next surgery. Essentially, he's powerless right now to get people out.

Now, in truth, he's issued signing statements indicating that he believes that Congress is invading the province of the executive. I think he's right and they are but who wants to go through that fight to try to get someone out. Unfortunately, the lack of relationship with Congress and the reactionary and adversarial nature that Congress has brought to this has been very, very unfortunate.

Q: Have you been in touch with the five men who did get out?

Kirsch: Very regularly, yes. We speak less frequently to Mr. Lahmar now and Mr. Nechla, who's in Algeria, we speak to less. But, certainly, Mr. Ait Idir and Mr. Boumediene every six to ten weeks we're in touch, at a minimum. I've visited Mr. Boudella and Mr. Ait Idir in Sarajevo. Steve has visited with them there. We've had three or four of us visit with Mr. Boumediene in France. I don't think anyone has seen Mr. Lahmar yet. Mr. Lahmar's family fell apart, as he

was—when he finally got out of Guantánamo, he's been divorced from his wife and it was fairly traumatic for him. From what I've seen, the men who have done the best are the ones who have had families to return to. Interestingly, the four men who have gone back to their families have four new children. They've essentially tried to resume as normal a life as they could after this eight-year break, caused by their imprisonment at Guantánamo.

Q: Boumediene—from the *New York Times*—the two op-ed pieces in the *New York Times*—but there's no sense of the others in Bosnia—what happened to them.

Kirsch: Lakhdar's situation and Saber's, in France, to some degree, is that they don't fit in the system. People can come to France through the normal immigration process, people can come to France through an asylum process, but there just isn't a category in France "because the president invited me." So what Lakhdar has explained is that he can get almost nothing done in the normal system because he's constantly having to re-explain his entire case to the next French bureaucrat when he's trying to get either his visa status or documentation straightened out. He is taken care of. The French are providing housing. The French are providing a stipend. The French provide vocational training. They've really been marvelous. The men have medical insurance. It's much more than a lot of other prisoners are getting when they're released.

In Bosnia, the only government service that our clients get is the additional attention from the internal security detail that shows up at their home once in a while and asks them questions. Other than that, they've gotten absolutely no assistance. We monitor how they're doing pretty regularly. Mr. Ait Idir and Mr. Boudella are about to receive or may have received, a gift. An

Austrian diplomat named Wolfgang Petrich, who was actually in Bosnia at the time that the men were seized, in the capacity of a UN official. He tried to get the Austrian government to accept men from Guantánamo. Failing that, he tried to get them to help fund the release to another country. Failing that, he actually launched a web-based campaign and raised twenty or thirty thousand euros for our clients, which he's transferring to them in the form of venture capital, to start a business. Because none of these men, of course, can get jobs. No one will hire them, no one will loan them any money, so he has arranged for this fundraising, which they're using. They've gotten the documentation they need and they're opening a printing shop in Sarajevo. So they will do better with this, but up until now they've suffered. They've been there largely living off the fact that their wives had jobs and that's what was supporting their family, which was very debilitating for Muslim men—to not be able to contribute to the welfare of their families. So Guantánamo may be behind them but it has not left them.

Q: Right. When you look back on the whole experience—Guantánamo may be behind you, yet it still lingers on. What do you think about your role, the way in which the seamless web of history unfolds?

Kirsch: Well, certainly—what day is today? The twenty-eighth. It was eight years ago today that the Supreme Court issued to the *Rasul* decision, so it was eight years ago today that I walked down to Steve's office and said, "I'll do this if you will," and it's been a huge piece of our lives for the past eight years. For me, eye-opening, life-changing in many respects. It's opened up a whole new area of life experience and professional experience. I did not ever think I would be an expert in the use of *ex parte*, classified evidence in the D.C. Circuit but it's certainly something

that we've learned to do. Or that I would have any experience dealing with foreign governments and embassies but it's something we've done extensively, particularly over the last four years. I certainly would do it again.

It was very disruptive to my personal life. It was very disruptive to my client work and professional life, but it was unquestionably the right thing to do. It's why we become lawyers. We have the advantages and opportunities that this society gives us. With that comes the obligation to use the skills when the society needs them, whether it knows it needs those skills or not. We're fortunate to have the support of a firm like this, which has underwritten this eight-year effort that's still not over and it still results in us spending thousands and thousands of dollars every year out of our pockets.

Q: That's an interesting question because, certainly, when you began, the firm couldn't imagine that it would go on and on and on and grow and grow and grow.

Kirsch: Fortunately, it's shrunken a bit. The case was very expensive initially because of many translators and many, many trips to Cuba. The price has shrunk but it doesn't go away. I'm in Washington for many weeks of the year and follow-up meetings because I've found that there simply is no substitute for in-person meetings with diplomatic officials to try to build your relationships with them. We are engaged in that now, trying to get our feet in as many doors as we can for Mr. Bensayah. The truth is because of the perception that the president may or may not be in office in January, not much is likely to happen on the diplomatic front until after the election. We're putting pieces in order and preparing information to keep Mr. Bensayah informed

but we don't expect any miracles in the next four or five months. Depending on how the election goes, we'll have a plan no matter what happens and we'll try to use it no matter what happens.

Q: Has there been grumbling in the firm?

Kirsch: I doubt there is anymore. I'm sure at the time we took the case—you have to remember, nothing was known about Guantánamo really. The only information that was available publicly was the incantation from Secretary Rumsfeld about them being the "worst of the worst," which, of course, turned out to be either horribly ill-informed or just a blatant lie. The firm had concerns, justifiably, about whether this would cost us clients. We have a policy on accepting politically controversial cases. That requires a consultation of our management committee before someone can open a case. This case went through that process and to the firm's credit we probably said we wanted to take the case by the afternoon of the twenty-eighth, maybe even sooner. I forget. By the next day, we were scheduling a conference call, so the firm went through all of this in about twenty-four hours, which was pretty fast for such a significant decision. But it was a huge undertaking.

Q: Well, I've reached the end of the questions I have. Do you have anything you want to add?

Kirsch: I don't know. I think that some of the lessons to be drawn from here are—I suppose, as a country—how similar we are to other countries in the way that we respond when we act through fear and defense; that we responded with something like Guantánamo because we were afraid

and we were responding to what had happened in New York and in Washington and in Pennsylvania.

In truth, none of these men had any connection to that and we didn't have the ability to step back. It's a real lesson in why it's important to maintain our standards and our principles and why, even though there may appear to be more reasons for making exceptions to those standards and principles under the exigencies of things like September 11, that in truth there never are. Because once you make those exceptions, you'll end up with something like the camps where Japanese citizens were held during World War II or the kind of facilities that we are still enduring at Guantánamo—which is costing tens if not hundreds of thousands of dollars per man, per year. For ninety of those men, we know that the government wants to release them and has wanted to release them for two years, all because of a poor decision.

Now, we also have to remember that if President Bush had had better lawyers or gotten better legal advice, they wouldn't have located this facility at Guantánamo and none of these men ever would have had any rights. There is a part of me that questions whether that would have been easier for people to get out of a facility that was less notorious because there would have been less controversy and less litigation about it. The profile of Guantánamo helped us get to where we are, but the profile of Guantánamo also put the Congress where it is with respect to the president. I don't know what the answer to the question is but I'm mindful that it's something to think about.

Q: On the other hand, there might be a couple thousand people who have just disappeared someplace.

Kirsch: There are still people being held at Abu Ghraib. We may not see any photographs coming out anymore, and I think things were bad under us and they may be worse under our successors. The ability to detain people without charge is a very, very awesome power and it's not one that should be exercised lightly. It should probably never be exercised but it's going to happen. Habeas, at least, gives people a right to challenge that and this does show the importance, even today, as we're well into the twenty-first century, of maintaining robust protections for rights and privileges as fundamental as habeas corpus.

Q: We interviewed a couple of former detainees in London. A couple of them made the point that they are much more than Guantánamo. That it's important for us to realize, when we interview them, that Guantánamo might have been very important in their lives but it's only one part of their lives. Life goes on.

Kirsch: Yes, I think it will go on more for people who get to have a normal or resume something more akin to a normal life. I fear for some people—and maybe this is more for people who settle in countries where they weren't born, like four of our five released clients—Guantánamo still hangs over them because they can't feed their families. So it doesn't entirely disappear. It was never a good thing, but it will be a less damaging thing if we can learn from it. I think the question is, will we be able to develop the memory or the knowledge to maintain a memory? Perhaps your work will help with that.

Q: Yes. A good place to stop.

Kirsch: I think that's right.

Q: Thank you very much.

[END OF SESSION]

VJD

Session Three

Interviewee: Robert C. Kirsch

Location: New York, NY

Interviewer: Ronald J. Grele

Date: September 13, 2013

Q: This is an interview for the Columbia University Center for Oral History, Guantánamo project, with Rob Kirsch. Today's date is September 14, 2013. The interview is being conducted in New York City; the interviewer is Ronald Grele. This is an interview for the Columbia Center for Oral History.

Kirsch: I think it's the thirteenth—Friday the thirteenth. Let's see what happens.

Q: I wonder if we can begin by doing a little fill-in by describing, if you can, within a short period of time, the *Boumediene* case—your involvement and what it's all about. What was the case?

Kirsch: Sure. Let me give you a little bit of historical background on it. The case started in Bosnia in October of 2001. This is relatively shortly after the September 11 attacks. At that time, all the American embassies around the world had suddenly gone onto alert, especially embassies in countries that had significant Muslim populations, as Bosnia did. Our embassy, very quickly, began reaching out to Bosnian security officials and asked them, through diplomatic communications, to arrest a list of Algerian men.

The list was longer than the number of clients—that I'll talk about—that I represent. We have six men. Each of our clients in the *Boumediene* case were born in Algeria. All had been living in Bosnia since shortly after the end of the unrest there that was settled by the Dayton Peace Accords, and all but one were working in humanitarian efforts, such as either in libraries, or teaching, or for Red Crescent societies, essentially distributing aid to the people who were victims of the violence.

So in early October, the Americans asked the Bosnians to arrest a list of men. The Bosnians, who were now functioning under a system we had set up under Dayton, said, "We need more evidence than simply a list of names on a piece of paper, delivered by your chargé d' affaires." This was delivered by Christopher [J.] Hoh, who is a career State Department official. He's in Washington today, but at the time he was working at the embassy. Several days went by, and the embassy actually conducted lie detector tests for its non-American staff. What they learned when they did that was that the son-in-law of the janitor was living in an apartment in the janitor's home and was married to the janitor's daughter. That son-in-law happened to be Saber Lahmar, who was ultimately one of our clients.

When the American security staff realized that someone on their list had what they immediately interpreted as an inside contact—what we were told by our Bosnian interviewees, and we've spoken to most of the security people on the Bosnian side who were involved in these investigations, was that the American side became very, very nervous. The word "berserk" was used to describe what happened, and essentially, Mr. Hoh, accompanied by the CIA station chief at the time, on a Sunday met with the Bosnian prime minister and one or two other ministers who

were available, in a small conference room, and essentially delivered the message, "Here's our list of men. The United States insists that you arrest them. If you don't arrest them, we will keep the embassy closed and pull our people out of Bosnia. If we do that, god help Bosnia." Then Mr. Hoh and the CIA station chief got up, left the room, and walked away. Within a few hours, after many telephone calls, Bosnian arrest warrants had been issued for our six clients.

Now they were arrested over—Mr. Bensayah, Belkacem Bensayah, was the first to be arrested. He was actually initially detained on suggestions that he had immigration problems, but even as he was being arrested, alleged links to terrorism were being put about in the press—which ultimately turned out to be false.

Q: They were tried in Bosnia?

Kirsch: They were never tried.

Q: They were never tried.

Kirsch: They were never tried. It took from about the beginning of October—I think the eighth or the ninth of October until the twenty-second for all the men to be detained—and each of their arrests was covered in the press. It was no secret that the United States was pressuring the Bosnian government, and each one after the other was brought in voluntarily. Security services would show up at their home; they would ask them to come in and speak with them; the men would go, and then they would not come back. This was being covered on television; it was on

the radio; it was being covered in Bosnian newspapers. So one of the things that we pointed out, as the case developed, of course, was that if these guys had been guilty of anything, with this level of publicity, they wouldn't have stuck around. Here you had six men who had moved from their home countries to Bosnia to do human services work.

Well, the Bosnian law allowed the men to be held for ninety days for investigative purposes, and a judge was appointed and started to conduct an investigation. Interpol was involved. There were many, many communications with the American embassy and American security officials, and essentially the Bosnians were searching for some connection between these men and threatening activities, terrorist activities—anything that could be deemed illegal. What we were told later by Bosnian security officials was that they were very sympathetic to the United States. What they said was, "You have to remember, America had helped us end a war. We owed our very existence to the United States. We were searching desperately to find a means of being able to hold these men and to justify what America was asking for."

Well, they never found it. No evidence was produced, none was provided. In fact, a Bosnian court issued an order on the sixteenth or seventeenth of January, 2002, at the expiration of the ninety-day period, saying that "You have to release these men. You have to let them go."

Q: That's why I thought they had been tried.

Kirsch: Yes. They were investigated. That proceeding was one that was initiated by the state and joined in by the Bosnian attorney general. The chief prosecutor of the country said, "Let these

men go." At the same time, four of the men, through their families, had hired Bosnian lawyers and had obtained an order from the Bosnian civil rights court that ordered the government to not turn them over to the United States. So you had both an order to free them and an order not to turn them over to the United States—both of which were issued by competent Bosnian judicial authorities.

Well, late on the night of the seventeenth, the early morning of the eighteenth, the men were, in fact, all taken to the central jail in Sarajevo and they were released. They were led out into a courtyard. Their freedom papers, the court orders were given to them, except, some five or ten yards away were Bosnian federal police—essentially commandos—accompanied by some American soldiers who were not in uniform; they were dressed in other clothes—who immediately put shackles on their hands and shackles on their feet. They put noise-suppression goggles on their ears, put bags over their heads, and they were stuck into vans. This was in the middle of the night, in the early-morning hours on the eighteenth.

As I said earlier, this was all highly publicized, so at this point there were hundreds of Bosnian citizens, largely representatives of the Bosniak Muslim population, in the street, protesting what they knew was an illegal turnover. What we later learned had happened was, there was a subsequent meeting between Bosnian authorities and the United States. At the time, David [H.] Petraeus was in Bosnia and he was the one who delivered this message. And General Petraeus's message was, "We have orders, under our authority here in Bosnia, as part of NATO. We are allowed to use force if we believe our troops are in danger. We have been told that if you release these men, we are to interpret that as endangering our troops. I'm here to tell you that it's not my

decision, but I will use force in Bosnia, with my troops, to recapture these people if you don't turn them over to me."

So the Bosnians, initially having been threatened with abandonment by America, now being threatened with the use of force that would really violate their sovereign status, took an unfortunate but entirely understandable decision and turned our clients over to the United States and to Bosnian federal police in the middle of the night.

Subsequently, that was determined to be illegal by Bosnian authorities. It was a clear violation of Bosnian law. There is an extradition treaty between the United States and Bosnia, which could have been used if they had wanted men to be turned over. Of course, they would have had to be charged with something first and none of these men had been charged with anything yet—nor would they be for another seven years.

Q: So they were flown then to Guantánamo?

Kirsch: They were first driven to a NATO base, where they were put on a helicopter and transferred to an American air base outside the city. They were flown from there to Incirlik, Turkey, to an American air base, where a plane landed and the men were consolidated there with prisoners from Bagram, put on one plane and flown from Incirlik to Guantánamo, where they arrived on the twentieth of January, 2002.

Q: Now how did they become your clients?

Kirsch: They became our clients through the efforts of some of the human rights organizations that were monitoring Guantánamo long before it was really on the screens of most people in the United States, except for whatever news clips came out of the second Bush administration about the danger posed by the men who were there. A group called the Center for Constitutional Rights and another called Reprieve had been monitoring the men and had actually represented some men in a case that was brought before the Supreme Court, and was decided at the end of the term, in 2004. That case was called *Rasul v. Bush*, and in the *Rasul* case the challenge was to assert that the habeas corpus statute in our laws extended to the men at Guantánamo. And without reaching the constitutional question, the Supreme Court agreed and said yes, these men have a right, under our statute, to habeas corpus. That case was decided, I believe, on the twenty-eighth or twenty-ninth of June in 2004.

That afternoon, the human-rights groups immediately reached out to I don't know how many law firms. Certainly, there were at least a dozen—there may have been two dozen—and asked for help. They went to large law firms that they knew would have resources because they had a concern that the Bush administration might have been planning to move prisoners immediately, to try to get them out of the jurisdiction of the court—because one of the things that is a footnote here, is that the reason Guantánamo exists is in part because President Bush was given bad legal advice. He believed that he could set up a facility there that would not be subject to oversight by the courts and it turned out that, purely because of the peculiarities of our arrangement with the Cuban government, it's a real estate document that has allowed us to extend the protections of

our Constitution to men at Guantánamo. It's purely that fluke of fate that allowed these men to actually assert and vindicate their rights.

But we were called. We were asked if we would represent—

Q: This is WilmerHale.

Kirsch: WilmerHale was called. An email was circulated, seeing if there were any partners who would be willing. Two of us spoke with each other and essentially said if we could do it together we would take it on because we had the sense that it would be a major undertaking—although I don't think we had any sense of how significant it would turn out to be. We ran it through our firm management structure—because you have to remember, in the summer of 2004, representing people at Guantánamo was an unknown entity. It was what was considered to be a politically controversial case, and we try to give all our partners the ability to think about things and to challenge or question them. But by the next morning we had approval from our management—which is lightning speed for that kind of a review and that kind of a controversy—to take on the case. By early afternoon we had a conference call going with representatives of the human rights groups and with WilmerHale lawyers in Boston and New York, London and Brussels, all on the telephone, people who had volunteered within twenty-four hours to sign up on the case. That's when we learned who our clients would be; that's when we were told the very rudiments of the case.

Q: Who assigned these six particular men to WilmerHale?

Kirsch: I don't know which of the groups—I remember that Clive Stafford Smith, who heads up Reprieve, was on the call with us. So Clive certainly had a hand in it. I don't know how much of the facts were known at the time. The interesting thing, sort of the unique aspect of this case, is that these men were in Europe. They were working; they were at home with their families; they weren't on a battlefield; they weren't in Afghanistan or Pakistan; they had never been there; they had never been to Iraq. They were essentially working jobs on September 11; they were working jobs in October. By January of the following year, they found themselves in Guantánamo.

Q: When did you first meet your clients?

Kirsch: We met our clients—we wrote to them immediately. We filed papers with the District of Columbia trial court, the federal trial court, in July of 2004. We wrote to the clients within a few weeks, contacted their families immediately to try to develop the kind of information that we could to show them that we were there legitimately with the approval of their families.

Q: That would be under the next friend or best friend—

Kirsch: Exactly. We represented them. The original petitioners were the six men and their wives. Their wives were there as best friends. They were the only ones we could actually speak with. Our first appearance before the court was in September and the judge that we drew from the district was Judge Richard Leon, who was an appointee of President Bush, and, as it turned out, had known Vice President Cheney for decades. He is, by philosophy, conservative. He

believed—and still believes—that the president had the authority to do what he did. But Judge Leon, like most federal judges—as you know from the outcome here—listened to the evidence, looked at the facts, and made a decision like we count on our judges to make. It was not one in accord with his philosophy, but it was one in accord with what he understood the law to be. So he really served us and our country well, in the end.

But our first appearance before Judge Leon was in the fall. It was in September of 2004, and the first thing he did was an indicator of the philosophy that I've just highlighted to you. There's a rule in the district court system that requires someone who's representing clients to come in with a document signed by the client, saying, "This is my lawyer, and I want him to represent me." Knowing full well that no one had had an opportunity to go to Guantánamo, the first sentence out of Judge Leon's mouth was, "Well, do you have a written document showing that you are authorized to represent these clients, signed by your clients?" Now, he let that pass, but the first shot had been fired over the bow at that point, within ninety seconds of our standing up in court, for our very first appearance.

We had to apply for security clearance. We weren't allowed to meet our clients or to travel to see them or to speak with them until we had security clearance. So two of us got our clearance in the fall, and in early December of 2004 my partner, Steve Oleskey, and I took our first trip down to Guantánamo and met the six men in the course of three or four days of preliminary interviews and meetings. That began our investigation with them. Then we did a lot of work on the ground in Bosnia, as I alluded to earlier.

We had a chance to speak with investigators, with government officials, to review the Bosnian proceedings—because I think unlike any other men at Guantánamo, these six men actually had been subjected to two different legal proceedings, both of which indicated that they should have been released, in 2001 and 2002, none of which got any attention, unfortunately, by our government.

So our clients—the six men were at Guantánamo from the very early days. I believe it opened on January 12 and they arrived by January 20. So they were among the very first flights to get there. Their number designations—each of these men at Guantánamo bears a number that is his internment—it's called an ISN—it's an interment serial number which they're all given, and theirs is different than any others. Their numbers are unique because they came from Bosnia, so they're designated with different digits than the other men had.

Q: Well, after *Rasul* and before you met them, the rules of the game changed with new legislation regulating the method of trial down at Guantánamo.

Kirsch: Exactly.

Q: Is that right?

Kirsch: Exactly right.

Q: So that when you went back to the judge, it was a new kind of legal milieu.

Kirsch: Yes. As soon as the *Rasul* decision came out, the Defense Department, through a man named Wolfowitz, issued what we ultimately termed the Wolfowitz Order, which established what were called Combatant Status Review Tribunals—CSRTs—that took place at Guantánamo. Those tribunals were the attempt by the administration to provide rights that were similar to what would be available in a habeas corpus proceeding, but something that was more efficient, more expedient. In fact, this was the first effort by the president to push back at the Supreme Court. And you'll see as we proceed through this that this case ultimately was not about whether these men had done anything wrong. The case largely was about the separation of powers in the United States, the structure of our government, and the struggle between the president and the court over who had authority and who was going to protect the men.

So with *Rasul*, the court said, "These men are entitled to rights." The president's response was to set up the Combatant Status Review Tribunals, which reviewed the cases of more than 650 men within five or six months, and in more than ninety-eight percent of the cases decided that those men still belonged at Guantánamo—that there was a basis for holding them. This was a process that lawyers could not participate in. The prisoners were allowed to speak with a personal representative, who was a soldier. The personal representative had no confidentiality obligation to the prisoner and, in fact, had obligations to report things up the command structure. As we later learned, even some of the military officers who served as judges on the CSRT panels were subjected to command pressure. For example, there are affidavits in the record of these cases by military officers who had served on these panels indicating that when they recommended that a prisoner did not belong at Guantánamo, they were told to review the case again.

Q: Moving ahead rather rapidly, why was it necessary to get certiorari to go to the Supreme Court for your clients?

Kirsch: When we initially filed the case, Judge Leon dismissed us. The government asserted that while *Rasul* gave us a right to make a filing in court, that we actually had no substantive rights, so it was an empty right. It allowed you to walk into court so someone could tell you that you should leave. Judge Leon agreed with that, and Judge Green, who also was handling some of the cases at the time—Joyce Hens Green—disagreed and allowed the cases to continue. So those decisions, the inconsistent decisions on similar facts and identical law, were appealed up to the D.C. Circuit.

Now, along the lines of your earlier question—Congress passed the Detainee Treatment Act as a means of supporting the president. The Detainee Treatment Act was ruled unconstitutional by the Supreme Court in a case called *Hamdan*. Mr. [Salim] Hamdan was alleged to be the driver of [Osama] bin Laden at a certain point in time. *Hamdan* challenged the military commission rules under the Detainee Treatment Act. The DTA tried to retroactively strip the courts of jurisdiction to hear these men. So the Congress was essentially backing the president and saying, "Well, if the Supreme Court said you had a statutory right, then we're going to pass a new statute and we're going to take away that right." And what the Supreme Court said was, "Well, you can do this. You can take away our right retroactively but you have to say that you're doing it. And, Congress, you didn't do it the right way."

So first the president, and now Congress shoots back, the Court shoots back. Now a new statute is enacted—the Military Commissions Act. That comes up and we are now on appeal. That's the state of the law by the time we reach the D.C. Circuit. The Military Commissions Act effectively does strip the courts of jurisdiction and relies on the CSRTs. The D.C. Circuit supported Judge Leon and ruled that we were dismissed, so we then filed for certiorari to the Supreme Court and our initial petition for certiorari was denied, which put us into a panic position because, suddenly, we had a case with nothing pending. So we did something that all our appellate experts said was unusual and potentially futile—but we needed to keep our case alive; we needed to have the right to continue to represent and meet with our clients, under the orders that were set up in these habeas cases—so we filed a motion asking the Supreme Court to reconsider its decision.

At the same time we filed a motion with the Supreme Court asking it to defer any decision on our motion to reconsider until the facts were more developed—until the CSRTs had had a chance to run. Because the decision by the Supreme Court denying our certiorari petition was accompanied by a dissent, and normally certiorari petitions are either accepted or rejected. Judges do not issue opinions. In our case, there was an opinion, it was a dissenting opinion, and it essentially gave us a hint as to what had been going on behind the scenes at the Court.

Q: And the author of this dissent was—?

Kirsch: I believe the author—there was an opinion—I don't know if it was a dissent or concurring opinion by Judge Kennedy. Justice Kennedy signed on and essentially said, "We need to see what happens." It was essentially a signal to us to wait and see. Shortly after that came out,

there was an affidavit filed in one of the cases that made clear the command structure pressure that I had mentioned to you earlier—that officers who didn't rule the right way were subjected to pressure at Guantánamo, and following that the court acted favorably on our motion to reconsider and actually did accept certiorari on our case.

So we were allowed to brief the case. That was accepted at the end of June. I think it was accepted at the end of the term in 2007. In December of 2007 we argued the case before the Supreme Court. My partner Seth Waxman argued on behalf of the petitioners.

Q: What was the basis of that argument?

Kirsch: The argument was that the men were entitled to the protections of habeas corpus under the Constitution and that the procedures afforded in the CSRT tribunals were not an adequate substitute. Because the Constitution does provide us with habeas corpus, but the government has, in some cases, stripped away that right—and it's allowed to do so if it gives you essentially a substitute that materially protects your rights. Our position was that because of all the infirmities—the lack of confidentiality; the lack of privilege; inability to consult with counsel when very, very significant liberty rights were at stake; and the command bias rendered the CSRTs useless in terms of offering any real protection. It was on that basis that the Supreme Court ruled in our favor and determined that yes, the CSRTs were simply not an adequate substitute, so the men should be entitled to habeas corpus relief. That was what the court decided in June of 2008.

Q: Do you remember your reaction when the decision came down?

Kirsch: I remember very well because I was on vacation in Grand Teton National Park. The email came flying through, and I can remember being at Jenny Lake, on the landing dock, waiting to get on a boat trip to go hiking with my family, and while we were on a conference call trying to figure out the plan for briefing the case and how we were going to put it together. We were elated because we knew what our arguments were; we knew where we wanted to go; but we really didn't know how the Court was going to come out. Because, as it is today, the ideological divide on the Supreme Court is stark. We were fairly confident that we would gain the support of four justices. We were fairly confident that we would be opposed by four justices. And the question at the time was how to structure the case in order to appeal to Justice Kennedy's understanding of the law. Justice Kennedy has been critical to preserving certain fundamental rights in these cases and he has a very balanced view of international law and how that applies with our domestic law and our constitutional principles. That was what we were planning, so that was how we had to go about attacking the case.

Q: So the next step was back to Judge Leon?

Kirsch: The next step, once we won the case, was to go back to Judge Leon. We were called in immediately because, suddenly, the district court docket in Washington had gone from having zero cases, habeas corpus cases, while they were on appeal, and when the *Boumediene* decision came out, there were now more than two hundred active habeas corpus cases pending in the court. The docket, I think, was potentially overwhelming to the judges because the principles

under habeas corpus dictate that those cases should go quickly and they should proceed not as fast as a criminal case, necessarily, because criminal defendants have constitutional rights to a speedy trial, but next—next in the queue.

So we were called in by the chief and we were shortly after that called in by Judge Leon. He had two cases and he brought us in and essentially said what I just outlined—"You're not a criminal case, but I'm clearing my civil docket. We're going to try this case as quickly as we can." He essentially said, "If you have vacations, I'm sorry about that. Talk to your families. You're not getting one this year." He initially proposed, in July, that we would be having these trials in September or October at the latest. Ultimately, we went pretty fast. We were in November.

Right after the cases were brought back, the government successfully asked the court to stay all the cases except ours. Only the *Boumediene* case went forward. The government staffed up its trial team. My personal view is that the government was making certain assumptions about Judge Leon's philosophy and how he might rule in the case, so they wanted to put all their guns behind one case to see what kind of an outcome they could achieve. Because I believe they thought that if they could get the right decision from Judge Leon, they'd be able to move their other cases much more quickly.

Q: What kind of evidence did the government offer against your clients?

Kirsch: It's an interesting question because here we are—the men were detained at the insistence of the United States in October of 2001; now it's July of 2008 and the men have never been

charged with anything. They still don't really understand why they're there. They understand what they were asked about when they were interrogated, but that had nothing to do with terrorism or any threats to the United States. So on August 22 of 2008, the government, for the first time in the habeas corpus case, filed what was called a "return." They had to respond to our petition, and that was the first time we saw what the government was suggesting was the reason for these clients to be detained.

The government did an interesting thing in that return. It filed about fifty or sixty pages of narrative, and it filed over six hundred pages of what they called documentary support, which were, by and large, documents that were drawn from intelligence collections. I won't be able to speak to the substance of those documents except to tell you how many pages there were and generally the kind of issues that they went to. But the government—essentially its case distilled down to three things, initially—that the men were intending to go to Afghanistan to oppose the United States; that the men were intending to go to Afghanistan and help others go to or from there to oppose the United States; and that the men had been part of a plot in 2001 that was considering bombing the American embassy. Those were the three allegations.

As the case developed, Judge Leon, in very few instances, allowed us to gain discovery—to actually force the government to provide documents to support its case. One of the things we had done in 2005 was to file a case under the Freedom of Information Act in the District Court in Massachusetts. The government had identified thousands and thousands of documents that were relevant. It didn't produce them to us in the FOIA proceeding because it argued that they were classified and therefore exempt, but we knew that they existed, and when it came time to go

before Judge Leon, the government initially said that there really were no documents, and we said, "Wait a minute. There were thousands of pages of documents. We have the list, and they represented that they were going through those documents." They subsequently had to admit that they had lost the documents and didn't know where they were—which caused great consternation to Judge Leon.

What I can tell you is that shortly after one set of documents was produced—and these were documents that Judge Leon had said, "If there are exculpatory documents in the file," particularly if they were identified in the course of the FOIA case, "the government must produce them." When the court finally forced the government to produce documents, all allegations of the bomb plot disappeared from the case. They went away immediately, before we went to trial. I'll allow you to draw your own inferences for what the documents might have said that caused that allegation to go away. So, yes.

Q: So Judge Leon freed them, essentially. Five of the six.

Kirsch: Yes. Judge Leon heard evidence from us for six days. We reduced the case to seventeen or eighteen discrete issues, and we argued each of those issues to him one after the other. We had two of our clients testify by classified video connection from Guantánamo—the first time anything like that had ever happened—so that they actually had an opportunity to speak to a sitting judge about why they were being detained. And on the twentieth of November, in 2008, in the ceremonial courtroom, in the District of Columbia District Court, Judge Leon read his decision to a packed audience and granted the writ of habeas corpus for five of our clients.

Those five men were immediately available to be freed, once we could get to the issue we're now facing, which is, "Okay, we've won. Now what? Where do you go?" Because all of these men—none of these men were in the United States. The judge couldn't simply order an American jailer to open the door; the men had to be freed—going back to a third country. They weren't going to be coming back to America necessarily, although that was an option at the time, and the judge theoretically could have had that authority. What the judge doesn't have the authority to do, under our system, is to order the executive to take a step with respect to a foreign country, where the executive is vested with the foreign relations authority. Judge Leon was very aware of that and in his order freeing the men he essentially instructed the government to work as quickly as possible to find a place for these men to go. I think that was the right thing. Judge Leon really set the bar in terms of release orders in habeas cases going forward.

So we lost one case. Judge Leon still determined that Mr. Bensayah was intending to go to Afghanistan to oppose the United States and determined that he had been willing to help other people go to and from Afghanistan.

Q: I'd like to talk about Mr. Bensayah, but first, were you involved in the negotiations with other countries, with the State Department, etc.—?

Kirsch: Yes.

Q: I wonder if you could take a few minutes to describe how that worked when you got them settled in France and in Bosnia.

Kirsch: Sure. We actually started working on the resettlement issues shortly after we took the case. We thought it was very unlikely—in fact, the advice we gave our clients from the outset was that they would probably be freed through some kind of diplomatic or settlement issue and that they shouldn't hold their breath waiting for a federal judge to order them released. So we were wrong, right from the outset, as to what would happen here. So we started meeting with foreign governments in December of 2004, only a few months after we filed our papers, with the understanding that we should start to communicate; we should start to introduce our clients, introduce their facts, and make sure that other governments were aware of them. And we focused, in part, on the Algerian government, because the men were all from Algeria but had moved to Europe. We met with the Bosnian government because it was the Bosnian government which had turned them over. So we were in very regular contact in 2005-2006-2007, with those governments.

We met with government representatives in Europe and were very much involved with speaking to the Bosnian government and then speaking with the United States, through the State Department and the Justice Department, about releasing the men to Bosnia as quickly as possible. Ultimately, what happened was in the middle of December of 2008, three men who still had Bosnian citizenship—Mr. Ait Idir, Mr. Nechla, and Mr. Boudella, were put on an American military plane and flown back to Sarajevo in the middle of the night.

Interestingly, when they arrived in Sarajevo, they were questioned by civilian authorities who asked them if they had papers to enter the country—having turned them over, illegally, and sent them to the United States. It proved to be a formality because we knew the planes were coming and we had a lawyer on the ground waiting for them, watching the flight come in. That was a very emotional night. The text messages and emails were flying from people who were on the ground because, in those days, the government wouldn't tell you when it was taking your clients out. We knew only from word that we'd heard from other lawyers who were representing clients that our clients had been segregated from the population late one week. We knew there were arrangements being made on the ground in Bosnia around an airport to enhance security. Based on that, we had lawyers on the ground and assistants on the ground, and the families, to welcome the men back.

So the three who still had citizenship in Bosnia were allowed to go home. That's in part, unfortunately, because the Bosnian government—which had never wanted to get mixed up in this case still didn't want to be mixed up in it. None of these men had been born there, so there was some pressure to resist. But they didn't have a legal basis to resist for men who didn't have citizenship. So they refused to accept back Mr. Boumediene and Mr. Lahmar. Mr. Boumediene had held citizenship, but the United States also pressured Bosnia, generally, to begin a process of stripping citizenship from men who had been in Bosnia from Arab countries following the violence caused by the Serbs. Mr. Boumediene's citizenship was stripped in that process. Mr. Lahmar had been a legal resident of Bosnia but had never applied for citizenship so the Bosnians refused to allow him back in—this despite the fact that both men had had jobs and families in the country for years.

So in February of 2009, shortly after we had won and our first three clients had been resettled, we sent a letter to the French embassy in Washington. I went onto their website and we identified a lawyer who was on the staff. We wrote to the lawyer in what was, in essence, a cold call for freedom. We asked for a meeting. We did this in part because we'd made a judgment call about the personality and willingness to take a high-stakes risk of President Sarkozy, who at the time was in power in France. We decided that if anyone would be willing to make a grand gesture to the United States, something that was very open and very bold, President Sarkozy would do it.

On March 10 of 2009 I had a two-and-a-half-hour meeting with representatives of the French embassy, the foreign ministry staff, and went over the case in tremendous detail, from start to finish, and on April 1, only three weeks later, I received a telephone call from our principal interlocutor—who proved to be a very, very good friend for our process—that in Strasbourg, two days later, at their first bilateral meeting, President Sarkozy would, in fact, invite Lakhdar Boumediene to come to France and to settle there. And that's what happened. So it was all in the nature of making a cold call and finding the right vehicle for your message.

Q: And Mr. Lahmar?

Kirsch: Mr. Lahmar still wanted to go to France. He did not have any interest in returning to Bosnia because he felt he'd been treated so unfairly there. Mr. Boumediene had two sisters-in-law who were living in France, so we had some minimal connection. But with Mr. Lahmar, things were a little more complicated. His only connection to France had been about thirty-six

hours spent there as a fourteen-year-old on a trip while he was an Algerian student. We made a request to the Algerian and French governments after Mr. Boumediene was settled in. The initial response on Mr. Lahmar was negative. They didn't say no, but they didn't say yes, and we were told by our contacts at the embassy, "Don't press for a bad answer." At the time, the United States was pressuring Bosnia very much to take back Mr. Lahmar, but he didn't want to go there and, frankly, Bosnia didn't want to take him.

We were in court, in front of Judge Leon, I believe in June of 2009, with the Justice Department suggesting that it couldn't talk about what was happening, but there would be no effort to force Mr. Lahmar to go anywhere. What we subsequently learned—really, courtesy of the Wikileaks documents that were released in 2010—was that the United States had been pressuring Bosnia consistently, very, very heavily, but that the Bosnians were refusing to take back Mr. Lahmar—which did lead, at the time, for the State Department to suggest that perhaps Mr. Lahmar should go back to Algeria—where he hadn't lived in many, many years.

What ultimately happened was that Mr. Lahmar was told, in a meeting with the ICRC, that he was going to be sent to Bosnia—because that was the effort and the protocol at the bases—the country is identified; the prisoner is given an opportunity to meet with the ICRC and to consult and to speak with them. He came away from that meeting very upset. He was refusing to go back. In the wake of that, there was an incident in which Mr. Lahmar was brutalized by guards. This was a time when he had been declared illegally held, pursuant to his writ of habeas corpus. He was living in what is considered to be the best accommodations at Guantánamo—which is an oxymoron in many respects—but because of this he resisted going with guards, and the incident

involved one where he was restrained bodily. He was held by his arms and his legs and his clothing was cut off of him—largely because he was insisting he wanted to have a chance to apply to France and he didn't want to go to Bosnia.

We documented what had happened. We sent it along to the French government and within a matter of a week, at most two, Dr. Bernard Kouchner, who at the time was the foreign minister of France, had intervened, and Mr. Lahmar was invited to resettle in France—I think largely based on the fact that he considered the possibility so significant that he was willing to be punished for it.

So we had political intervention on the one hand and humanitarian/political intervention on the other, and that's what gained two of our men their freedom in France, where they live today.

Q: Now since that time, you've been struggling or working to find a way to get Mr. Bensayah released.

Kirsch: Yes.

Q: What have you been doing?

Kirsch: Well, those actions never really ceased. As soon as Mr. Bensayah's case was lost, we appealed it. In the summer of 2010, in June of 2010, the District of Columbia Circuit Court of Appeals ruled in his favor. Judge Leon's decision was reversed and the case was sent back. What

that court decided was that there was no evidence that Mr. Bensayah had intended to go to Afghanistan or to help other people go to Afghanistan. The court went on to say that even if there had been evidence that he was intending to do this, because there was no other evidence, that that was insufficient grounds for holding him. So based upon what the government had offered, there was no basis to hold him. So Mr. Bensayah's case was remanded.

Now when a case is remanded from the circuit court back to the trial court, a document called a mandate issues, and the mandate essentially sends the case back down to the lower court. In this instance, with the acquiescence of the Department of Justice, no mandate has been issued in Mr. Bensayah's case since June of 2010. We have continued to extend deadlines, pursuant to which either we or the United States could appeal the decision—could ask to go for en banc review before the D.C. Circuit or to allow the case to go back before Judge Leon.

We did this for a couple of reasons. Number one, another hearing would be very resource-intensive and would simply offer the prospect of losing again. We know that there is always that risk. Judge Leon's philosophy has not changed, and during the intervening years the case law in Guantánamo cases has deteriorated from the perspective of the rights of prisoners. Decisions that have been published, particularly by the D.C. Circuit—one would not be irrational to interpret them as intentionally eviscerating many of the rights that the court tried to establish in the *Boumediene* decision, and they've done that in successive decisions. In fact, as we sit here today, of the twenty-three appeals that have been handled by the D.C. Circuit relating to Guantánamo prisoners, Mr. Bensayah's is the only one that ruled in favor of a prisoner. The other twenty-two cases have either affirmed decisions to deny writ of habeas corpus, or, in many other instances,

have reversed the decision to grant the writ. So that court has been devastating to the rights that were available.

So we've parked that case and continue to meet diplomatically. In the intervening years I've met, on almost a weekly or bi-weekly basis, with representatives of many European governments; with representatives of the Algerian government; with representatives of the Bosnian government. We've made two or three trips to Europe to advocate on behalf of our clients. We've met regularly with the State Department and met with the Justice Department, all in an effort to open the door so we can push him through and get him resettled in a country. He has a wife and two daughters who are in Bosnia and he desperately wants to rebuild his relationship with them. His wife, understandably, being born and raised in Bosnia, is very reluctant to ever permit her daughters to travel to Algeria, where she thinks they could be at risk—because it's a fairly conservative country. She does not want them to face the prospect of not being able to return to Europe.

So, in order to keep his family together, Mr. Bensayah has been seeking to be resettled in Western Europe. We don't know what's going to happen there because, of course, in the wake of our decision, Congress passed legislation in connection with the budget for the Defense Department, a bill that's come to be known by the acronym of the NDAA—I think it's the National Defense Authorization Act—and that statute, every year, when it's been passed—this is the bill that provides revenue that keeps our military going. So, as Congress well knows, it is legislation that the president could not lightly veto because of its significance. Congress has included restrictions in that bill every time that prohibit the president from spending certain

funds to take men from Guantánamo to the United States; prohibit the president from spending money to work on jails that might be used to house Guantánamo prisoners in the United States, essentially pulling every string that Congress was able to identify to limit the president's authority to take people out of Guantánamo.

It specified only two routes out for men. One is that they could be released through diplomatic channels if the Congress was notified thirty days before release and if the release was to a country that the Secretary of Defense had certified was acceptable. Acceptable essentially means that the foreign government will impose enough restrictions on the man who's released and monitor the man who's released with enough diligence to make the United States feel safe. Or, the man has to be the subject of an order by a court. So an order by Judge Leon, or an order by any other judge, would obviate the need to issue a certification.

One of the problems is that since the NDAA was first passed with those restrictions in 2010, there was no certification issued until 2013. Finally, in 2013, after the men at Guantánamo engaged in a hunger strike and brought the attention of the world back onto their plight, that put the issue back onto President Obama's screen. The president said that he would renew efforts to empty the camp, and while he's never affirmatively backed away from his promise to empty the camp, he sadly has not put the political weight that would be necessary to actually deliver on that promise, in support of the men and their positions.

Finally, in the summer of 2013, he appointed someone at the State Department to resume the work of getting the men out of Guantánamo. He had his defense secretary certify Algeria as a

country who could accept people. Sadly, Algeria is the only country that has ever been certified by the Defense Department, pursuant to the NDAA—which means that, at most, as we sit here today, another three men could be released from Guantánamo, I believe. Only three more men.

Q: A couple weeks ago two were—

Kirsch: Two men were resettled there, neither of whom really wanted to go to Algeria, but neither of whom was prepared to fight, just because of the position they were in.

Q: Now, would they be able to go someplace from Algeria, once they got to Algeria? Or would they be limited to staying in Algeria?

Kirsch: I think that remains to be seen. Our Algerian clients who are in Europe have received their Algerian passports; therefore, they can travel. To my knowledge—and I don't have the specific knowledge about everyone in Algeria—to my knowledge, the other men from Guantánamo who have been released to Algeria do not have their passports. Their papers have never been given back to them. Certainly, the United States has asked for certain assurances and representations.

Query, one of the things I understand is a problem is that even though our NATO allies and our closest military and cultural allies are in Western Europe, with the United States, with the exception of the North American countries, no European country has been certified as acceptable to accept a man from Guantánamo. One of the reasons appears to be that the European Union has

Schengen visas, which allow for travel well beyond national boundaries. It appears that the issue of a Schengen visa is something that is of sufficient concern to the United States that people in the Defense Department has so far been unwilling to certify a Western European country. And to your question—I believe that one of the reasons that Algeria *has* been certified is that it's a tighter control. The same reasons that might make a man reluctant or cautious to resettle there—particularly men who are innocent—is the reason that, under the NDAA, our government has certified that country.

Q: You mentioned the hunger strikes. Did Mr. Bensayah go on a hunger strike?

Kirsch: He did participate in the hunger strike, I think. Of the 166 men, well over 120 participated in the hunger strike, ultimately. I don't know the true number and the numbers that have been published by the Defense Department are unreliable because they're based on definitions that are imposed on the soldiers who are guarding these men, and in many instances it's like trying to put a square peg into a round hole—sometimes it just doesn't fit. But while we were never officially notified that Mr. Bensayah was participating in the hunger strike, in the three months before I saw him, in May of this year, he had lost over fifty pounds. So I think it's safe to say that he was striking.

Q: You just saw him in May?

Kirsch: We saw him in May.

Q: What were his spirits like?

Kirsch: His spirits vary. Keep in mind, the men have been confined in what can really fairly be called not-humane conditions for almost twelve years now. In January, he will have been at Guantánamo for twelve years without ever having been charged with anything. He's isolated from his family. He's been able to have only two or three phone calls with his wife and children over the last few years. His daughters don't even remember him anymore; they know him only as someone they've heard about in the news. He's restricted to having a community of other men who are away from home. The only thing they share with each other is a religion. They're from many different countries and many different cultures, and the only book they were allowed to read, for the first five or six years of their imprisonment, was the Koran.

I think it's safe to say that, in that kind of an environment, only someone who was not in touch with the Earth would think that you wouldn't end up with a relatively fundamentalist, conservative set of men, at least in terms of their religious belief, if that's how you restrict them for the first six or seven years of their imprisonment together. I think that's one of the issues that our government is facing now. It's created a problem for itself and it's having a very hard time fixing it. Instead of engaging in the kind of behavior at Guantánamo that might actually open things up—give the men a broader perspective—we just continue to deceive ourselves and try new tactics that are built on the failures of the past as opposed to looking to succeed, going forward.

Q: In our discussion before we began taping, you mentioned that you thought President Obama had gotten himself into a bind. I wonder if you could parse that out for me.

Kirsch: I think part of what is playing out now, with the appointment of Clifford Sloan as the new State Department official and the resignation from the Defense Department of a man named William Lietzau, who was in charge of detainee issues for the past several years at the Defense Department, things appear to be opening up. Mr. Sloan is very well-versed, has a good reputation as a doer, is very active and enthusiastic, and Mr. Lietzau was in a position where he was actually able to keep his thumb on the scale and stop anyone from getting out of Guantánamo. He had actually worked under the second President Bush. He was instrumental in writing some of the procedures that I referred to the "Wolfowitz order" that led to the CSRTs. And for some unknown reason, a man with those credentials ended up as President Obama's designee for detainee issues. I think there was an extremely important tactical mistake that was made when Mr. Lietzau was put into that position.

Now, with him out, the president is desperate to try to improve things and to try to get these men out. The way that it appears he's going to do it is to try to change the NDAA. He's going to claim that the NDAA is unreasonably restrictive and is preventing him from being able to execute his authority as executive in the foreign affairs arena. The way he's going to have to do that, I believe, is to get all the Algerian men out of Guantánamo because Algeria has, of course, been certified under the NDAA. And if you're going to take the position that it doesn't work, first you have to remove the men who come from a country that is certified. Then the administration will go to Congress and say, "You're tying our hands. We all want to close Guantánamo but we've

only been able to certify one single country. There are no men left from that country. You have to change the law."

I think it's somewhat of a straw-man argument. I think it unfortunately confesses a certain degree of naiveté that remains in the administration about what it might or might not be able to persuade the Congress to do on this kind of issue, and I think it's simply going to lead to another dead-end, and the need to work within the strictures that Congress has put in place, either by requiring the president to step up and assert his authority and say, "Aspects of this statute are unconstitutional and I'm going to ignore them"—which he has indicated in signing-statements that he's issued each time that the legislation is enacted and signed into law, but he's never actually taken a step to point out that he's going to act in violation of it because he believes he's got authority under the Constitution to do so.

Q: Have you had any conversations with anyone in the Obama administration about Mr. Bensayah?

Kirsch: We speak on a regular basis with government lawyers. Certainly, we've met with Mr. Sloan since his appointment on general principles *and* about Mr. Bensayah. We speak to other State Department representatives. We speak to the Justice Department. We try to keep as many avenues of communication open as possible because that's the way he's going to gain his freedom and be able to resume his life again.

Q: I'm fascinated with the whole idea that you continue to work on this, even though the case itself is long in the past. You're continuing as the lawyer-of, the friend-of or—what is the commitment?

Kirsch: Well, our commitment was to zealously represent him, to try to gain his freedom. The way we chose to do it initially was through a habeas corpus petition. In fact, that petition is still pending. The case could still go back before Judge Leon. Every ninety days, we make a filing to the Circuit Court of Appeals for the D.C. Circuit, explaining what's been happening and seeking a ninety-day continuance of the stand-down order, so there are no mandate issues. So far the court has seen fit to grant those motions—which, I will point out, are taken without any opposition from the Justice Department. The government has not disagreed with us on this. So in many respects, what we're doing is carrying out the strategy.

We continue to believe that there are risks to resuming a habeas corpus trial that argues against taking that course. We continue to try to work on the diplomatic front, which we think is the one that is in Mr. Bensayah's best interest, and in which Mr. Bensayah has supported us in so far. He wants to go home. He wants to know his daughters again. He wants to live as a normal, free man, off the radar screen; just quietly get whatever aspects of his life are remaining to him now. He's lost twelve years of his life to a mistake.

Q: Have you maintained contact with the other five?

Kirsch: We do. The other five—at least three of them we communicate with them quite regularly. They're on email. They have their cellphones. We all have our cellphone numbers and we can speak on a fairly regular basis. Interestingly, I think I pointed out at the outset that when the men were first taken to Guantánamo, they were given internment serial numbers, and at least two of our clients have incorporated those numbers into their email addresses. So they at least have some macabre sense of humor that continues even after their release and trying to resume normal lives.

But Guantánamo doesn't go away. It's made it almost impossible for them to actually gain employment. It serves as sort of a scarlet letter on them. They go to apply for work and there's this eight-, or nine-, or ten-year hole in their résumé where they weren't doing anything except trying to vindicate their rights from a prison in the Caribbean.

Q: What have been among the long-term effects—are there any other long-term effects besides not getting a job? Family relations, personal relations—?

Kirsch: That's a very good point. My answer was way too narrow, in the first instance. The Guantánamo experience has affected each of these men in many, many ways. They all suffer physical ailments because of the conditions under which they were confined. Keep in mind that, for many years, their ability to obtain medical help was limited by the willingness of their interrogator, their chief interrogator, who essentially served the role of a gatekeeper. Think of these men of recipients of social services and the interrogator is your chief social worker—your case worker. While you might find some in the United States government who would deny this,

the record is fairly clear that the chief interrogators—except in cases of true emergency—were able to influence when, whether, and in what form men received medical help from Guantánamo. We were able to document cases where medical records were falsified by doctors at Guantánamo in order to help cover up misconduct by guards.

So the men, as a result of that, almost of all of them suffer physical ailments now that were not properly addressed. They all suffer emotional scars, only some of which I think we've been able to identify and they've been able to address. We did full mental health workups of our clients and provided them to the countries that accepted them back in the hope that they would receive assistance. I know that, certainly, in the case of the men in France, those resources have been available, and at least one of our clients has availed himself of that. Because he's seen that he got angry when he shouldn't be getting angry. He's seen that there are influences on his personality that weren't there before, and he wants to resume a normal life. So they've taken advantage of those resources.

But it took them away. It isolated them. It's made them more quiet. It's made them retrospective. It's made them reserved. It's taken men who had great joy and used to live openly and very jovial lives and given them a much more limited existence. I don't want to diminish the fact that they are now free, they're with their families, and they are very, very grateful for the lives that they have in front of them. But I think it would be a real disservice to ignore the far-ranging consequences that all of them have suffered.

Q: Have they been able to knit together their relationships with their children and their wives?

Kirsch: Very well. Not in every case, certainly. Some of the marriages suffered. Mr. Lahmar's wife supported him until he was being released, but then, once he was safely on his way to France, let him know that that relationship was really over. They had only been married for a few months when he was taken away. They had known each other for less than a year, and then for the next eight he was away and she was forced to fend for herself, to work and to raise their daughter. That family was a victim.

The other four clients who are free so far have been able to preserve their families. They've all gone home; they've resumed their lives with their wives and children. They've all had more children. So their families, I think—which were the motivating factors for them, the motivating force for them trying to get their freedom—have stood by them. I think that's been a real factor in how successful they've been in resettling.

So I think, as we would expect, at a fundamental level, the existence of those family roots, that very, very basic, human element, has been a good indicator of how successful these men will be at re-integrating into society.

Q: Now have they at all been in touch with Mr. Bensayah? Does he know what has happened to them?

Kirsch: He knows what's going on with them in a general sense. We certainly can share that with him. But very often he will tell us, "I really don't want to hear too much about that. I need to

focus on my case. I want to get out of here." He has nothing on his hands but time. He has nothing to think about except his case; when he's going to be freed; how he's going to get out; where he might be able to live; whether he'll see his daughters again.

All these men have suffered. All these men have been diagnosed with varying degrees of PTSD [post-traumatic stress disorder]; all of them have been diagnosed as having different levels of depression—which is completely understandable, given the circumstances in which they've been required to live for the years they were at Guantánamo. We forget, at a distance, that Guantánamo is not like any other penal institution that we have in the United States. There's no professional guard staff. There's not even a professional administrative staff. There were originally no records that were kept. I point out that we filed a Freedom of Information Act request, and what that revealed was that there was nothing there because it was set up as a temporary internment facility. The guards are cycled through every nine to twelve months. There's no opportunity, even if they wanted to, to build up a relationship with the prisoners. The support staff that might help the guards are government contractors. Contracts come up and are renewed every few years. There's no consistency, there's no planning, there's no rehabilitation. There is simply incarceration. That kind of management of the case, without any planning, without any constructive element, is very *destructive* to the emotional state of these men; to the physical state of these men. So that aspect of Guantánamo continues to be, I think, quite depressing, and from the perspective of our country, quite challenging.

Q: What are their views of the United States now? When they reflect on it, what do they say about this country?

Kirsch: I can only speak to, certainly, our six clients. These six men bear no hard feelings to the United States, no ill-will. They're not fans of President Bush or Vice President Cheney. They're aware of the public statements that were made by the administration. They're aware that their problems were political and not factual. They understand that their case was not about anything they did, because they didn't do anything. It was about a mistake that was made and the unwillingness of our government to acknowledge that mistake and gain them their freedom. But I think both our observations, and, in fact, the observations of people who have interviewed them—press interviewers over the years have all remarked that the men bear no animosity toward the United States at all. You can't detect that. They're sad about what happened. They want to put that chapter of their lives behind them. But they're also mindful of the fact that they were victims of a political struggle, and mistakes that were made and not remedied.

Q: Now Mr. Boumediene has, of course, written op-ed pieces and discussed openly his experience. The others do not seem to have done that. Is there a difference?

Kirsch: I think Mr. Boumediene has always been a very thoughtful man. He's also in Western Europe and he understood, when we consulted with him, that an op-ed piece by him, pieces that he wrote, might be able to help some of the men who were still at Guantánamo; might be able to open the EU up to resettlements. Remember that one of the things that happened in the wake of Mr. Boumediene's release is that once France had accepted a prisoner, Germany, Ireland, Spain, Italy, Switzerland—European countries began to accept men from Guantánamo. That spigot has closed since the NDAA went into effect in 2010, but Mr. Boumediene was the first, and he got

more publicity than some of the others as a result of that. And, he's been willing to extend himself on behalf of the men who are still behind, because he knows that, by and large, almost every man is there because of a mistake, or because of conduct that was misconstrued, and does not really represent any kind of threat to the United States.

[SIDE CONVERSATION]

Q: Do you have any final comments to offer that you want to get out into the public?

Kirsch: Well, I think we have to hope that we'll learn from this experience, as a country. I think we always do—

Q: It's been thirteen years.

Kirsch: We didn't apologize for the internment of the Japanese in World War II until the 1980s. Sometimes it takes a while for the message to sink in. I hope that people will remember what happened here. It was easier to make a mistake with these men because they speak languages that are different than most of us. They practice a religion that's different than most of us. They were living in a country that's different than most of us. There are many, many reasons that made it easier for us, as a nation, in the wake of the September 11 attacks, to see these men as *them* rather than *us*. But what we've really seen over time is that they're human beings, and it's vitally important, particularly here in the United States—if we're going to continue to hold ourselves out as somehow different, as somehow more willing to take risks in order to preserve freedom, and

somehow more willing to protect each other's individual rights, because of the benefits that we see that bringing to our society—it's going to be important that we think about what that means not only on a good day, when the sun is shining and people are obeying the law, but even on a bad day, when evil people do things that threaten us. I think that's the lesson we need to derive.

Q: This just came to me. How has this affected your usual practice of the law? This is not exactly what you do at WilmerHale.

Kirsch: Well, it wasn't.

Q: It wasn't. It is now.

Kirsch: It's certainly been part of my life now for nine years. This was a very significant case, bigger than we had anticipated. At this point the firm—it's the largest pro bono undertaking the firm has ever undertaken, and this, in the combined history of the firm, means that there's a lot of pro bono work that we've done over the years, that the firm has represented presidents on a pro bono basis; the firm supported the Army in the Army-McCarthy hearings on a pro bono basis. We do this kind of work seriously. The value of our legal services, if we'd been getting paid for this work, is approaching \$30 million today. And the money we've spent out of the pockets of my partners is approaching \$2 million today.

Has it affected my practice? It absolutely has. But have I been able to maintain a semblance of normality, because the firm has principles that allow us to continue to take on cases when they

may be controversial, and to represent men who have no resources, just as if they were the wealthiest corporation in the world? It's been absolutely essential. So I feel privileged to be able to represent these six men, to have them as friends today, and to be able to be part of a firm that recognizes the importance of vindicating rights like this, and will do it, as we did in 2004, even if it poses a risk. And we did have some clients who were very, very upset. We did lose some work from that, but very little. I think, in the end, the vast majority of our clients recognized that this was about our Constitution, our form of government, and the rule of law in our society. Ultimately, that benefits all of us, from the lowliest individual to the mightiest corporate throne.

So I've been glad to be able to be part of that; but, certainly, it interrupted my normal practice. Certainly, it imposed burdens on my family and the families of all my colleagues on this case. But those burdens all pale in comparison to what our clients endured.

Q: Thank you very much.

Kirsch: Thank you. It's been my pleasure.

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